

NOTES

PRUDENCE LOST? SEPARATION OF POWERS AND STANDING AFTER LEXMARK

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In its 2014 decision in Lexmark International, Inc. v. Static Control Components, Inc., the Supreme Court began the process of “bringing discipline” to the various elements of prudential standing and suggested that the doctrine as a whole is inconsistent with the Court’s place in the federal separation of powers. Last year, the litany of opinions delivered by a divided Court in June Medical Services L.L.C. v. Russo manifested ongoing confusion about the fate of prohibitions on third-party standing and generalized grievances—two of the traditional prongs of prudential standing. This Note documents the heterogeneous approaches to prudential standing taken in the lower federal courts since Lexmark, and argues that this confusion is partly attributable to the Court’s misleading analysis of the role of judge-made gatekeeping doctrines in our federal system. Judge-made gatekeeping rules are ubiquitous in the federal judiciary, and courts have adopted a wide-range of approaches in the wake of Lexmark’s failure to identify a principle that could cabin its disfavor to only prudential standing rules. This Note argues that courts should instead acknowledge that judge-made gatekeeping rules like prudential standing’s third-party standing rule do a better job than alternatives in upholding the separation of powers values that are at the heart of the Supreme Court’s jurisdictional jurisprudence.

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INTRODUCTION

The principle that this nation's courts are open fora in which residents may pursue justice is a central piece of American democracy. When the courts declare themselves closed to a particular kind of plaintiff or a particular kind of claim, they send a strong signal about whom our democracy is designed to serve.¹ Nevertheless, courts require gatekeeping rules to ensure that limited judicial resources go

¹ The most notorious example of this is *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1857), in which the Court dismissed Dred Scott's claims for lack of jurisdiction on the theory that Black people could not be citizens and therefore could not invoke a federal court's diversity jurisdiction. See generally Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 52-64 (2011) ("[D]iminution of public adjudication is a loss for democracy because adjudication can itself be a kind of democratic practice.").

to cases that merit them most. These gatekeeping rules take two broad forms: claims-processing rules that regulate the manner in which litigants may press their claims, and jurisdictional rules that regulate whether courts are competent to entertain those claims.

Despite the differences between these rules, courts are not always careful to distinguish between them when deploying one to dismiss a claim. It may not much matter to the thwarted plaintiff whether the claim is thrown out for lack of subject-matter jurisdiction or for failure to state a valid cause of action, but this difference may in fact have significant consequences. Some of these consequences will be procedural—affecting the timing and forfeitability of certain defenses—and some will have to do with the *res judicata* effects of a claim's dismissal.

For these reasons, the Roberts Court has been on a mission to “bring . . . discipline” to its jurisdictional jurisprudence.² The main goal has been to put an end to what the Court has called “drive-by jurisdictional rulings.”³ These are rulings in which the court ostensibly employs a jurisdictional gatekeeping rule to dismiss a claim but in truth looks ahead to the merits and makes a peremptory assessment of the likelihood that the claim could prevail. The worry is not simply that the courts are making poor predictions. The point is rather that a gatekeeping rule ought not be treated as jurisdictional unless it really gets at the adjudicatory capacity of the courts, as opposed to the worthiness of the claim. Otherwise, plaintiffs are wrongly denied the opportunity to develop and present the merits of their claims.

This project of bringing discipline to jurisdictional jurisprudence has been carried out across a wide range of gatekeeping doctrines, including the adverseness requirement, the act of state doctrine, the political question doctrine, the zone-of-interests test, the ban on generalized grievances, and the rule against raising the interests of a third party. These last three doctrines are often bundled together under the label “prudential” standing.⁴

² *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). The Court has attempted to discipline jurisdictional jurisprudence in a number of areas. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 163 (2010) (finding that failure to fulfill the registration requirement for bringing a claim under the Copyright Act does not implicate a court's subject-matter jurisdiction); *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 558 U.S. 67, 82–83 (2009) (holding that a requirement for “in conference” settlement before labor arbitration under the Railway Labor Act is a claims-processing and not a jurisdictional rule); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006) (holding that the fifteen-employee threshold for Title VII liability is not jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443, 453–54 (2004) (concluding that deadlines for bankruptcy filings do not implicate subject-matter jurisdiction).

³ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

⁴ *E.g.*, *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Prudential standing has traditionally been seen as a “branch of standing, . . . not derived from Article III,”⁵ but rather crafted by federal courts as a matter of judicial self-restraint. It emerged over the last several decades as an important tool the courts employed in their exercise of what Alexander Bickel called the “passive virtues.”⁶ Alongside other doctrines such as ripeness, mootness, abstention, adverseness, and the political question doctrine, prudential standing is thought by some to be an important tool in disciplining counter-majoritarian exercises of judicial power,⁷ as well as avoiding “undue friction with political branches” and protecting other core constitutional values.⁸ Yet scholars and judges had often decried what might appear to be the judiciary’s self-given power to avoid the jurisdiction given to it by Congress.⁹

In 2014, the Supreme Court tapped into this longstanding reservoir of unease about prudential standing. A unanimous Court held in *Lexmark International, Inc. v. Static Control Components, Inc.*¹⁰ that the zone-of-interests test is not a jurisdictional rule, but rather a non-judicial statutory gatekeeping rule.¹¹ The Court determined that whether a claim falls within the zone of interests contemplated by a statute’s grant of a cause of action is not a question that implicates the

⁵ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

⁶ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98, 200 (1962) (surveying and advocating the exercise of the “passive virtues” in the federal judiciary, understood to be techniques for avoiding decisions on substantive constitutional grounds when narrower grounds for disposing of the case are available).

⁷ See *infra* notes 39–47 and accompanying text.

⁸ See, e.g., Fred O. Smith, Jr., *Undemocratic Restraint*, 70 *VAND. L. REV.* 845, 869 (2017).

⁹ See generally, e.g., Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71, 74 (1984) (arguing that such abstention is unacceptable, both “as a matter of legal process and separation of powers”); see also, e.g., Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1, 25 (1964) (“[T]here is an obligation to decide in some cases; there is a limit beyond which avoidance devices cannot be pressed . . . without enervating principle to an impermissible degree.”).

¹⁰ 572 U.S. 118 (2018).

¹¹ *Id.* at 127–28. The “zone-of-interests” test was originally developed in the context of review under the Administrative Procedures Act (APA), and was used as an inquiry to decide whether the complainant belonged to the class of persons intended to be protected by the relevant administrative action. See *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987) (“The principal cases in which the ‘zone of interest’ test has been applied are those involving claims under the APA . . .”). The test was also applied outside the APA context, see, e.g., *Dennis v. Higgins*, 498 U.S. 439, 449 (1991) (citing *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 320 n.3 (1977)), and was eventually classified as one of the prudential standing doctrines. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (discussing the zone-of-interests test as one of “several judicially self-imposed limits on the exercise of federal jurisdiction”).

court's subject-matter jurisdiction. Rather, it is a question of statutory interpretation: Did Congress intend for whatever injury the plaintiff alleges to be protected by the statute and redressable in court? Using the same logic, the Court's opinion in *Lexmark* put all of prudential standing in its crosshairs as part of the broader aim of disciplining the law of jurisdiction.

Prudential standing raises uniquely difficult conceptual and doctrinal questions that complicate the campaign to bring discipline to jurisdictional jurisprudence. This is in part because the prudential standing rules are among a variety of what this Note calls *judicially sourced gatekeeping rules*. Courts apply these judge-made rules to decline to adjudicate claims either because they lack jurisdiction or because they refuse to exercise that jurisdiction.¹² A court applying judicially sourced gatekeeping rules is not necessarily importing a merits judgment into a jurisdictional ruling. Instead, that court is making a decision about the wise exercise of its jurisdiction. Because such rules are judge-made but deny adjudication of otherwise valid claims, they pose special problems.¹³

The *Lexmark* Court's attempt to bring discipline to prudential standing raises difficult and unsettled questions in constitutional separation of powers law—questions not raised as sharply by the other doctrines to which the Court has moved to bring discipline. This attempt poses many fundamental questions, the first being: Do courts have the authority to decline to exercise the jurisdiction granted to them by Congress and the Constitution? And, in a broader sense, what are the respective roles of the legislative and judicial branches in regulating access to the federal courts?

Lexmark's discussion of prudential standing is centered around separation of powers concerns. The Court suggests that prudential

¹² This idea is often traced to Justice Brandeis. See, e.g., ANDREW NOLAN, CONG. RSCH. SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 9–10 (2014) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (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.”)).

¹³ In addition to the separation of powers problems that this Note will focus on, these judge-made gatekeeping rules also have a sharp end that can be used to keep litigants—in particular racially and economically marginalized litigants—out of federal courts. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (holding that a plaintiff who had been placed in an illegal chokehold by Los Angeles Police Department officers lacked standing to pursue an injunction because he could not show that he was likely to be placed in another chokehold by the LAPD). However, as this Note hopes to show, in some cases the fact that these rules are judge-made, as opposed to constitutional, is precisely the feature that blunts the sharp end. See *infra* Section III.C; see also Smith, *supra* note 8, at 878 (describing the risks of constitutionalizing such rules).

standing doctrines are in “some tension” with “the principle that ‘a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging.’”¹⁴ This idea that prudential standing undermines the separation of powers is what *distinguishes Lexmark* from other cases in the Court’s recent efforts to discipline the law of jurisdiction.

The *Lexmark* Court envisioned three categories of gatekeeping rules—constitutional, prudential, and statutory—and argued that the middle category of prudential rules ought to be vacated on the grounds that only the Constitution and Congress may confer or alter jurisdiction. This trichotomy is powerful yet wrong. It flattens the distinction between jurisdictional and nonjurisdictional gatekeeping rules, and it simplifies the dynamic and dialogical role the courts play in articulating the contours of the exercise of jurisdiction. By focusing on prudential standing alone, the Court misses both the broader category of judicially sourced gatekeeping rules and the historical, doctrinal, and theoretical justifications behind them.

Thus, this Note argues that judicially sourced gatekeeping rules allow the Court to uphold the separation of powers values at the heart of its jurisdictional jurisprudence. The central tension in the judiciary’s place in the separation of powers scheme is that it is tasked with upholding individual rights but must do so in a way that is consistent with democratic rule. Judicially sourced gatekeeping rules enable the courts to do this by simultaneously giving them the flexibility required to protect individual rights and constraining that flexibility by subjecting those rules to the possibility of alteration or abrogation by Congress in ongoing dialogue.¹⁵

This Note further demonstrates that prudential standing continues to enjoy ongoing vitality even after *Lexmark*’s intervention.¹⁶ While this has been observed by one other scholar,¹⁷ this Note is the first to develop a theoretical framework to account for prudential standing’s perseverance, and to sketch a path forward. The stubbornness of prudential standing doctrine, coupled with the prevalence of a wide range of other judicially sourced gatekeeping rules,¹⁸ suggests that courts have an important role to play in shaping their jurisdiction.

¹⁴ *Lexmark*, 572 U.S. at 126 (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

¹⁵ See *infra* Section III.C.

¹⁶ See *infra* Section II.B.

¹⁷ Kylie Chiseul Kim, *The Case Against Prudential Standing: Examining the Courts’ Use of Prudential Standing Before and After Lexmark*, 85 TENN. L. REV. 303, 311 (2017) (“After *Lexmark* . . . lower courts have continued to use prudential standing.”).

¹⁸ See *infra* Section III.B.

Though courts could attempt to find more authority to participate in defining jurisdiction in the Constitution itself, doing so threatens to shut Congress out of the conversation, thereby posing even greater danger to the separation of powers. Judicially sourced gatekeeping rules allow courts to thread the needle: maintaining their necessary role in articulating jurisdiction, while doing so in dialogue with the other branches.

The battle to bring discipline to jurisdictional jurisprudence is far from over. Five years after *Lexmark*, prudential standing continues to be very much alive, but exists in startlingly heterogeneous forms across the lower federal courts. Further, other judicially sourced gatekeeping rules continue to vex courts and are far from displaying the sort of discipline the Court has sought in this area.¹⁹

The significance of developing a coherent framework for analyzing prudential standing is evident from the litany of decisions in *June Medical Services L.L.C. v. Russo*.²⁰ That case signals a continuing struggle over prudential standing, arising in the context of a challenge to laws imposing obstacles on doctors who perform abortions and other maternal health services.²¹ While the controlling plurality and concurring opinions do not directly address the question, Justice Thomas's dissent points out that it is "especially puzzling that a majority of the Court insists on continuing to treat the rule against third-party standing as prudential when our recent decision in [*Lexmark*] questioned the validity of our prudential standing doctrine more generally."²²

With the wrong conceptual tools, the campaign to discipline jurisdiction may never end. There must be a distinction between the effort to bring discipline to jurisdictional jurisprudence in service of the important procedural and democratic values mentioned at the outset, and the separate need to preserve courts' proper roles in promoting the values protected by the separation of powers. In overlooking this distinction, *Lexmark* proposed a framework that creates more problems than it solves, jeopardizing future progress. That framework fails to see that judicially sourced gatekeeping rules provide a workable way forward that is consistent with the Court's goals and precedent. This Note seeks to remedy this broken framework and chart a path forward.

¹⁹ See *infra* Part II.

²⁰ 140 S. Ct. 2103 (2020).

²¹ *Id.* at 2113 (describing plaintiffs' challenge to the laws); see Brief for the Respondent at 25–30, *June Med. Servs.*, 140 S. Ct. 2103 (No. 18-323), 2019 WL 7372920, at *25–30 (arguing that the Supreme Court should address the question of standing).

²² *June Med. Servs.*, 140 S. Ct. at 2144 (Thomas, J., dissenting).

This Note proceeds as follows. Part I provides an overview of the constitutional and prudential strands of standing doctrine, before articulating some of the criticisms of prudential standing that culminated in its repudiation by the Supreme Court in *Lexmark*. Part II then shows that, despite the Court's stance on prudential standing, it continues to live on in most of the lower courts. Part III analyzes the category of judicially sourced gatekeeping rules and shows how these rules may ultimately protect the proper role of the judiciary in the separation of powers.

I

DISCIPLINE AND PRUDENCE

This Part provides a conceptual and historical background to the doctrine of prudential standing.²³ It then outlines the discomfort the courts and many scholars have had with this self-imposed rule of judicial restraint and ultimately concludes by describing the Supreme Court's recent explicit renunciation of the doctrine.²⁴

A. *The Bifurcated Structure of Standing*

For all its importance in controlling access to the courts, the word "standing" never appears in the Constitution. Rather, the doctrine of standing has been developed primarily over the last century,²⁵ partly as judicial interpretation of the jurisdictional limits imposed by Article III's Cases and Controversies clause.²⁶ This disconnect between explicit text and worked-out doctrine may account for why the conception behind the standing requirement has been described as "more than an intuition but less than a rigorous and explicit theory."²⁷

Swirling uneasily in this space between intuition and theory have been two competing thoughts. On the one hand is the "heavy obligation" of courts to exercise their jurisdiction and hear the cases pro-

²³ See *infra* Section I.A.

²⁴ See *infra* Section I.B.

²⁵ See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992) (arguing that modern standing doctrine arose out of the efforts of Justices Brandeis and Frankfurter to "insulate progressive and New Deal legislation from frequent judicial attack").

²⁶ U.S. CONST. art. III, § 2; see *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."). See generally Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RESV. L. REV. 1023, 1036–41 (2009) (canvassing the controversy over whether the Framers intended for standing to be required for federal court jurisdiction).

²⁷ *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)).

erly brought before them.²⁸ On the other hand is the longstanding and “‘deeply rooted’ commitment” of courts not to adjudicate constitutional issues unless doing so is necessary and unavoidable.²⁹ The outcome of this clash had long been, roughly, compromise. As the Court summarized in *Elk Grove Unified School District v. Newdow*, “standing jurisprudence contains two strands: Article III standing, which enforces the Constitution’s case-or-controversy requirement, . . . and prudential standing, which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction.’”³⁰ This Section will briefly outline the development of each of these two strands, before turning to the apparent demise of the latter in Section I.B.

1. Article III Standing

Though the three-part test for standing—an “injury in fact” that is “fairly . . . trace[able]” to the alleged actions of the defendant, which can be “redressed” by the relief requested of the court³¹—may be “numbingly familiar,”³² the development of the Constitution’s standing requirements has proven much more controversial.³³ It is common ground that Article III’s standing limitation is “built on separation-of-powers principles,”³⁴ and that these principles are enforced by “identify[ing] those disputes which are appropriately resolved through the judicial process.”³⁵ Which disputes are appropriately so resolved, and who has the authority to settle the borderline cases, have proven to be much more contentious questions. As Professor Sunstein argues, “‘standing’ began to make a modest initial emergence as a discrete body of doctrine” during the Progressive and New Deal periods, as progressive justices like Justices Brandeis and Frankfurter sought to insulate New Deal legislation from attack in the courts.³⁶ Unsurprisingly given its origins, standing doctrine has long

²⁸ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 820 (1976).

²⁹ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)); see also Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 743–47 (2013) (surveying techniques of constitutional avoidance).

³⁰ *Newdow*, 542 U.S. at 11 (quoting *Allen*, 468 U.S. at 751).

³¹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (alteration in original) (first citing *Allen*, 468 U.S. at 756; then quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976); and then quoting *id.* at 38).

³² William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

³³ See Solimine, *supra* note 26, at 1026 (“The history of the development of standing is a contested one.”).

³⁴ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013).

³⁵ *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

³⁶ Sunstein, *supra* note 25, at 179; see also John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L.

been a centerpiece in the debates and struggles over the appropriate role of the courts in American democracy.³⁷

2. Prudential Standing

Prudential standing has been described as “standing doctrine’s forgotten stepchild”³⁸ and an “anachronism.”³⁹ The former charge is apt if one considers the paucity of attention it has received in its own right in legal scholarship. But in terms of prudential standing’s importance in guiding the exercise of federal jurisdiction, neither of these labels is quite right. As we will see below, even despite the Supreme Court’s recent efforts to vanquish prudential standing, it has proven to be a powerfully resilient doctrine.⁴⁰

Like Article III standing, prudential standing was originally “developed to restrict courts to their properly limited role.”⁴¹ Unlike Article III standing, prudential standing derives not from the Constitution, but from “the Court’s view of prudent judicial administration.”⁴² Prudential standing plays its role by capitalizing on a distinction articulated by Justice Frankfurter between the “limits of power and the wise exercise of power,” or equivalently, between “questions of authority and questions of prudence.”⁴³ This broad distinction can be found behind many of the prudential justiciability doctrines adopted by the courts and defended by prominent justices like Justice Frankfurter⁴⁴ and Justice Brandeis,⁴⁵ and influential scholars like James Bradley Thayer⁴⁶ and Alexander Bickel.⁴⁷

REV. 962, 1009 (2002) (“There was no doctrine of standing prior to the middle of the twentieth century.”); Fletcher, *supra* note 32, at 224 (“[C]urrent standing law is a relatively recent creation.”).

³⁷ See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (“[S]tanding is a crucial and inseparable element of [the separation of powers], whose disregard will inevitably produce . . . an overjudicialization of the processes of self-governance.”).

³⁸ S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 97–98 (2014).

³⁹ Kim, *supra* note 17, at 305.

⁴⁰ See *infra* Section II.B.

⁴¹ Brown, *supra* note 38, at 98–99.

⁴² ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 66 (6th ed. 2020).

⁴³ *Trop v. Dulles*, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting).

⁴⁴ See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1449–52 (1988) (surveying Justice Frankfurter’s defense of prudential justiciability doctrines).

⁴⁵ See *id.* at 1443–48 (surveying Justice Brandeis’s defense of prudential justiciability doctrines).

⁴⁶ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (advocating a highly deferential form of judicial review). As Fred Smith Jr. observes, Thayer’s essay has been called “the most influential essay ever written on American constitutional law.” Smith, *supra* note 8, at 872

Intuitive though this distinction between jurisdiction and its wise exercise surely is, a sharp theoretical articulation has been hard to come by. The Supreme Court's first significant encounter with this difficulty came in the context of taxpayer standing. In *Frothingham v. Mellon*,⁴⁸ the Court confronted a challenge to the constitutionality of the popular Maternity Act, which appropriated funds for programs reducing maternal and infant mortality.⁴⁹ A unanimous Court held that status as a taxpayer was insufficient to confer standing on the challengers.⁵⁰ However, the rationale for that holding was far from clear.

When confronting this rule forty-five years later in *Flast v. Cohen*,⁵¹ however, the Court reconsidered the basis for the bar on taxpayer standing and found it to be “a rule of self-restraint which was not constitutionally compelled.”⁵² The plaintiffs in *Flast* argued that the use of their tax dollars to help pay for instruction and materials for religious schools gave them standing to challenge that practice as a violation of the Establishment Clause and Free Exercise Clause.⁵³ Eight justices agreed that the *Frothingham* rule was prudential, and should therefore be understood as a rule merely to guide inquiry into whether the plaintiffs had a sufficient connection to the injury and a possible remedy to confer standing.⁵⁴ The Court held that under the circumstances, the plaintiffs satisfied the prudential test for taxpayer standing.

In *Flast*, we can see the most controversial feature of a rule of prudential standing: flexibility. *Flast* cast the bar on taxpayer standing as one that the judiciary imposes on itself in its effort to avoid imprudent exercises of power. As a limit the court imposes on itself, it is also one of which the court can—at least in rare circumstances—relieve itself. Such an understanding contrasts with a bar that flows

n.167 (quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7 (1983)).

⁴⁷ See BICKEL, *supra* note 6 (expounding a theory of judicial restraint).

⁴⁸ 262 U.S. 447 (1923).

⁴⁹ *Id.* at 479–80.

⁵⁰ *Id.* at 486–89 (“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.”). See generally Brown, *supra* note 38, at 102–04 (tracing the development of prudential standing and the confusion over its relationship to constitutional standing principles). It is likely significant that the distinction between Article III and prudential standing was not itself highly visible at the time *Frothingham* was decided. See *id.* at 103–04 (noting that *Frothingham* was “unsurprisingly unclear” in its treatment of that distinction).

⁵¹ 392 U.S. 83 (1968).

⁵² *Id.* at 92.

⁵³ *Id.* at 85–86.

⁵⁴ *Id.* at 105–06.

from the constitutional text—one in which the justices would be (in principle) powerless to relax. As we will see in Part III, flexibility and discretion are at the heart of the normative controversy over prudential standing.⁵⁵

a. The Three Parts of Prudential Standing

The Court's understanding of prudential standing in *Flast* was not fully self-explicating. It was rather in *Warth v. Seldin*,⁵⁶ in an opinion by Justice Powell, that the Court explicitly endorsed the bifurcation of standing into constitutional and prudential strands.⁵⁷ That opinion also began the process of organizing the various prongs of prudential standing itself. *Warth* identified two categories of prudential standing: the bar on generalized grievances, and the bar on third-party suits.⁵⁸

Several years later, in a case dealing with a challenge to the federal government's gifting of surplus military land to a religious college, the Court explicitly added the zone-of-interests test under the prudential standing heading.⁵⁹ Adding this third category to *Warth*'s created a three-part structure of prudential standing.

At least until *Lexmark*, the three traditional tests of prudential standing doctrine were the ban on generalized grievances, the ban on third-party suits, and the zone-of-interests test. Justice Stevens summarized the doctrinal landscape well in a 2004 opinion: Although the Court has never “exhaustively defined the prudential dimensions of the standing doctrine,” he wrote, it was established to encompass “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.”⁶⁰

⁵⁵ See *infra* Sections III.A, III.D.

⁵⁶ 422 U.S. 490 (1975).

⁵⁷ *Id.* at 498 (“[Standing] inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.”).

⁵⁸ *Id.* at 499–500.

⁵⁹ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474–75 (1982). This “zone-of-interests” test has been articulated primarily in the context of challenges brought under the Administrative Procedure Act, *CHEMERINSKY, supra* note 42, at 66 n.25, and refers to the question whether the nature of a plaintiff’s injury brings them within the “class of persons” Congress intended to protect in enacting the relevant legislation. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 529 (1983)).

⁶⁰ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

b. Other Prudential Justiciability Doctrines

Standing is not the only tool the courts have to exercise prudence or their “passive virtues.” Professor Fred Smith, Jr. has provided a useful catalog of the various prudential doctrines currently in use in the federal courts. A doctrine counts as prudential for Smith if either a majority of the Supreme Court has called it prudential, or if a combination of scholars and some justices on the Court have labelled the doctrine either prudential or a “common law limitation on federal judicial power.”⁶¹ By this metric, Smith finds six additional prudential doctrines: ripeness, adverseness, *Pullman* abstention, *Younger* abstention, sovereign immunity, and the political question doctrine.⁶² More could easily be added to the list. For example, Chief Justice Rehnquist argued in *Honig v. Doe*⁶³ that mootness should be understood as a prudential justiciability doctrine because its well-known exceptions, like the “capable of repetition yet evading review” exception, could not be rooted in Article III itself.⁶⁴ Insofar as all of these doctrines reflect judicially self-imposed restrictions on the exercise of jurisdiction, there is reason to think that arguments against the viability or legitimacy of any one of them could be construed as an argument against the viability or legitimacy of each of them. In this Note, I will focus on the Supreme Court’s recent pronouncements on prudential standing. However, at least from one perspective it should be the case that much of what is said about prudential standing ought also apply to these other doctrines.⁶⁵ This feature of the discussion has unfortunately been largely absent.⁶⁶ There is little doubt that these judicial tools are widely used and quite significant,⁶⁷ yet their fate in light of recent Supreme Court treatment of prudential standing is deeply uncertain.⁶⁸ The reason for this, as Parts II and III will explain, is the

⁶¹ Smith, *supra* note 8, at 853.

⁶² *Id.*

⁶³ 484 U.S. 305 (1988).

⁶⁴ *Id.* at 330 (Rehnquist, C.J., concurring).

⁶⁵ Yet from another perspective, each of these doctrines seems to live and die on its own. The procedural significance of classifying a gatekeeping rule as jurisdictional discussed in Section II.B.1 does not apply in the same way to each of the various prudential doctrines. So from one perspective this is a sign that the project to bring discipline has a lot of work ahead. From another perspective it signals that the project to bring discipline may have bitten off more than it can chew.

⁶⁶ Professor Fred Smith, Jr.’s Article is the notable exception. See Smith, *supra* note 8, at 853–69.

⁶⁷ See Coenen, *supra* note 29, at 744 (describing the prevalence of “Bickelian” constitutional avoidance strategies).

⁶⁸ See *infra* Sections II.B–C.

paucity of discussion of the more general phenomenon of prudential doctrines.⁶⁹

B. Bringing Discipline to Standing Doctrine: The Road to Lexmark

Even as the Court's confidence in its bifurcation of standing into two strands grew, the theoretical basis of this bifurcation remained murky. Eventually some members of the Court began to voice displeasure with this and sought to "bring some discipline" to the Court's jurisdictional jurisprudence.⁷⁰ The chief concerns revolved around the connection between prudential standing and jurisdiction.

1. Some Confusions About Standing and Jurisdiction

Characterizing a rule as one touching subject-matter jurisdiction can have "drastic" consequences.⁷¹ Since questions of subject-matter jurisdiction are ultimately questions about whether the court has the authority to hear the case in the first place, the court has the duty to consider the question *sua sponte* at any time during the litigation.⁷² The question cannot be waived and so can be addressed for the first time on appeal.⁷³ And in deciding the question, courts can appeal to materials outside the pleadings.⁷⁴ Finally, when dismissals are treated under Rule 12(b)(1) as failure to invoke subject-matter jurisdiction, the claimants are deprived "an opportunity for a binding resolution on the merits of a claim," and the judgment may not have preclusive effect.⁷⁵

⁶⁹ Or as this Note calls them, "judicially sourced gatekeeping rules." See *infra* Section II.A.

⁷⁰ *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

⁷¹ *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (quoting *Henderson*, 562 U.S. at 435). See generally Kim, *supra* note 17, at 308–09, 338–40 (noting the harmful consequences of misclassifying merits decisions as jurisdictional decisions).

⁷² See *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.").

⁷³ See, e.g., *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 474 n.4 (5th Cir. 2013) ("Although 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.").

⁷⁴ See, e.g., *Douglas v. United States*, 814 F.3d 1268, 1278 (11th Cir. 2016) ("[A] 'factual attack' on subject matter jurisdiction 'challenge[s] the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered.'" (second alteration in original) (quoting *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1311–12 (11th Cir. 2009), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010))).

⁷⁵ Kim, *supra* note 17, at 340. The above citations are all originally collected in *id.* at 307–09. While from a strategic perspective, plaintiffs may prefer dismissal for lack of jurisdiction rather than dismissal on the merits of the claim, this Note focuses on the

Because of these consequences, the Roberts Court has emphasized the need to be careful in the use of jurisdictional labels, especially the “standing” label. As the Court has explained, “a rule should not be referred to as jurisdictional unless it governs a court’s adjudicatory capacity, that is, its subject-matter or personal jurisdiction.”⁷⁶

2. *The Intervention of Lexmark*

The Court’s most aggressive move to date to advance its project of bringing discipline to jurisdictional jurisprudence came in the 2014 case *Lexmark International, Inc. v. Static Control Components, Inc.*⁷⁷ *Lexmark* involved a false advertising dispute arising under the Lanham Act⁷⁸ between a laser printer manufacturer, Lexmark, and a company, Static Control, that produces the parts necessary for refurbishing and reselling Lexmark’s toner cartridges.⁷⁹

Lexmark moved to dismiss Static’s Lanham Act claim for lack of prudential standing. Both parties carried out the dispute in those terms throughout the litigation and in their briefs to the Supreme Court. Yet Justice Scalia, writing for a unanimous Court, found the “prudential standing” label to be “misleading.”⁸⁰ He determined that instead of invoking the idea of standing, the question should have been framed as whether Static Control’s claim fell within the “zone-of-interests” contemplated by the Lanham Act. And *this* question, Justice Scalia urged, is not a matter of standing at all, whether we call it prudential or not.⁸¹

The Court made two crucial observations. First, it noted that to “decline to adjudicate . . . on grounds that are ‘prudential,’ rather than constitutional,” would be “in some tension” with the Court’s obligation to hear cases within its jurisdiction.⁸² This touches and casts doubt

expressive and democratic values that seem to militate in favor of resolution on the merits rather than a refusal to hear a claim.

⁷⁶ *Henderson*, 562 U.S. at 435; see also *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010) (finding that failure to fulfill the registration requirement for bringing a claim under the Copyright Act does not implicate a court’s subject-matter jurisdiction); *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng’rs*, 558 U.S. 67, 82 (2009) (concluding that a requirement for “in conference” settlement before labor arbitration under the Railway Labor Act is not a jurisdictional rule but rather a claims-processing one); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006) (holding that a fifteen-employee threshold for Title VII liability is not jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443, 455–56 (2004) (explaining that deadlines for bankruptcy filings do not implicate subject-matter jurisdiction).

⁷⁷ 572 U.S. 118 (2014).

⁷⁸ 15 U.S.C. § 1125(a).

⁷⁹ *Lexmark*, 572 U.S. at 120–22.

⁸⁰ *Id.* at 125.

⁸¹ See *id.* at 126–27.

⁸² *Id.* at 125–26.

on the very idea of prudential doctrines, or of judicially self-imposed restraints.⁸³ The Court's second point zeroed in on the zone-of-interests test. The real inquiry when applying that test, it explained, is not one that implicates subject-matter jurisdiction because it is not one that gets at whether the court has adjudicatory authority over a "case" or "controversy." Rather, the question is "whether Static Control has a cause of action under the statute."⁸⁴ This is a question of congressional intent, calling upon the Court to employ its "traditional principles of statutory interpretation."⁸⁵

The Court's narrow holding on this question can be summed up in its quotation of Judge Silberman of the D.C. Circuit: "'[P]rudential standing is a misnomer' as applied to the zone-of-interests analysis."⁸⁶ As we saw above,⁸⁷ the zone-of-interests test was a latecomer to the prudential standing label, and in some casebooks is even treated as a somewhat separate test.⁸⁸ So from one perspective the Court's move to take the zone-of-interests test out of the prudential standing category is not particularly drastic. Yet in a footnote, the Court returns to the first point mentioned above, namely the general tension faced by all prudential doctrines. The note is worth quoting at length:

The zone-of-interests test is not the only concept that we have previously classified as an aspect of "prudential standing" but for which, upon closer inspection, we have found that label inapt. Take, for example, our reluctance to entertain generalized grievances While we have at times grounded our reluctance to entertain such suits in the "counsels of prudence" . . . we have since held that such suits do not present constitutional "cases" or "controversies." They are barred for constitutional reasons, not "prudential" ones. The limitations on third-party standing are harder to classify; we have observed that third-party standing is "closely related to the question whether a person in the litigant's position will have a right of action on the claim," . . . but most of our cases have not framed the inquiry in that way. This case does not present any issue of third-party

⁸³ See *supra* Section I.A.

⁸⁴ *Lexmark*, 572 U.S. at 128.

⁸⁵ *Id.*

⁸⁶ *Id.* at 127 (quoting *Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 675 (D.C. Cir. 2013) (Silberman, J., concurring)).

⁸⁷ See *supra* Section I.A.2.a.

⁸⁸ *E.g.*, CHEMERINSKY, *supra* note 42, at 66 n.25 (relegating the zone-of-interests test to a footnote and calling it "a third prudential standing requirement that arises almost exclusively in the administrative law context"). The zone-of-interests test has a somewhat special relationship with the Administrative Procedure Act, and is most commonly discussed in the context of cases arising under that statute's grant of causes of action. See *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987); Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 317-18 (2004).

standing, and consideration of that doctrine's proper place in the standing firmament can await another day.⁸⁹

Clearly the Court is targeting more than the zone-of-interests test. This footnote signals a strong antipathy to the continued use of prudential standing in the federal courts. Yet, this is also a strikingly brief treatment, and is not obviously necessary for the disposition of the case. How exactly we should understand these passages, and how exactly courts have interpreted them, will be the subject of Part II.

II PRUDENCE LOST

The unanimity of the *Lexmark* Court is all the more startling in light of the disunity that continues to characterize prudential standing doctrine. Five years after *Lexmark*, the Court's attempt to bring discipline to this area of law seems to have yielded anything but. This Part catalogues the wide range of approaches courts continue to take toward the various prudential standing doctrines. Because *Lexmark* provides little guidance on how to wade through the difficult questions it surfaces on the role of the judiciary in articulating the contours of the exercise of its own jurisdiction, many courts interpret and implement its holding differently. While some courts seem eager to follow the Supreme Court's lead in *Lexmark* and disavow all prudential standing doctrines, others have continued to use such doctrines expansively. Thus, while in the immediate aftermath of *Lexmark*, one scholar could refer to the opinion as "Justice Scalia's treatise on prudential standing," subsequent history of its reception in the lower courts reveals it to have been more of a preface.⁹⁰

A. *Premature Eulogizing: Prudential Standing's Post-Lexmark Afterlife*

After *Lexmark*, a number of scholars treated the Court's intervention in prudential standing doctrine as more of an evisceration. For some it was cause for celebration. Professor Martin Redish, a long-time critic of the doctrine,⁹¹ wrote of the "apparent rejection of the concept of prudential, judicially imposed limitations on the exercise of

⁸⁹ *Lexmark*, 572 U.S. at 127 n.3 (citations omitted) (first quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992); then quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 475 (1982); and then quoting *Dep't of Lab. v. Triplett*, 494 U.S. 715, 721, n.** (1990)).

⁹⁰ Ernest A. Young, *Prudential Standing After Lexmark* International, Inc. v. Static Control Components, Inc., 10 DUKE J. CONST. L. & PUB. POL'Y 149, 149 (2014).

⁹¹ See generally Redish, *supra* note 9 (criticizing judge-made abstention doctrines as inconsistent with democracy and the separation of powers).

federal jurisdiction” as a development that was “long overdue.”⁹² Professor Bradford Mank, in a somewhat more ambivalent tone, asked whether prudential standing was “abolished” totally in the wake of *Lexmark*, or if it has the possibility of staging a “comeback” under a “more liberal future Supreme Court.”⁹³ Both agreed, however, that *Lexmark* signaled the demise of prudential standing doctrine.

However, these eulogies for prudential standing are premature. As we will see in this Part, prudential standing lives on in some form in most of the federal courts.⁹⁴ While part of the explanation for this may have to do with the Court’s rather brief treatment of the issue in *Lexmark*, there are deeper reasons for why the courts have splintered over the fate of prudential standing doctrine. The first problem is that if “prudential standing” is no longer a legally viable category, then the concerns it handled need somewhere else to go. The Court can eliminate the label, but this gives no guidance as to the fate of the underlying judicial concerns and inquiries. In this sense the elimination of “prudential standing” may prove to be merely tinkering with the “superstructure.”

Professor Adam Steinman calls this a “transplantation” problem.⁹⁵ As Steinman explains it, the transplantation problem refers to the fact that after a particular concern has been removed from the “prudential standing” category, it is left undetermined whether that concern should migrate to the “Article III standing” category, or if it should be removed from “standing” and treated as an artifact of either congressional will or the common law.⁹⁶ In *Lexmark*, the Court performed an act of “nonconstitutional transplantation,” clarifying that the zone-of-interests gatekeeping rule is not part of Article III’s requirements but is instead a nonjurisdictional rule imposed by Congress.⁹⁷ Yet other doctrines have undergone or threaten to undergo “constitutional transplantation.”⁹⁸ For example,

⁹² 15 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 101.50 (3d ed. 2021).

⁹³ 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, 213 (2015).

⁹⁴ To my knowledge, Kylie Chiseul Kim is the only author to have pointed this out. See Kim, *supra* note 17, at 311 (“After *Lexmark* and Justice Scalia’s subsequent death, however, lower courts have continued to use prudential standing.”). This Note builds on Kim’s observation by more systematically tracing the ways in which courts continue to use the doctrine and analyzing the reasons they may have for doing so.

⁹⁵ Adam N. Steinman, *Lost in Transplantation: The Supreme Court’s Post-Prudence Jurisprudence*, 70 VAND. L. REV. EN BANC 289 (2017).

⁹⁶ *Id.* at 290–91.

⁹⁷ *Id.* at 292–93.

⁹⁸ *Lexmark* itself attempted to subject the ban on generalized grievances to constitutional transplantation. See *infra* Section II.B.3.

three Justices recently opined that the adverseness requirement is properly understood as part of Article III's standing requirements.⁹⁹ Professor Steinman and Professor Fred Smith, Jr. have both observed that how the transplantation problem is resolved with respect to any particular doctrine may have important consequences for access-to-courts issues.¹⁰⁰

In *Lexmark*, the Court provided very little guidance as to how the transplantation problem could be resolved with respect to various gatekeeping doctrines. It suggested that the generalized grievances ban has already undergone constitutional transplantation, and it expressed explicit uncertainty as to what should become of the third-party standing rule.¹⁰¹ But as difficult as the transplantation problem may be, it does not get quite to the heart of the matter. The problem, as Part III explores at length, is that it is not clear that transplantation is forced on courts in the first place.¹⁰² The *Lexmark* Court suggests, without detailed argument, that in our separation of powers tradition, gatekeeping rules can only be constitutional or congressional. But judicially sourced gatekeeping rules are widely prevalent, long-established, and normatively defensible. The Court's attempt to bring discipline to prudential standing runs headlong into this reality and the widely held view that judicial gatekeeping rules are valid and necessary. The fact that courts continue to pursue different paths after *Lexmark* reflects more than disagreement about which options to choose from within the transplantation problem. The ongoing disagreement suggests that *Lexmark* may have presented a false choice altogether.

B. *The Unsettled Doctrine of Prudential Standing*

Despite the scholarly perception that *Lexmark* put an end to prudential standing, that opinion did little to discipline the use of prudential standing in the federal courts. Courts have embraced at least four different approaches to post-*Lexmark* prudential standing doctrine. At one extreme is a complete disavowal of all prudential standing doctrines. Under this approach, some have embraced the animating spirit

⁹⁹ *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715–17 (2017) (Thomas, J., concurring).

¹⁰⁰ See Steinman, *supra* note 95, at 289–90 (suggesting that the transformation of prudential standing limits into “concepts grounded in positive law” affects “[a]ccess to courts”); Smith, *supra* note 8, at 878 (“[C]onstitutionalizing prudential limits sometimes significantly harms congressional efforts to expand access to federal courts, especially Congress’s ability to create and enforce rights.”).

¹⁰¹ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014).

¹⁰² See *infra* Part III.

behind *Lexmark*'s broader dicta, and disavowed prudential standing as a legitimate jurisprudential category altogether.¹⁰³

On a second option taken by some courts, the zone-of-interests test is treated as an ordinary matter of statutory interpretation, and generalized grievances are taken to be barred on constitutional grounds. But, it is conceded on this second option that the Court provided no guidance on whether the ban on third-party suits will be thought of as prudential in the future. Under this option, the court will fall back on pre-*Lexmark* precedent that typically treats the third-party ban as prudential. This approach therefore accepts that the zone-of-interests test and the generalized grievances ban are both taken out of the prudential standing firmament, with the former becoming a matter of statutory interpretation and the latter being recognized as part of Article III standing.¹⁰⁴ This approach is perhaps the most natural reading of *Lexmark*'s intended significance for prudential standing doctrine. The Court was explicit that "the limitations on third-party standing are harder to classify" and that it would not use the *Lexmark* litigation as the vessel to take up the question.¹⁰⁵

¹⁰³ See, e.g., *Prometheus Radio Project v. FCC*, 939 F.3d 567, 581 (3d Cir. 2019) (referring to the zone-of-interests prudential standing doctrine as a "now-discredited doctrine"), *rev'd on other grounds*, 141 S. Ct. 1150 (2021); *Keen v. Helson*, 930 F.3d 799, 802 (6th Cir. 2019) (finding that "prudential standing" is a "misnomer[]" and better thought of as a "*merits* issue that does not implicate the court's constitutional power to decide the case"); *Pelletier v. Victoria Air Conditioning, Ltd.*, 780 F. App'x 136, 139 (5th Cir. 2019) (per curiam) ("[A] dismissal for lack of prudential standing should be granted under Rule 12(b)(6) for failure to state a claim" because prudential standing implicates the merits and not jurisdiction); *Ecosystem Inv. Partners v. Crosby Dredging, L.L.C.*, 729 F. App'x 287, 291 & n.1 (5th Cir. 2019) (per curiam) (explaining that a party lacks prudential standing when it "lacks a 'legislatively conferred cause of action'" (quoting *Lexmark*, 572 U.S. at 127)); *Newton v. Duke Energy Fla., LLC*, 895 F.3d 1270, 1274 n.6 (11th Cir. 2018) (finding that *Lexmark* "effectively abolished prudential standing"); *United States v. Funds in the Amount of \$239,400*, 795 F.3d 639, 645 (7th Cir. 2015) (acknowledging that the Supreme Court in *Lexmark* "clarified and narrowed standing doctrine" and that "[r]ather than relying on these supposed standing concepts that are not rooted in Article III," the appropriate inquiry is whether Congress authorized a cause of action).

¹⁰⁴ See, e.g., *Kane County v. United States*, 928 F.3d 877, 900–01 (10th Cir. 2019) (finding that *Lexmark* does not address third-party standing, which remains a component of the prudential standing inquiry); *VR Acquisitions, LLC v. Wasatch County*, 853 F.3d 1142, 1146–47 (10th Cir. 2017) (finding that the third-party ban is "clearly rooted in principles of prudential, rather than Article III, standing" and that "[p]rudential standing imposes different demands than injury in fact" (alteration in original) (quoting *Wilderness Soc'y v. Kane County*, 632 F.3d 1162, 1171 (10th Cir. 2011) (en banc))); *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1118 n.9 (9th Cir. 2015) ("[T]he third-party-standing doctrine continues to remain in the realm of prudential standing."); *Survjustice Inc. v. Devos*, No. 18-cv-00535, 2019 U.S. Dist. LEXIS 54616, at *20 n.6 (N.D. Cal. Mar. 29, 2019) (treating third-party standing as prudential and refusing to apply *Lexmark*).

¹⁰⁵ *Lexmark*, 572 U.S. at 127 n.3.

And while the analytic thrust of the opinion certainly indicates misgivings about the continued vitality of *any* aspects of prudential standing, it is simply not obvious what should be done with the ban on third-party suits if that ban is no longer to be thought of as part of the prudential standing doctrine. This difficulty has already come back to the Supreme Court.¹⁰⁶

A third approach preserves two prongs of the pre-*Lexmark* prudential standing regime: The ban on generalized grievances and the ban on third-party suits continue to be regarded as prudential. Given the condensed nature of that discussion, it is understandable that some courts have treated as dicta the Court's statement that generalized grievances are barred for constitutional and not prudential reasons.¹⁰⁷ In footnote three of *Lexmark*, Justice Scalia treats the fact that generalized grievances are barred for Article III reasons as a *fait accompli*. As he says, the Court had previously treated the ban on generalized grievances as a matter of prudence, but has "since held that such suits do not present constitutional 'cases' or 'controversies.'"¹⁰⁸ But this is a contentious statement of the law as it stood before *Lexmark*.¹⁰⁹ Most notably, it overlooks the important case of *Federal Election Commission v. Akins*,¹¹⁰ in which the Court acknowledged uncertainty in the provenance of the ban on generalized grievances.¹¹¹

A fourth approach cabins the Court's intervention in prudential standing to suits involving a cause of action under the Lanham Act, and continues to treat even the zone-of-interests test, in other statutory contexts, as part of a prudential standing inquiry.¹¹² This fourth

¹⁰⁶ See *infra* Section III.E.

¹⁰⁷ *Lexmark*, 572 U.S. at 127 n.3.

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169 (2008) (surveying the pre-*Lexmark* debate on the generalized grievance test).

¹¹⁰ 524 U.S. 11 (1998).

¹¹¹ *Id.* at 23. The *Lexmark* footnote essentially reproduces a line of argument pursued in Justice Scalia's dissent in *Akins*. See *id.* at 34–35 (Scalia, J., dissenting) (arguing that even "concrete" generalized grievances should be barred by Article III because they are not "particularized" in virtue of being "undifferentiated and common to all members of the public" (quoting *United States v. Richardson*, 418 U.S. 166, 177 (1974))).

¹¹² Several courts in the First and Second Circuits seem to retain the pre-*Lexmark* approach to the zone-of-interests test, even while citing *Lexmark* in almost the same breath. See, e.g., *Bais Yaakov of Spring Valley v. Educ. Testing Serv.*, 367 F. Supp. 3d 93, 114 (S.D.N.Y. 2019) (citing *Lexmark* as authority for the consideration of the zone-of-interests as a prudential standing inquiry); *Katz v. Liberty Power Corp.*, No. 18-cv-10506, 2019 U.S. Dist. LEXIS 162793, at *29 (D. Mass. Sept. 24, 2019) (employing a prudential standing analysis in the context of a zone-of-interest inquiry, while citing *Lexmark* for support in doing so).

approach is a rather extreme interpretation, but has been adopted in a minority of courts.¹¹³ Ninth Circuit courts have adopted this narrowest reading, limiting the effect that *Lexmark* had on prudential standing doctrine to the question of whether the specific statutory scheme of the Lanham Act confers a cause of action on a particular plaintiff, i.e., whether that plaintiff is in the “zone of interests” of the Lanham Act.¹¹⁴

C. *Transplantation and Its Discontents*

As a matter of doctrinal fact, lower courts have responded to the Court’s attempt to disfavor prudential standing in a variety of ways. Some have seen this as a welcome development and have been eager to assist the Court in eliminating the doctrine. Others have been defiant to varying degrees. The difficult task is in understanding why this split has happened.

Part of the difficulty with following *Lexmark*’s lead is the “transplantation problem” as discussed previously.¹¹⁵ *Lexmark* provided little guidance on how to analyze other prudential standing doctrines. Yet the deeper difficulty is that the Court’s motivation for kicking over the prudential standing bucket in *Lexmark* seems to imply a ripple effect that goes far beyond just these three doctrines.

The Court’s turn away from prudential standing is predicated on a rather formal argument: Congress and the Constitution have conferred jurisdiction on the judiciary, and the judiciary lacks the authority to unilaterally abrogate that jurisdiction. But this formal argument runs headlong into a functional one¹¹⁶: the judiciary *constantly* exercises prudence and discretion in determining what constitutes a “wise exercise of power.”¹¹⁷ What the Court calls “prudence” implicates the entire category of judicially sourced gatekeeping rules. This category includes a wide variety of doctrinal tools, many of which

¹¹³ See, e.g., *Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1253 n.5 (9th Cir. 2017).

¹¹⁴ The Ninth Circuit is the only court of appeals to explicitly adopt this view after *Lexmark*. But it is not completely alone. Several district courts in the First Circuit have continued to treat non-Lanham Act zone-of-interests cases as implicating prudential standing. See, e.g., *Katz*, 2019 U.S. Dist. LEXIS 162793, at *29 (citing *Lexmark* yet still employing a prudential standing analysis in the context of a zone-of-interest inquiry); *S. Shore Hellenic Church, Inc. v. Artech Church Interiors, Inc.*, 183 F. Supp. 3d 197, 210 (D. Mass. 2016) (same).

¹¹⁵ See *supra* Section II.A.

¹¹⁶ See Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (advocating for “constitutional and public-law doctrines that . . . adapt legal doctrine to take account of how . . . institutions actually function in, and over, time”).

¹¹⁷ *Trop v. Dulles*, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting).

are firmly rooted in well-established jurisprudence.¹¹⁸ Moreover, when the Court and sympathetic scholars raise functional concerns of their own—for example, that prudential standing is an antidemocratic violation of separation of powers principles—these are unconvincing.¹¹⁹

III DEAR PRUDENCE

Part II's survey of the fate of prudential standing doctrine reveals that the Court's attempt to "bring[] discipline" to this area of law has yielded anything but.¹²⁰ This Part argues that *Lexmark*'s larger project failed because it offered a simplified vision of the landscape of what this Note calls "gatekeeping rules."¹²¹ It envisioned three categories of gatekeeping rules—constitutional, prudential, and statutory—and argued that the middle category of prudential rules ought to be vacated. The trouble is not merely that this does not yet decide what is to happen to the contents of this category (the "transplantation problem").¹²² The deeper trouble is that the Court's justification for ending prudential standing lacked a clear limiting principle. Prudential standing is just one of several judicially sourced gatekeeping rules. This category is solidly grounded in history and widespread usage.¹²³ Moreover, the Court's primary argument against prudential standing—an argument rooted in separation of powers concerns—is unconvincing on theoretical grounds.¹²⁴ In flattening the theoretical and doctrinal landscape, *Lexmark* not only failed to give guidance on a difficult choice but also offered a false choice in the first place.

This Part will begin by exploring the motivation behind the Court's attempts to discipline its jurisdictional jurisprudence. While these attempts are rooted in sound procedural concerns, prudential standing raises distinct questions of separation of powers. Next, this Part will explore various nuances at stake in the distinction between jurisdictional and nonjurisdictional gatekeeping rules before proceeding to disaggregate the several values that may be implicated by a reference to the "separation of powers." Finally, using this conceptual clarification, this Part argues that the flexibility of judicially sourced

¹¹⁸ See *infra* Section III.B.

¹¹⁹ See *infra* Section III.D.

¹²⁰ *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

¹²¹ See *supra* Section II.A.

¹²² See Steinman, *supra* note 95, at 291 (dissecting the problem of what happens with rules after the Court strips them of their "prudential" status).

¹²³ See *infra* Section III.B.

¹²⁴ See *infra* Section III.D.

rules like prudential standing in general and the third-party standing rule in particular actually *further*s the goals of the separation of powers.

A. *Motivating Discipline*

There has consistently been an attractive principle driving much of the Court's recent efforts to "bring[] discipline" to jurisdictional jurisprudence,¹²⁵ whether in the context of prudential standing, political question abstention,¹²⁶ or the act of state doctrine.¹²⁷ This is the principle that a rule ought not be treated as jurisdictional unless it really gets at the adjudicatory capacity of the courts. In many cases where the Court has sought to bring order to jurisdictional jurisprudence, the concern has focused on the procedural consequences of classifying a rule as jurisdictional. These "drive-by jurisdictional rulings"¹²⁸ potentially lead to the sorts of confusions discussed above,¹²⁹ including the fact that when dismissals are treated under Rule 12(b)(1) as failure to invoke subject-matter jurisdiction, the claimants are deprived "an opportunity for a binding resolution on the merits of a claim" and therefore of the finality of *res judicata*.¹³⁰

However, the Court's dissatisfaction with prudential standing in *Lexmark* sounds more in separation of powers worries than in these sorts of procedural worries. This is evidenced by the Court's citation of the principle that the federal courts have an obligation to hear and decide cases that fall within their jurisdiction.¹³¹ The problem with prudential standing, according to the *Lexmark* Court, is that it empowers the courts to make decisions about the proper exercise of their own jurisdiction, whereas this is a decision that ought to be made by Congress within the limits set by the Constitution.

Lexmark itself concerns a case in which courts use the prudential standing label to dismiss a case that falls within their jurisdiction. Yet Justice Scalia, at least, was just as concerned with the opposite possibility: using the flexibility of prudential standing to *hear and decide* a case that might not fall squarely within a court's jurisdiction. The last time the Court had confronted prudential standing before *Lexmark*

¹²⁵ *Henderson*, 562 U.S. at 435.

¹²⁶ See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (finding that a statutory claim was not a political question and thus was justiciable).

¹²⁷ See *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) (noting that the act of state doctrine is not a jurisdictional issue but a substantive one).

¹²⁸ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

¹²⁹ See *supra* Section I.B.1.

¹³⁰ *Kim*, *supra* note 17, at 340.

¹³¹ *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (citing *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

was in *United States v. Windsor*,¹³² the case that invalidated Section Three of the Defense of Marriage Act.¹³³ Justice Scalia dissented in that case, and vigorously opposed the majority's decision to cast the "adverseness" requirement as an element of prudential standing rather than of Article III's standing requirements.¹³⁴ Doing this allowed the Court to relax the typical strictures of the requirement in order to hear the case and reach a final judgment ending federally sanctioned marriage discrimination.¹³⁵ This prompted Justice Scalia's protest: "Relegating a jurisdictional requirement to 'prudential' status is a wondrous device, enabling courts to ignore the requirement whenever they believe it 'prudent'—which is to say, a good idea."¹³⁶ His point is that while Congress may grant and withdraw jurisdiction on the basis of its conception of what is or isn't a "good idea," the courts may not do so.

However, in applying this separation of powers concern in *Lexmark*, Justice Scalia's opinion moved far too quickly. He was right to identify the importance that the jurisdiction of federal courts plays in the federal separation of powers.¹³⁷ However, without carefully distinguishing various elements of the separation of powers,¹³⁸ it is impossible to determine the appropriate place of judicially sourced gatekeeping rules in upholding those values.

B. A Misleading Trichotomy

The *Lexmark* Court's concern with separation of powers is evident from three principles it sets out in its brief discussion of prudential standing. First, the Court holds that the zone-of-interests test should be conceived as a matter of statutory interpretation: Did Congress mean for Static Control to have a cause of action under the Lanham Act?¹³⁹ Second, the Court seems to implicitly hold that the zone-of-interests test is nonjurisdictional; this is suggested by the Court's insistence that the "standing" label is "misleading" as applied to the zone-of-interests test.¹⁴⁰ Third, the Court separates what it deems to be the "constitutional," "prudential," and "statutory" limita-

¹³² 570 U.S. 744 (2013).

¹³³ *Id.*

¹³⁴ *Id.* at 785 (Scalia, J., dissenting).

¹³⁵ *Id.* at 756–57, 769 (majority opinion).

¹³⁶ *Id.* at 785 (Scalia, J., dissenting).

¹³⁷ Something he pointed out long ago. See Scalia, *supra* note 37, at 88; see also Redish, *supra* note 9, at 74 (explaining how judge-made doctrines like abstention are in tension with separation of powers principles).

¹³⁸ See *infra* Section III.B.

¹³⁹ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014).

¹⁴⁰ *Id.* at 125.

tions on plaintiffs and casts doubt on the validity of “prudential” limitations.¹⁴¹ Yet both the relationship between these three principles, and the justification for each of them, is far from evident. The Court’s simplified trichotomy here leads it to overlook the prevalence of “prudential” rules and thus to underestimate what it would take to upend them.

1. *Statutory Rules Can Be Jurisdictional*

The first complication with *Lexmark*’s approach appears in the relationship between the holding that the zone-of-interests test should be a matter of statutory interpretation, and the holding that the zone-of-interests test is nonjurisdictional. In drawing a connection between these two ideas, the Court appears to rely on a simple syllogism. Major premise: If a gatekeeping rule can be reduced to a matter of statutory interpretation, then that gatekeeping rule is nonjurisdictional. Minor premise: The zone-of-interests test can be reduced to a matter of statutory interpretation. Conclusion: The zone-of-interests test is nonjurisdictional.¹⁴²

The trouble with this argument is that the major premise is false. It does not follow from the fact that a gatekeeping rule is sourced in a statute that such a rule is nonjurisdictional. Putting aside the obvious point that the federal courts have their jurisdiction conferred on them by acts of Congress,¹⁴³ it is also true that some rules and limitations that Congress writes into statutes are construed by the courts as limitations on jurisdiction, rather than as limitations on causes of action. For example, the Court has repeatedly affirmed its “longstanding treatment of statutory time limits for taking an appeal as jurisdictional.”¹⁴⁴ It later clarified its position, holding that “[s]ome statutes of limitations” that aim “to achieve a broader system-related goal, such as facilitating the administration of claims, . . . or promoting judicial efficiency” require courts to raise the issue *sua sponte*, and forbid them from applying “equitable considerations” to extend the limitations period.¹⁴⁵ These are the hallmarks of jurisdictional rules.

¹⁴¹ *Id.* at 128 (explaining that a court “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates”).

¹⁴² On an alternative reading, the Court does not rely on the premise that a statutory rule is necessarily nonjurisdictional, but rather denies the existence of a free-floating, trans-substantive zone-of-interests test. This is a theoretically sound position, but it does not avoid the practical difficulties discussed below. *See infra* notes 164–71 and accompanying text.

¹⁴³ *See, e.g.*, 28 U.S.C. § 1331 (conferring federal question jurisdiction on the federal courts); *id.* § 1332 (conferring diversity jurisdiction).

¹⁴⁴ *Bowles v. Russell*, 551 U.S. 205, 210 (2007).

¹⁴⁵ *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–34 (2008).

The fact that statutory limitations may be either limitations on causes of action or limitations on jurisdiction also complicates the first principle in *Lexmark*—its vision of applying the “traditional tools of statutory interpretation” to assess whether the plaintiff’s claim may be entertained.¹⁴⁶ It is true that courts need only apply “traditional tools of statutory interpretation,” but they must do so in the service of determining whether or not a statute includes a jurisdictional limit. This will often require courts to engage in the same sorts of inquiries that *Lexmark* dismisses as “prudential.”

To see why, consider the Court’s approach when it must decide whether a statutory provision is jurisdictional. First, it asks whether Congress has “attach[ed] the conditions that go with the jurisdictional label to a rule that [the Court] would prefer to call” a nonjurisdictional rule.¹⁴⁷ This is done by asking whether Congress has “clearly state[d] that a threshold limitation on a statute’s scope shall count as jurisdictional,” a test which the Court has optimistically described as a “readily administrable bright line” rule.¹⁴⁸ And that’s not even all. Even if a court determines that a rule is nonjurisdictional, it must further ask whether the rule is “important and mandatory”¹⁴⁹ or implicates “values beyond the concerns of the parties.”¹⁵⁰ If it is or does, there are further difficult questions regarding whether litigants can forfeit the protection of these rules by failing to raise them,¹⁵¹ whether courts can raise these blocks *sua sponte*,¹⁵² and most controversially, whether courts may exercise “reasonable equitable discretion” in altering or neglecting to apply the rule.¹⁵³ Given the involved nature of this inquiry, *Lexmark*’s suggestion that eliminating prudential standing will keep judges from determining the limits of their own jurisdiction seems improbable.

¹⁴⁶ *Lexmark*, 572 U.S. at 127.

¹⁴⁷ *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

¹⁴⁸ *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006).

¹⁴⁹ *Henderson*, 562 U.S. at 435; *see also Bowles*, 551 U.S. at 216 (Souter, J., dissenting) (explaining the consequences of whether a mandatory rule is treated as jurisdictional versus nonjurisdictional).

¹⁵⁰ *Day v. McDonough*, 547 U.S. 198, 205 (2006) (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d. Cir. 2000)).

¹⁵¹ *See Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019) (explaining that a nonjurisdictional rule “can be waived or forfeited by an opposing party”); *Arbaugh*, 546 U.S. at 503–04 (finding that Title VII’s exemption for employers with fewer than fifteen employees may be forfeited as a defense); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (finding that Title VII’s statutory requirement to file a timely charge with the Equal Employment Opportunity Commission can be forfeited as a defense).

¹⁵² *Bowles*, 551 U.S. at 216 (Souter, J., dissenting) (“[A] mandatory but non-jurisdictional limit is enforceable . . . by a judge concerned with moving the docket . . .”).

¹⁵³ *Id.*

2. *Judicially Sourced Gatekeeping Rules*

The third principle—which separates the three sorts of limitations and casts doubt on the “prudential” variety—might seem to rest on the idea that jurisdictional rules can be sourced only in the Constitution or in an act of Congress. However, it does not follow from this that *all gatekeeping rules*—that is, all rules that courts apply to decline to adjudicate claims either because they lack jurisdiction, or because they decline to exercise that jurisdiction¹⁵⁴—must be sourced exclusively in either the Constitution or in statutes.

There are a number of rather noncontroversial examples of this category of judicially sourced gatekeeping rules.¹⁵⁵ The Court has held for example that Supreme Court Rule 13.1, which requires that a petition for a writ of certiorari be filed within ninety days of the entry of the judgment sought to be reviewed, is nonjurisdictional when applied to appeals in criminal suits.¹⁵⁶ This rule has been interpreted as one of a number of “procedural rules adopted by the Court for the orderly transaction of its business [which] are not jurisdictional and can be relaxed by the Court in the exercise of its discretion.”¹⁵⁷ The Court has similarly classified the Federal Rules of Bankruptcy Procedure as nonjurisdictional gatekeeping rules subject to the Court’s equitable discretion.¹⁵⁸ More recently the Court responded to the COVID-19 pandemic by relaxing all filing deadlines.¹⁵⁹

This category is not limited only to the Supreme Court. The lower federal courts also routinely make use of judicially sourced gatekeeping rules. The most prominent example is the so-called “well-pleaded complaint rule.”¹⁶⁰ In principle, this rule arises as a judicial interpretation of the 1875 Act which officially conferred federal ques-

¹⁵⁴ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (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.”).

¹⁵⁵ But see 28 U.S.C. § 2071(a), which arguably constitutes statutory license for these instances of rulemaking authority. As with the well-pleaded complaint rule, *see infra* notes 160–64 and accompanying text, however, there is little evidence that the Court makes any attempt to anchor its rulemaking authority in an interpretation of that statute.

¹⁵⁶ *See Bowles*, 551 U.S. at 211–12.

¹⁵⁷ *Schacht v. United States*, 398 U.S. 58, 64 (1970).

¹⁵⁸ *See Kontrick v. Ryan*, 540 U.S. 443, 454 (2004).

¹⁵⁹ Miscellaneous Order of March 19, 2020, 589 U.S. (2020).

¹⁶⁰ *See generally Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908) (holding that plaintiffs cannot use an anticipated defense to earn federal question jurisdiction); *Metcalf v. Watertown*, 128 U.S. 586 (1888) (holding that the right of removal under the 1875 Act depends on whether the original complaint contained a federal question that fell within the jurisdiction of a circuit court).

tion jurisdiction on district courts.¹⁶¹ However, the Court has made it clear that, in general, its own interpretation of federal question jurisdiction has come quite unmoored from congressional intent, citing instead factors such as “the demands of reason and coherence” as well as “dictates of sound judicial policy.”¹⁶² As Professor Barry Friedman has argued, despite the fact that Congress’s intent in the 1875 Act seemed to be no more than to codify the constitutional standard, courts developing and applying the well-pleaded complaint rule have significantly tightened their interpretation of that grant of jurisdiction, and have done so while “generally neglect[ing] even to mention that a statute is being construed, let alone attempt[ing] to discern congressional intent.”¹⁶³ The well-pleaded complaint rule is, then, for all intents and purposes, a child of the judiciary, and an example of a judicially sourced gatekeeping rule long-accepted in the lower courts.¹⁶⁴

C. *The Separation of the Separation of Powers*

As mentioned above,¹⁶⁵ the Court’s principled argument against prudence sounds in the separation of powers. That principle, the argument goes, both constrains a court’s authority to articulate the boundaries of its own jurisdiction and precludes it from deciding *how* it should exercise its jurisdiction. However, before asking whether courts legitimately may exercise discretion (or “prudence”) in deciding not to hear cases that fall within their jurisdiction without running afoul of important separation of powers principles, it is important to be more precise about what those principles are.

Notwithstanding the Court’s insistence that the “separation of powers” refers to “a single basic idea,”¹⁶⁶ there are *at least* two different but related values classified under that label. The first is a majoritarian value, according to which policy decisions must be made in the popularly controlled political branches in order to promote

¹⁶¹ 28 U.S.C. § 1331.

¹⁶² *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494–95 (1983) (quoting *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 379 (1959)).

¹⁶³ Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 *Nw. U. L. REV.* 1, 22 (1990).

¹⁶⁴ The sorts of dialogue discussed in this paragraph and the next suggest that locating gatekeeping rules in statutory authority—even loosely—may be salutary from the perspective of the separation of powers. That may be true. However, this defense of judicially sourced gatekeeping rules assumes that Congress can legislate to alter or abolish those rules just as easily as it can legislate to change or abolish statutory gatekeeping rules. The relevant contrast is between these two types of gatekeeping rules on the one hand, and constitutional gatekeeping rules on the other.

¹⁶⁵ See *supra* Section III.A.

¹⁶⁶ *Allen v. Wright*, 468 U.S. 737, 752 (1984).

democratic accountability. The second is an individual autonomy value, according to which the failure to separate out the various powers of governments makes tyrannical overreach more likely. While these values are surely related, they are also importantly dissimilar, and have different implications for how we think of the judiciary's role in articulating its own jurisdiction. Once those values are explicitly articulated, it becomes clear that prudential standing and other judicially sourced gatekeeping rules can promote, rather than undermine, the separation of powers.

1. *Separation of Powers as Democracy-Promoting*

The first strand of separation of powers is essentially concerned with the countermajoritarian difficulty, albeit in a somewhat unusual form. Typically, the countermajoritarian difficulty refers to the possibility of a small, unelected body overthrowing legislation that was duly enacted by the popular, political branches of government.¹⁶⁷ In the jurisdiction context, however, the worry is that a small, unelected body will fail to give effect to legislation by refusing to hear suits brought under it. In doing so, they can be thought to be thereby effectively overthrowing legislation that was duly elected by the popular, political branches of government. Professor Redish has expressed this concern in the context of judicial abstention in civil rights cases, which in his view amounts to the judiciary unilaterally, and unconstitutionally, "repealing or modifying the legislation."¹⁶⁸

This understanding of the separation of powers has been particularly prominent in the development of the requirement of a "particularized" injury.¹⁶⁹ This requirement indicates that as a plaintiff's claimed injury becomes less particularized and more generalized, judicial redress will increasingly be seen as an exercise of the legislative, rather than judicial, function and hence a usurpation of legislative power.¹⁷⁰ The Court has held that the "particularized" injury requirement flows directly from Article III's "case-or-controversy requirement."¹⁷¹ It is worth noting, however, that unlike Redish's portrayal of abstention, the theory behind the particularized injury requirement is that undue *judicial involvement*, rather than *judicial abdication*, would strike a blow to democratic values.

¹⁶⁷ Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998).

¹⁶⁸ Redish, *supra* note 9, at 77.

¹⁶⁹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

2. *Separation of Powers as Tyranny-Preventing*

The second strand of separation of powers reflects the *Federalist* idea that an effective way to prevent the tyrannical exercise of the government's power over individuals is to disperse that power into a number of different hands. As Madison conceived it, this involves a dispersal of power between the several branches of the federal government (horizontal separation of powers),¹⁷² as well as a dispersal of power between the states and the federal government (vertical separation of powers).¹⁷³ Madison argued that by spreading the reins of power among a variety of sources, it would be less likely that any one malevolent actor would be capable of amassing the power required in order to persecute disfavored minorities. Perhaps recognizing this aspect of the separation of powers, the Court has suggested that at least part of standing doctrine "reflects a due regard" for individual "autonomy."¹⁷⁴

D. The Case for the Court's Power to Decide Not to Decide

Distinguishing between these two strains of the separation of powers—democracy-promoting and tyranny-preventing—illuminates the controversy surrounding a court's discretionary decision not to hear and decide a case that admittedly falls within its jurisdiction. Further, it raises the following question: Given the values expressed by the democracy-promoting and tyranny-preventing variants of the separation of powers, what authority could there be for applying a nonjurisdictional gatekeeping rule to decline to hear a case?

1. Does Deciding Not to Decide Violate the Separation of Powers?

The view implicit in *Lexmark*, but articulated more explicitly by Professor Redish, is that there can be *no authority* for applying nonjurisdictional gatekeeping rules because that is forbidden by separation of powers concerns.¹⁷⁵ To test this theory, it is again necessary to distinguish between the two variants of the separations of powers.

¹⁷² See THE FEDERALIST NOS. 47, 48, 51 (James Madison) (articulating Madison's idea that dispersing federal power among the three branches and enabling each to serve as a check on the others will prevent minority factions from seizing too much power).

¹⁷³ See THE FEDERALIST NOS. 45, 46 (James Madison) (explaining the political safeguards of federalism).

¹⁷⁴ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 473 (1982).

¹⁷⁵ Redish, *supra* note 9, at 72.

a. Democracy-Promoting

The first separation of powers idea that centers on democracy-enhancing objectives rules out this possibility only if two things are true. First, it must be the case that the articulation of nonconstitutional jurisdiction is a purely legislative function. Second, it must be the case that federal courts have an indefeasible obligation to hear all cases that fall within their jurisdiction. However, both of these claims are highly contestable.

The law of jurisdiction suggests that the power to define jurisdiction has long been split between the legislative and judicial branches.¹⁷⁶ Against what he calls the “congressional control model” of federal jurisdiction, Professor Friedman argues that as both a descriptive and a normative matter, it is better to understand the development of federal jurisdiction as a dialogue between Congress and the Court.¹⁷⁷ Drawing on examples like the Anti-Injunction Act, habeas corpus, and military induction, Friedman shows how courts have moved to define their own jurisdiction in ways that are not tethered to congressional intent, and how Congress has responded by either pushing back or acquiescing, depending on the case.¹⁷⁸ A more recent example comes from *Arbaugh v. Y&H Corp.*,¹⁷⁹ a case in which the Court was called on to determine whether Title VII’s statutory thresholds were jurisdictional limits.¹⁸⁰ In holding that the fifteen-employee threshold criterion is nonjurisdictional, Justice Ginsburg’s opinion for the Court explicitly invited Congress to react, arguing that “the sounder course” is to “leave the ball in Congress’[s] court.”¹⁸¹

The second claim that must be true if the democracy-promoting separation of powers value is to rule out judicially sourced nonjurisdictional gatekeeping rules is that courts have an obligation to hear all cases within their jurisdiction. *Lexmark* describes this as an “obliga-

¹⁷⁶ See Friedman, *supra* note 163, at 10 (“[T]he issue is the subject of an ongoing dialogue between these two branches.”).

¹⁷⁷ See *id.* at 29 (“The dialogic approach is the most reasonable interpretation of article III precisely because it does the best job of harmonizing the text of the Constitution, the judicial interpretation of that text, and policy arguments concerning which branch should maintain control over federal jurisdiction.”).

¹⁷⁸ See *id.* at 23–24. Not only is it the case that Congress and the courts participate in this dialogue, but the dialogue is normatively desirable because in many cases, “the Court simply is more competent than Congress in refining jurisdictional decisions. Jurisdictional rules often must be painted with a narrower brush—and fine-tuned more frequently—than the legislative system permits.” *Id.* at 60.

¹⁷⁹ 546 U.S. 500 (2006).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 515.

tion” that is “virtually unflagging.”¹⁸² The first thing to notice is that even the statement of this obligation suggests its own halfheartedness.¹⁸³ Indeed it is often the case that a case paying lip service to this theory is also a case availing itself of the escape hatch.¹⁸⁴ Furthermore, as previously observed, prudential standing doctrines are far from alone in constituting instances of courts lapsing in this apparent “obligation.” The political question doctrine, as recently affirmed in *Rucho v. Common Cause*, is one striking example.¹⁸⁵ Further discussion of this principle is taken up below.¹⁸⁶

b. Tyranny-Preventing

The second strand of the separation of powers is the tyranny-preventing strand. Not all gatekeeping rules interact with this strand in the same way. In some cases, courts use gatekeeping rules in order to protect the rights of individuals, which is exactly the value that this tyranny-preventing strand has in mind to protect. A nice example of this is the ban on third-party suits, which have long been considered a core component of prudential standing.¹⁸⁷ The point of restricting the ability of third parties to bring claims implicating the rights of absent parties is to protect the rights of the absent party.

As noted above, the *Lexmark* Court expressed uncertainty about what to do with the third-party rule in light of its attack on prudential standing.¹⁸⁸ We have seen how the Court’s menu of possibilities in *Lexmark* was abbreviated,¹⁸⁹ and now that we have a fuller sense of

¹⁸² *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

¹⁸³ See also *W.S. Kirkpatrick & Co. v. Env’t Tectonics Corp.*, 493 U.S. 400, 409 (1990) (“Courts in the United States have the power, *and ordinarily* the obligation, to decide cases and controversies properly presented to them.” (emphasis added)).

¹⁸⁴ For example, in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 820 (1976), the Court affirmed the general principle while ducking the duty, giving rise to the eponymous abstention doctrine.

¹⁸⁵ 139 S. Ct. 2484, 2506 (2019). Prudential ripeness is another widely acknowledged exception to the principle that courts must hear cases falling within their jurisdiction. See, e.g., *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807–08 (2003); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009).

¹⁸⁶ See *infra* Section III.D.2.

¹⁸⁷ See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (“[W]e have recognized [third-party standing] as a prudential doctrine and not one mandated by Article III of the Constitution.”); *Craig v. Boren*, 429 U.S. 190, 193 (1976) (explaining that it is “settled” that limitations on third-party suits “are not constitutionally mandated,” but are “prudential”); see also *supra* Section I.A.2.

¹⁸⁸ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014); *supra* Section I.B.2.

¹⁸⁹ See *supra* Section III.A.

the options we can have a fuller discussion of how the third-party rule fits into the firmament of gatekeeping rules.

In a third-party standing inquiry, the question is not whether there is a particularized injury, but rather whether the plaintiff stands in the appropriate relation to the injured party. The Court has held that Article III requires that plaintiffs “allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.”¹⁹⁰ However, a third-party case typically does not run afoul of this requirement because (i) the injured parties are not unidentified, and (ii) the plaintiff does not purport to belong to the class, but rather to bring a claim on their behalf. The point of the rule against third-party standing is therefore not to prevent the courts from facilitating a usurpation of legislative power but rather to protect the interests of the injured parties on whose behalf a claim is being advanced.¹⁹¹ It is about protecting the rights of the injured party, and this is the role envisioned for courts in the separation of powers scheme.¹⁹² So the third-party standing rule may be an example of a judicially sourced gatekeeping rule that *supports*—rather than undermines—the judiciary’s tyranny-preventing role.¹⁹³

2. *Flipping the Burden: Why Must the Court Decide?*

While the above arguments that courts lack the power to decline jurisdiction are unconvincing, one might argue instead that the “burden of production” has been illicitly flipped.¹⁹⁴ On this approach, the suggestion is that the advocate of judicially sourced nonjurisdictional gatekeeping rules must provide an affirmative argument against the constitutional default position that courts must adjudicate all cases

¹⁹⁰ *Warth v. Seldin*, 422 U.S. 490, 502 (1975).

¹⁹¹ According to the tradition in which the chose in action is taken to be an individual right, third-party suits are conceived as an invasion of the property interests of the claimant, who would normally possess the traditional property right to exclude.

¹⁹² This is consistent also with Justice Scalia’s earlier view. See Scalia, *supra* note 37, at 894 (“[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority[] . . .”).

¹⁹³ The *Younger* abstention doctrine also provides an example of how the courts have used nonjurisdictional gatekeeping rules to position the judiciary as a protector of individual rights. As Friedman explains, by taking the “question of enjoining state court proceedings in section 1983 civil rights cases out of Congress’s hands,” the courts made it the case that “where individual liberties are at stake, judicial interference with state court proceedings becomes a matter of judicial—not congressional—discretion.” Friedman, *supra* note 163, at 20.

¹⁹⁴ Redish, *supra* note 9, at 73.

within their jurisdiction. This brings us back once again to the “virtually unflagging” obligation discussed in *Lexmark*.¹⁹⁵

One response to this is to point again to Friedman’s argument that the law of jurisdiction is better understood as reflecting a dialogue between the branches, rather than as providing confirmation for the “congressional control” model.¹⁹⁶ Another response is to point to the fact that the theory behind the position that courts have this “virtually unflagging” obligation is maddeningly underdeveloped. Invocations of the principle are without exception accompanied by a citation of Chief Justice Marshall’s declaration that it would be nothing less than “treason” for the Court to “decline the exercise of jurisdiction which is given.”¹⁹⁷ Yet beyond this assertion, there is little by way of systematic defense of the principle.

Professor Redish again provides the most lucid defense of the principle on offer. In his view, judicial alteration of Congress’s statutory schemes is permissible only in the name of the Constitution, and the refusal to hear and decide cases falling within a court’s jurisdiction amounts to an alteration of Congress’s statutory scheme.¹⁹⁸ However, his conception of the phenomenon is unfortunately narrow. He describes the phenomenon that he considers troubling as a case in which the Court “ignore[s] or invalidate[s] those statutes *merely because of disagreement with their substance*.”¹⁹⁹ Again, he writes that if the Court were to decline a case within its jurisdiction then it “would be altering a legislative scheme *because of disagreement with the social policy choices that the scheme manifests*.”²⁰⁰

This understanding of *why* courts decline to hear and decide cases is unnecessarily cramped. Even Justice Scalia’s suggestion in *Windsor* that courts exercise “prudence” when they think it is a “good idea” contemplates a more expansive notion of why courts might decline to hear a case.²⁰¹ Redish is suggesting that the only sense in which a court might disagree with the “substance” of a statute is when it disagrees with the “social policy choices” expressed in that statute,

¹⁹⁵ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

¹⁹⁶ See *supra* Section III.B.2; see also Friedman, *supra* note 163, at 10.

¹⁹⁷ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

¹⁹⁸ Redish, *supra* note 9, at 77. We might wonder whether Professor Redish would feel the same about the Executive’s exercise of discretion in failing to give full force to a statute. What accounts for differing intuitions *vis-à-vis* executive discretion and judicial discretion? If the answer points to the fact that *enforcement* is the Executive’s prerogative, this merely deepens the puzzle, for we should now be inclined to ask why it is that the *Legislature’s* desired enforcement results are controlling in the first place.

¹⁹⁹ *Id.* (emphasis added).

²⁰⁰ *Id.* (emphasis added).

²⁰¹ See *supra* note 136 and accompanying text.

and this is a violation of the democracy-promoting value because social policy choices are issues that only the political branches can decide.²⁰² But there are other senses in which courts may disagree with a statute's substance. They may disagree with the substance *qua effect on judicial administration*. As discussed above, there are recognized instances in which Congress has acquiesced in reasons of judicial administration being cited to shape jurisdiction.²⁰³ They may also disagree with the substance *qua effect on individual liberties*. This captures the courts' approach to third-party standing, and perhaps also to *Younger* abstention.²⁰⁴

In sum, Redish's defense of the "virtually unflagging" obligation leaves much to be desired. It would also be quite surprising if this duty were as demanding as Redish and the *Lexmark* Court seem to suggest. For, if Chief Justice Marshall was right that it amounts to "treason" for federal courts to "decline the exercise of jurisdiction which is given,"²⁰⁵ then once we focus on the enormous array of prudential doctrines that have proliferated over the last hundred years,²⁰⁶ and once we focus on the difficulty that the Supreme Court has confronted in eliminating prudential standing over just the last five years,²⁰⁷ it would seem to follow that the majority of federal judges to have served over the last century are traitors. This is of course preposterous, and any view which leads to that result is in need of considerable rethinking.

E. *The Transplantation Problem Revisited: June Medical*

What this discussion of judicially sourced nonjurisdictional gatekeeping rules has taught is that there are several ways of keeping a gatekeeping rule in judicial, rather than congressional, hands. The choice suggested in *Lexmark* is that a rule must either be conceived as a creature of Article III or of congressional intent. *Lexmark's* core holding on the zone-of-interests test suggested a position of judicial modesty by ceding that test to Congress. However, the Court's quick discussion of the general grievances rule belies a significantly more immodest position according to which the judiciary has the power to classify a gatekeeping rule as constitutional in nature, and to assert judicial supremacy in articulating Article III's jurisdictional demands. What *Lexmark* overlooks is the option of both retaining judicial con-

²⁰² See Redish, *supra* note 9, at 77.

²⁰³ See *supra* notes 177–81 and accompanying text.

²⁰⁴ See *supra* note 193 and accompanying text.

²⁰⁵ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

²⁰⁶ See *supra* Sections I.A.2, III.B.

²⁰⁷ See *supra* Section II.B.

trol over a gatekeeping rule *and* keeping open a channel for dialogue with Congress with respect to that rule.

Seeing the full range of options available to the Court is important for appropriately deciding the fate of third-party standing. The issue recently came before the Court in *June Medical Services L.L.C. v. Russo*.²⁰⁸ Respondents in that case urged that Petitioners—physicians who faced liability under a Louisiana law that made it significantly more difficult to obtain the requisite licensing to provide abortions and other maternal health services—lacked third-party standing, so the Court should dismiss for lack of jurisdiction.²⁰⁹ Because this objection was not raised until quite late in the litigation, everything appeared to turn on how the Court would understand the gatekeeping nature of the third-party standing rule. If it was conceived as part of Article III’s standing firmament, then the fact that the issue was raised late would have been immaterial since a court must assure itself of jurisdiction at every stage of litigation.²¹⁰ Petitioners urged, however, that the Court should understand the third-party rule as a defense that had been forfeited.²¹¹

A splintered Court managed to mostly avoid the question, despite the fact that all six opinions (one opinion for each male Justice) discussed standing principles at some length. Justice Breyer’s plurality opinion and Chief Justice Roberts’s concurring opinion each make essentially the same argument: Louisiana forfeited its right to question the plaintiffs’ standing so late in the litigation, or, alternatively, the Court’s third-party standing precedents compel the result that the *June Medical* plaintiffs have third-party standing.²¹² In principle, by holding that the question of third-party standing can be waived, the Court conceded that it is a nonjurisdictional gatekeeping rule. However, neither Justice Breyer’s nor Justice Roberts’s opinion analyzed this question directly.

The difficulty that the Court’s opinion in *Lexmark* posed for third-party standing in *June Medical* did not go unnoticed, however. Justice Thomas in dissent complained that not only had the “Court . . . never provided a coherent explanation for why the rule against third-party standing is properly characterized as prudential,” it was also

²⁰⁸ 140 S. Ct. 2103 (2020).

²⁰⁹ See Brief for the Respondent at 25–30, *June Med. Servs.*, 140 S. Ct. 2103 (No. 18-323), 2019 WL 7372920, at *25–30.

²¹⁰ It would be a further question then whether Petitioners satisfied the third-party standing requirement even conceived as part of Article III.

²¹¹ See Reply Brief for Petitioners at 27–29, *June Med. Servs.*, 140 S. Ct. 2103 (No. 18-323), 2020 WL 996893, at *27–29.

²¹² *June Med. Servs.*, 140 S. Ct. at 2118 (plurality opinion); *id.* at 2139 n.4 (Roberts, C.J., concurring).

“puzzling that a majority of the Court insist[ed] on continuing to treat the rule against third-party standing as prudential when [the] recent decision in [*Lexmark*] questioned the validity of our prudential standing doctrine more generally.”²¹³ Justice Thomas went on to argue both that third-party standing should be thought of as a constitutional rule—part of Article III—and moreover that the plaintiffs in *June Medical* failed to satisfy the requirements.²¹⁴

Putting aside Justice Thomas’s arguments about whether the plaintiffs in *June Medical* had standing, his general point that *Lexmark* casts doubt on the ongoing viability of third-party standing doctrine—in the abortion context and elsewhere—remains troubling. Neither the plurality nor the concurring opinion contains the resources for answering it. This Note, however, has provided an answer. It is imperative to recognize the legitimacy of judicially sourced nonjurisdictional gatekeeping rules.²¹⁵ Such a rule is one that the courts may invoke without finding it in either a statute or Article III. As discussed above,²¹⁶ the court can locate the third-party rule in its autonomy-protecting role. Yet, crucially, since such a rule is created by the judiciary, it can also be altered according to the judiciary’s equitable discretion.

Taking this approach is consistent with respecting both strains of the separation of powers—the prime value behind jurisdictional jurisprudence. By refusing to squirrel the third-party rule away in Article III, the Court can keep the rule alive while also inviting Congress to participate in dialogue regarding its scope.²¹⁷ Not only does dispersing

²¹³ *Id.* at 2143–44 (Thomas, J., dissenting).

²¹⁴ *Id.* at 2145–46. Justices Alito, Gorsuch, and Kavanaugh each wrote dissenting opinions that called into question the plaintiffs’ standing, but none of them engaged in any serious way with the overarching question of the validity of prudential standing doctrines. *See id.* at 2165–71 (Alito, J., dissenting); *id.* at 2173–75 (Gorsuch, J., dissenting); *id.* at 2182 n.2 (Kavanaugh, J., dissenting).

²¹⁵ A possible alternative would be for the Court to locate the third-party rule in Rule 17 of the Federal Rules of Civil Procedure. Doing so would allow the Court to cite congressional authorization. However, the risk in locating the rule in a statute is that the Court may lose some of its equitable discretion in controlling the application of the rule. But this need not be the case. For example, in the context of statutory time limitations, the Court has suggested that so long as the limitations are intended to “protect a defendant’s case-specific interest in timeliness,” rather than to “achieve a broader system-related goal,” then it is open that “certain equitable considerations [may] warrant extending a limitations period.” *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–34 (2008). What this indicates is that whatever authority the Court has to establish judicially sourced nonjurisdictional gatekeeping rules may also allow it to apply equitable discretion in the application of statutorily sourced nonjurisdictional gatekeeping rules, at least when doing so furthers the law’s interest in protecting the rights of the litigants.

²¹⁶ *See supra* Section III.D.1.b.

²¹⁷ Professor Fred Smith, Jr. has shown how dialogue around the third-party rule has played out in the context of the Fair Housing Act. *See Smith, supra* note 8, at 879–80.

the power to define this rule between the two branches of government directly serve the tyranny-preventing function of the separation of powers; the Court can additionally both invoke and alter the rule according to its equitable discretion in order to carry out its assigned role of protecting the autonomy interests of individual litigants.

CONCLUSION

To date, the *Lexmark* Court's attempt to carry forward the project of "bringing discipline" to jurisdictional jurisprudence has failed to bring clarity to the doctrine of prudential standing.²¹⁸ This Note has argued that part of the reason for this is that the prudential standing doctrines are just several of a long list of gatekeeping rules. Seeing the more general category of gatekeeping rules, and the various ways in which these rules can intersect with important separation of powers values, allows us to take a more targeted and nuanced approach to reforming this area of law. Finally, this Note has argued that judicially sourced nonjurisdictional gatekeeping rules are a firmly established, and theoretically defensible part of the law, and that the Court should be open to treating the third-party component of prudential standing as one of these rules.

²¹⁸ See *supra* Part II.