

**PRUDENTIAL STANDING DOCTRINE ABOLISHED OR WAITING
FOR A COMEBACK?: *LEXMARK INTERNATIONAL, INC. V. STATIC
CONTROL COMPONENTS, INC.***

Bradford C. Mank^{*}

ABSTRACT

In the Supreme Court's 2014 decision in Lexmark International, Inc. v. Static Control Components, Inc., Justice Antonin Scalia writing for a unanimous Court partially achieved his goal of abolishing the prudential standing doctrine. First, the Court concluded that the zone of interests test concerns whether Congress has authorized a particular plaintiff to sue and is not a prudential standing question despite several Court decisions classifying it as such. However, there is a continuing controversy in the D.C. Circuit about applying the test to suits by competitors, especially in environmental cases. The better approach is to allow competitor standing in at least some environmental cases because even self-interested suits may advance the environmental purposes of the applicable statutes. Second, the Court held that its limitations on "generalized grievances" suits is based on constitutional Article III standing requirements and not the prudential standing principles relied in some of the Court's previous cases. Yet it is not clear that treating limitations on "generalized grievances" as Article III standing requirements will preclude taxpayer suits, voting rights cases or climate change litigation, especially if the Court's composition changes. Finally, the Court did not resolve the issue of whether limitations on third-party standing are based on prudential standing or other grounds. If the Court precludes third-party suits, however, it should recognize that some challengers have a sufficient personal Article III injury in protecting the various constitutional rights at issue in those cases, although the differing circumstances in various third-party standing cases likely preclude a single easy rule. Justice Scalia in theory eliminated two of the three major prongs of prudential standing endorsed by the Court in a 2004 decision. However, a more liberal future Supreme Court might be able to revive prudential standing in practice, if not name, without overruling Lexmark.

^{*} James Helmer, Jr. Professor of Law, University of Cincinnati College of Law, P.O. Box 210040, University of Cincinnati, Cincinnati, Ohio 45221-0040, Telephone 513-556-0094, Fax 513-556-1236, e-mail: *brad.mank@uc.edu*. I thank Michael Solimine and my other faculty colleagues attending a June 2014 presentation of an early draft of this Article. All errors or omissions are my responsibility.

¹ This Article is one of a series of explorations of modern standing doctrines. The other pieces are (1) Bradford C. Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008) [hereinafter Mank, *States Standing*]; (2) Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1 (2009); (3) Bradford C. Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009) [hereinafter Mank, *Standing and Statistical Persons*]; (4) Bradford C. Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, But a "Realistic Threat" of Harm is a Better Standing Test*, 40 ENVTL. L. 89 (2010); (5) Bradford C. Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute's Misuse of Lyons's "Realistic Threat" of Harm Standing Test*, 42 ARIZ. ST. L.J. 837 (2010); (6) Bradford C. Mank, *Summers v. Earth Island Institute: Its Implications for Future Standing Decisions*, 40

TABLE OF CONTENTS

INTRODUCTION.....	215
I. INTRODUCTION TO CONSTITUTIONAL AND PRUDENTIAL STANDING.....	218
A. <i>Constitutional Article III Standing</i>	218
B. <i>The Controversial Prudential Standing Doctrine Before Lexmark</i>	220
1. <i>The Court’s Pre-Lexmark Prudential Standing Doctrine</i>	220
2. <i>Criticisms of Prudential Standing Doctrine</i>	225
II. <i>LEXMARK</i>	227
A. <i>Basic Facts of the Lexmark Litigation</i>	227
B. <i>Prudential Standing in Lexmark</i>	228
C. <i>The Zone of Interests in General and in Lexmark</i>	230
III. WHETHER THE USUAL RULE AGAINST GENERALIZED GRIEVANCES IS A PRUDENTIAL OR ARTICLE III BARRIER AND HOW BROAD IS THE BARRIER	231
A. <i>Taxpayer Suits Are Usually Prohibited Because They Are Generalized Grievances, But Lexmark Fails to Prohibit All Taxpayer Suits</i>	231
B. <i>The Prohibition Against Generalized Grievances Not Involving Taxpayer Suits</i>	234

ENVTL. L. REP. 10958 (Oct. 2010); (7) Bradford C. Mank, *Standing in Monsanto Co. v. Geertson Seed Farms: Using Economic Injury as a Basis for Standing When Environmental Harm is Difficult to Prove*, 115 PENN. ST. L. REV. 307 (2010); (8) Bradford C. Mank, *Informational Standing After Summers*, 39 B.C. ENVTL. AFF. L. REV. 1 (2012); (9) Bradford C. Mank, *Reading the Standing Tea Leaves in American Electric Power v. Connecticut*, 46 U. RICH. L. REV. 543 (2012) [hereinafter Mank, *Tea Leaves*]; (10) Bradford C. Mank, *Judge Posner’s “Practical” Theory of Standing: Closer to Justice Breyer’s Approach to Standing than Justice Scalia’s*, 50 HOUS. L. REV. 71 (2012) [Mank, *Judge Posner’s “Practical” Theory of Standing*]; (11) Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869 (2012) [hereinafter Mank, *Standing for Private Parties in Global Warming Cases*]; (12) Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413 (2013); (13) Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211 (2014); (14) Bradford C. Mank, *No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit’s Decision in Washington Environmental Council v. Bellon*, 63 AM. U. L. REV. 1525 (2014) [hereinafter Mank, *No Article III Standing for Private Plaintiffs*]; (15) *Does United States v. Windsor (the DOMA case) Open the Door to Congressional Standing Rights?*, 76 U. PITT. L. REV. 1 (2014).

C. <i>Climate Change Suits By States May Not Be Generalized Grievances</i>	238
IV. ZONE OF INTERESTS.....	242
A. <i>Pre-Lexmark Cases Treat the Zone of Interests as Prudential</i>	242
B. <i>Lexmark Defines the Zone of Interests as Determining Which Plaintiffs Congress Intended To Have the Right to Sue</i>	245
C. <i>The Battle in the D.C. Circuit Regarding Competitor Standing</i>	247
1. <i>Hazardous Waste Treatment Council v. EPA</i>	248
2. <i>Clean Air Act Cases</i>	249
3. <i>White Stallion Energy Center</i>	251
V. THIRD-PARTY STANDING AND RELATED ISSUES: PRUDENTIAL STANDING OR SOMETHING ELSE?.....	257
CONCLUSION.....	261

INTRODUCTION

Until 2014, the Supreme Court distinguished between mandatory Article III standing requirements² and discretionary court-imposed prudential standing considerations.³ However, in a 1983 law review article, Justice Antonin Scalia, then a judge on the Federal Court of Appeals for the D.C. Circuit, argued that the prudential standing doctrine was problematic because there was no legal basis for giving judges discretionary authority to reject otherwise lawful cases and that federal courts should abolish the doctrine to rely solely on constitutional standing principles.⁴ In the Supreme Court's 2014 decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, Justice Scalia writing for a unanimous⁵ Court partially achieved his goal of abolishing the prudential standing doctrine.⁶ However, a more liberal future Supreme Court might be able to revive prudential standing in practice, if not name, without overruling *Lexmark*.⁷

² See *infra* Part I.A.

³ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004), *partially abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 & n.3 (2014); see *infra* Part I.A.

⁴ See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983); see also Mank, *Judge Posner's "Practical" Theory of*

First, the *Lexmark* decision concluded that the zone of interests test concerns whether Congress has authorized a particular plaintiff to sue and is not a prudential standing question despite several Court decisions classifying it as such.⁸ However, there is a continuing controversy in the D.C. Circuit about applying the test to suits by competitors, especially in environmental cases.⁹ The better approach is to allow competitor standing in at least some environmental cases because even self-interested suits may advance the environmental purposes of the relevant statutes.¹⁰ Because it involves a case by case determination of statutory intent, the zone of interests test formulated by Justice Scalia in *Lexmark* is likely to survive even after his departure from the Court, but a future Court might interpret the test more liberally than Justice Scalia without overruling *Lexmark*.¹¹

Standing, *supra* note 1 at 106–07 (discussing Justice Scalia’s 1983 article’s criticism of prudential standing doctrine).

5 During the 2013–2014 Supreme Court term, from October 2013 through June 2014, “the Supreme Court justices voted unanimously in 65 percent of orally argued cases—the highest share since at least 1953” “and those cases revealed signs of compromise and restraint, which many Supreme Court specialists said was a testament to the leadership of Chief Justice John G. Roberts Jr.” Adam Liptak, *Compromise at the Supreme Court Veils Its Rifts*, N.Y. Times, July 1, 2014, <http://www.nytimes.com/2014/07/02/us/supreme-court-term-marked-by-unanimous-decisions.html?hpw&action=click&pgtype=Homepage&version=HpHedThumbWell&module=well-region®ion=bottom-well&WT.nav=bottom-well&r=0>. In *Lexmark International, Inc. v. Static Control Components, Inc.*, the Court was able to achieve unanimity in part by avoiding the controversial issue of third-party standing. 134 S. Ct. at 1387 & n.3; *see infra* Part V.

6 *Lexmark*, 134 S. Ct. at 1386–88, 1387 n.3.

7 *See infra* Parts III–V and Conclusion.

8 *Lexmark*, 134 S. Ct. at 1386–88 & nn.3–4.

9 *See infra* Part IV.C.

10 *See infra* Part IV.C.

11 *See infra* Part IV.B.

Second, the Court held that its limitations on “generalized grievances” suits are based on constitutional Article III standing requirements and not the prudential standing principles relied on some of the Court’s previous cases.¹² The prohibition against generalized grievances most notably bars suits based solely on a plaintiff’s status as a federal taxpayer,¹³ but also addresses other types of suits in which the alleged harm affects large numbers of or all American citizens or voters.¹⁴ Yet the *Lexmark* decision did not explicitly prohibit all taxpayer suits despite Justice Scalia’s likely desire for such a result, and, therefore, a future Supreme Court could revive taxpayer suits in some circumstances.¹⁵ Furthermore, the Court could continue to allow certain suits by voters or climate change suits that a minority of the Court, including Justice Scalia, view as generalized grievances that are prohibited by Article III.¹⁶

Finally, the Court did not resolve the issue of whether limitations on third-party standing are based on prudential standing or other grounds.¹⁷ The doctrine of third-party standing is complicated because it involves several different types of suits that cannot be easily treated as similar, and, therefore, there may not be a simple standing answer for all third-party suits.¹⁸ If the Court precludes third-party suits, however, it should recognize that some challengers have a sufficient personal Article III injury in protecting the various constitutional rights at issue to sue on their own standing in those cases.¹⁹

Justice Scalia did not win a complete victory against prudential standing in *Lexmark*. However, in theory he eliminated two of the three major prongs of prudential standing endorsed by the Court in a 2004 decision.²⁰ Nevertheless, a more liberal future Supreme Court could revive particular prudential standing practices, such as allowing some taxpayer suits, without overruling *Lexmark*, or allow more liberal competitor standing than is the current practice in the D.C. Circuit.²¹

Part I explains the basic principles of constitutional Article III standing and the more controversial doctrine of prudential standing.

¹² *Lexmark*, 134 S. Ct. at 1387 & n.3.

¹³ *See infra* Part III.A.

¹⁴ *See infra* Parts III.B–C.

¹⁵ *See infra* Part III.A.

¹⁶ *See infra* Parts III.B–C.

¹⁷ *See infra* Part V.

¹⁸ *Lexmark*, 134 S. Ct. at 1387 & n.3.

¹⁹ *Id.*

²⁰ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 12, *partially abrogated by Lexmark*, 134 S. Ct. at 1386–88, 1387 & n.3; *see infra* Part I.A.

²¹ *See infra* Parts III, IV and Conclusion.

Part II discusses how the *Lexmark* decision changed the prudential standing doctrine. Part III examines the complicated history of whether the Supreme Court's reluctance to hear, and partial prohibition against "generalized grievances" suits, is based on prudential standing principles or constitutional Article III standing requirements, how *Lexmark* squarely concluded that Article III standing doctrine governs the issue, and why *Lexmark* may not prohibit all suits that are arguably generalized grievances. Part IV examines the history of the zone of interests test, how *Lexmark* determined that the zone of interests test is not a prudential standing issue, and why *Lexmark* did not resolve the contentious issue in the D.C. Circuit regarding whether and when economic competitors met the zone of interests test. Part V explains the Court's usual, but not complete, prohibition against third-party suits, and explores how it may be possible to recognize suits by some, but not all, third parties as having a sufficient personal interest in the suit. The conclusion tries to assess how significantly *Lexmark* changed prudential standing doctrine, and which important issues remain unresolved by that decision.

I. INTRODUCTION TO CONSTITUTIONAL AND PRUDENTIAL STANDING²²

A. *Constitutional Article III Standing*

Although the Constitution does not explicitly require that each plaintiff establish "standing" to file suit in federal court, the Supreme Court has inferred from Article III's restriction of judicial decisions to "Cases" and "Controversies" that federal courts must impose standing requirements to confirm that a plaintiff has a genuine interest in the outcome of a case.²³ For a federal court to have jurisdiction over a

²² The discussion of standing in Part I relies upon my earlier standing articles cited in note 1.

²³ The constitutional standing requirements are derived from Article III, section 2, which provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2; *see* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006) (explaining why the Supreme Court infers that Article III's case and controversy requirement necessitates standing limitations). *See generally* Michael E. Solimine, *Congress, Separation of Powers and Standing*, 59 CASE W. RES. L. REV. 1023, 1036–38 (2009) (discuss-

case, at least one plaintiff must demonstrate it has standing for each form of relief sought.²⁴ Federal courts must dismiss a case for lack of jurisdiction if no plaintiff meets constitutional Article III standing requirements.²⁵

Standing requirements are grounded in constitutional principles. Standing doctrine prevents unconstitutional advisory opinions.²⁶ Additionally, standing requirements are consistent with separation of powers principles delimiting the division of powers between the judiciary and political branches of government so that the “Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society.”²⁷ Individual members of the Supreme Court have disagreed, however, regarding the extent to which separation of powers principles limit Congress’s authority to authorize standing to sue in federal courts for private citizen suits challenging executive branch decisions.²⁸

The Supreme Court has formulated a three-part test for constitutional Article III standing that requires a plaintiff to establish that: (1) he has “suffered an injury-in-fact,” which is (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypo-

ing a scholarly debate on whether the Framers intended the Constitution to require standing to sue).

24 See *DaimlerChrysler*, 547 U.S. at 351–52 (confirming that “a plaintiff must demonstrate standing separately for each form of relief sought” (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000))).

25 See *id.* at 340–41 (emphasizing the importance of the case or controversy requirement); *Friends of the Earth*, 528 U.S. at 180 (adding that courts have an affirmative duty at the outset of the litigation to ensure that litigants satisfy all Article III standing requirements).

26 See *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (“Article III of the Constitution restricts the power of federal courts to ‘Cases’ and ‘Controversies.’ Accordingly, ‘[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.’ Federal courts may not ‘decide questions that cannot affect the rights of litigants in the case before them or give opinion[s] advising what the law would be upon a hypothetical state of facts.’” (citations omitted)).

27 *DaimlerChrysler*, 547 U.S. at 341 (internal quotation marks and citations omitted).

28 Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–78 (1992) (concluding that Articles II and III of the Constitution limit Congress’s authority to authorize citizen suits by any person lacking a concrete injury and citing several recent Supreme Court decisions for support), with *id.* at 580 (Kennedy, J., concurring) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before....”); *id.* at 602 (Blackmun, J., dissenting) (arguing that the “principal effect” of the majority’s approach to standing was “to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates”). See generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 496 (2008) (suggesting the “disagreement” is “[u]nsurprising[]” and arguing that courts should not use standing doctrine as “a backdoor way to limit Congress’s legislative power”).

thetical”; (2) “there [is] a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able]²⁹ to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court”; and (3) “it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”³⁰ The plaintiff bears the burden of proof for all three prongs of constitutional Article III standing.³¹

B. *The Controversial Prudential Standing Doctrine Before Lexmark*

1. *The Court’s Pre-Lexmark Prudential Standing Doctrine*

Before the *Lexmark* decision in 2014, federal courts had imposed prudential standing considerations to limit unreasonable demands on limited judicial resources or for other judicial policy reasons to prohibit suits in federal courts even if a plaintiff met constitutional Article III standing requirements.³² Before its *Lexmark* decision, the Supreme Court had identified three major parts to the prudential standing doctrine:

Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses “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.”³³

²⁹ The *Lexmark* decision explained the distinction between the standing requirement of fairly traceable causation and the ultimate question of proving proximate causation on the merits as follows: “Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff’s injury be fairly traceable to the defendant’s conduct.” *Lexmark*, 134 S. Ct. at 1391 n.6.

³⁰ *Lujan*, 504 U.S. at 560–61 (second, third, and fourth alterations in original) (internal quotation marks and citations omitted).

³¹ *DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must “carry the burden of establishing their standing under Article III”); *Lujan*, 504 U.S. at 561 (same); see also LARRY W. YACKLE, *FEDERAL COURTS* 336 (3d ed. 2009) (explaining that a plaintiff at the summary judgment stage must ultimately prove the existence of injury, causation, and redressability).

³² See, e.g., *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997) (describing the zone of interests standard as a “prudential limitation” rather than a mandatory constitutional requirement); *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (stating that prudential requirements are based “in policy, rather than purely constitutional, considerations”); YACKLE, *supra* note 31, at 318 (stating that prudential limitations are policy-based).

³³ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 12 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984), partially abrogated by *Lexmark*, 134 S. Ct. 1377; see also S. Todd Brown, *The Story of*

Even before the Court's *Lexmark* decision, however, the Court in some decisions had based the prohibition against generalized grievances on Article III rather than prudential concerns.³⁴ The distinction between constitutional Article III and prudential standing matters because Congress may enact legislation to override court-imposed prudential limitations, but may not do so for constitutional standing requirements.³⁵

Prior to its *Lexmark* decision, the Court had been inconsistent in at least two decisions regarding whether the prudential standing doctrine was as important as constitutional Article III standing requirements in protecting core separation of powers principles and, therefore, whether prudential standing was a mandatory jurisdictional issue that required dismissal of a case from the federal courts if a plaintiff's suit was contrary to prudential standing principles, although the language in these two decisions is arguably dicta.³⁶ First, the Court in its 1975 decision in *Warth v. Seldin* implied that prudential standing doctrine is crucial in preventing federal courts from addressing political questions more appropriately addressed by the political branches, but the decision did not explicitly address whether prudential standing is a jurisdictional issue:

Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though

Prudential Standing, 42 HASTINGS CONST. L.Q. 95, 95, 101, 109–15, 118–24 (2014) (discussing three main types of prudential standing used before 2014: (1) zone of interests; (2) generalized grievances; and (3) third-party standing; but observing courts have recognized some other miscellaneous prudential standing issues).

³⁴ See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599 (2007) (“We have consistently held that [the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution] is too generalized and attenuated to support Article III standing.”); *Lujan*, 504 U.S. at 573–74 (“We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”); *Brown*, *supra* note 33, at 109–10 (observing that Supreme Court originally treated generalized grievances as prudential issue, but later as a constitutional issue).

³⁵ *Bennett*, 520 U.S. at 162–66 (explaining that “unlike their constitutional counterparts, [prudential limits on standing] can be modified or abrogated by Congress,” that prudential limitations must be “expressly negated” and concluding that a citizen suit provision abrogated the zone of interests limitation); *Mank*, *Standing and Statistical Persons*, *supra* note 1, at 676 & n.53 (same). The Court’s requirement that Congress use express statutory language to override the Court’s prudential standing rules probably does not necessitate the extraordinary specificity demanded by a clear statement rule of statutory construction. YACKLE, *supra* note 31, at 386 n.493.

³⁶ See *Mank*, *Is Prudential Standing Jurisdictional?*, *supra* note 1, at 426–29.

other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.³⁷

In *Thompson v. County of Franklin*, the Second Circuit interpreted the above quoted language in *Warth* to determine that prudential standing issues affect a federal court's subject matter jurisdiction and, accordingly, that it had a duty to sua sponte examine prudential standing issues despite the failure of the parties to raise the question.³⁸

Contrarily, in its 1984 decision in *Allen v. Wright*, the Supreme Court concluded that Article III standing is "perhaps the most important" of the case-or-controversy doctrines including "mootness, ripeness, political question, and the like."³⁹ The *Allen* decision implied that Article III standing, as a "core component" of standing "derived directly from the Constitution," is a more fundamental constitutional core requirement than prudential standing doctrines, stating:

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as 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. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.⁴⁰

In *Alliance for Environmental Renewal, Inc. v. Pyramid Crossgates Co.*, the Second Circuit interpreted the *Allen* decision as treating Article III standing as "[m]ore fundamental than judicially imposed, prudential limits on the exercise of federal jurisdiction."⁴¹

The Supreme Court's pre-*Lexmark* prudential standing doctrine was arguably less clear and more open to interpretation than the Ar-

³⁷ *Warth v. Seldin*, 422 U.S. 490, 500 (1975), *partially abrogated by Lexmark*, 134 S. Ct. 1377.

³⁸ 15 F.3d 245, 248–49 (2d Cir. 1994).

³⁹ 468 U.S. 737, 750 (1984); *see also Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 85 (2d Cir. 2006) (discussing *Allen v. Wright's* emphasis that Article III standing is the most important of the case-or-controversy doctrines).

⁴⁰ *Allen*, 468 U.S. at 751 (citation omitted); *accord Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("[The Article III requirement] states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called 'prudential' considerations."); *Alliance for Envtl. Renewal, Inc.*, 436 F.3d at 85 (discussing *Allen v. Wright's* suggestion that Article III standing is more important than prudential standing).

⁴¹ *Id.*

title III constitutional standing doctrine discussed earlier in Part I.A.⁴² In *Elk Grove Unified School District v. Newdow*, the Supreme Court in 2004 conceded that “we have not exhaustively defined the prudential dimensions of the standing doctrine.”⁴³ In *Newdow*, the Court dismissed an Establishment Clause suit filed by the father of an elementary school student challenging the constitutionality of a school district’s policy requiring teacher-led recitation of the Pledge of Allegiance because of prudential standing concerns about the appropriateness of federal courts “entertain[ing] a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff’s claimed standing.”⁴⁴ The child’s mother, who was the custodial parent, intervened in the suit to dismiss the complaint and disputed the father’s right to influence his daughter’s religious upbringing under California law.⁴⁵ Because of these family law issues, a majority determined that the Court should invoke prudential standing principles to avoid a case involving difficult family law issues governed by California domestic relations law.⁴⁶ In his concurring opinion, Chief Justice William Rehnquist, who was joined by Justices Sandra Day O’Connor and Clarence Thomas, complained that the majority had created a “new prudential standing principle” based on “ad hoc improvisations” to dismiss a troublesome case and should instead formulate “general principles” for prudential standing.⁴⁷

Both *Newdow*⁴⁸ and the more recent *Windsor* decision demonstrate that there were sometimes considerable disagreements on the Court before the *Lexmark* decision about how to apply prudential standing principles. In its 2013 decision *United States v. Windsor*,⁴⁹ decided just a year before *Lexmark* and with the same nine Justices serving on the Court, the majority opinion by Justice Anthony Kennedy suggested the usual requirement that the parties be truly adverse in their posi-

⁴² See Gregory Bradford, Note, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065, 1079 (2011) (describing prudential standing doctrine as “a malleable framework”).

⁴³ 542 U.S. 1, 12 (2004).

⁴⁴ *Id.* at 17.

⁴⁵ *Id.* at 13–17; Mank, *Is Prudential Standing Jurisdictional?*, *supra* note 1, at 423.

⁴⁶ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 12–17; see also Mank, *Is Prudential Standing Jurisdictional?*, *supra* note 1, at 423.

⁴⁷ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 18–25 (Rehnquist, J., concurring); Mank, *Is Prudential Standing Jurisdictional?*, *supra* note 1, at 423.

⁴⁸ See Bradford, *supra* note 42, at 1079–80.

⁴⁹ 133 S. Ct. 2675 (2013).

tions is a flexible prudential standing principle that can be waived in certain circumstances if non-parties filing amicus briefs provide sufficient critical arguments.⁵⁰ The Court concluded that the House of Representatives leadership's amicus brief had sufficiently supported the constitutionality of a statute denying government benefits to same sex married couples to create an adverse case fit for judicial resolution despite the executive branch's unwillingness to defend the constitutionality of the statute.⁵¹ However, the dissenting opinion by Justice Scalia argued that the requirement of adverseness was instead mandated by constitutional Article III principles and that majority's treatment of the issue as prudential in nature was motivated by issues of convenience so that the Court could decide the case on the merits and not dismiss a case in which the government and the challenger agreed that the statute was unconstitutional.⁵² *Windsor* involved a challenge to Section 3 of the Defense of Marriage Act⁵³ ("DOMA"), which excluded same-sex married partners from numerous federal laws otherwise applicable to lawfully married spouses.⁵⁴ In particular, the Court held that the United States met Article III standing because, despite its agreement with the lower court's ruling, the United States had not refunded the money to which Edie Windsor was entitled under that ruling and thus suffered an economic injury.⁵⁵ Additionally, the Court found it appropriate to permit arguments provided in an amicus brief by the Bipartisan Legal Advisory Group ("BLAG"), which represented a majority of the House of Representatives leaders, supporting DOMA to satisfy the prudential concerns that the United States and Windsor were "friendly" parties and, therefore, that BLAG's participation supplied the necessary "adverseness" required to have a justiciable controversy suitable for resolution by federal courts.⁵⁶

50 *Id.* at 2687; *see also* Mank, *Is Prudential Standing Jurisdictional?*, *supra* note 1, at 422–23, 428.

51 *Windsor*, 133 S. Ct. at 2687.

52 *Id.* at 2701 (Scalia, J., dissenting) ("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.").

53 1 U.S.C. § 7 (2012), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

54 *Id.*

55 *Windsor*, 133 S. Ct. at 2686.

56 *Id.* at 2687–88 (citing other cases where the Court has entertained adversarial arguments from nonparties).

2. *Criticisms of Prudential Standing Doctrine*

In a 1983 law review article authored when he was serving as a judge on the D.C. Circuit, now-Justice Scalia doubted the validity of “the so-called ‘prudential limitations of standing’ allegedly imposed by the Court itself, subject to elimination by the Court or by Congress.”⁵⁷ He questioned whether any prudential standing principles not based on constitutional standing are valid, asserting, “I find this bifurcation [between prudential and constitutional standing] unsatisfying—not least because it leaves unexplained the Court’s source of authority for simply granting or denying standing as its prudence might dictate.”⁵⁸ Justice Scalia has followed a judicial philosophy in which he believes that federal courts are bound by the original intent of the Framers of the Constitution and may not exercise judicial authority outside the scope of Article III’s provisions.⁵⁹ In his 1983 article, he contended that the “judicial doctrine of standing is a crucial and inseparable element” of separation of powers principles required by the structure and original intent of the Constitution, which provides boundaries for the respective exercise of legislative, executive and judicial powers.⁶⁰ Because authority for flexible prudential judicial decisionmaking is not contained in Article III, then-Judge Scalia suggested that federal courts should eliminate prudential standing doctrine and hear all cases for which there is constitutional standing: “as I would prefer to view the matter, the Court must always hear the

⁵⁷ See Scalia, *supra* note 4, at 885; see also Brown, *supra* note 33, at 128–33 (arguing courts should abolish prudential standing doctrine because federal courts have duty to hear all cases for which they have constitutional standing jurisdiction); Mank, *Judge Posner’s “Practical” Theory of Standing*, *supra* note 1, at 106–07 (discussing Justice Scalia’s 1983 article’s criticism of prudential standing doctrine).

⁵⁸ Scalia, *supra* note 4, at 885.

⁵⁹ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 44.47 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts in a Civil-Law System*] (supporting an originalist approach to constitutional interpretation); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–62 (1989) [hereinafter Scalia, *Originalism*] (defending originalist approach to constitutional interpretation but acknowledging some difficulties); see also Mank, *Judge Posner’s “Practical” Theory of Standing*, *supra* note 1, at 105–06 (discussing Justice Scalia’s approach to constitutional originalism, including that he is a “fainthearted originalist” who acknowledges that originalist principles may have to yield in some cases to pragmatic concerns about adhering to longstanding judicial precedent).

⁶⁰ Scalia, *supra* note 4, at 881; see also Mank, *Judge Posner’s “Practical” Theory of Standing*, *supra* note 1, at 104.

case of a litigant who asserts the violation of a legal right.”⁶¹ Before the *Lexmark* decision, Justice Scalia did not directly call for the abolition of prudential standing,⁶² but in cases where the line between constitutional and prudential standing is questionable, he prefers to categorize issues as constitutional standing rather than prudential.⁶³ In *Hein v. Freedom from Religion Foundation, Inc.*, Justice Scalia in his concurring opinion, which was joined by Justice Thomas, contended that the Court should overrule its 1968 decision in *Flast v. Cohen*,⁶⁴ which suggested that the prohibition against taxpayer standing is prudential rather than constitutional,⁶⁵ and clearly declare that the bar against taxpayer standing is constitutional and not just prudential.⁶⁶

Besides Justice Scalia, other commentators have made various criticisms of the Court’s prudential standing doctrines. Some commentators have argued that the line separating constitutional Article III standing doctrine from prudential standing doctrine is often murky.⁶⁷ For example, as is discussed in Part III, the Court for many years did not clearly explain whether the general prohibition against taxpayer suits was a principle based on prudential standing doctrine or constitutional Article III principles.⁶⁸ Furthermore, Dean Erwin Chemerinsky has contended that the Court sometimes manipulates arbitrary distinctions between constitutional Article III standing and pruden-

61 Scalia, *supra* note 4, at 885; *see also* Mank, *Judge Posner’s “Practical” Theory of Standing*, *supra* note 1, at 106–07 (discussing Justice Scalia’s 1983 article’s criticism of prudential standing doctrine).

62 Mank, *Judge Posner’s “Practical” Theory of Standing*, *supra* note 1, at 106–07 (discussing Justice Scalia’s 1983 article’s criticism of prudential standing doctrine).

63 Mank, *Is Prudential Standing Jurisdictional?*, *supra* note 1, at 425.

64 392 U.S. 83 (1968).

65 *Id.* at 92–94; Solimine, *supra* note 23, at 1042 (suggesting that *Flast v. Cohen* interpreted the *Frothingham* decision generally prohibiting taxpayer suits as a prudential rather than constitutional standing case).

66 *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 618–37, 634 n.5 (2007); *accord* *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449–50 (2011) (Scalia, J., concurring) (reiterating his view in *Hein* that the Court should overrule *Flast* and reject taxpayer standing on constitutional grounds); *see also* Mank, *Is Prudential Standing Jurisdictional?*, *supra* note 1, at 425; Solimine, *supra* note 23, at 1045.

67 Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692 (1990) (arguing that the Court’s distinction between prudential and constitutional standing is often arbitrary); *see* Brown, *supra* note 33, at 96–97, 108–15, 124–27 (2014) (same); 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, 1173 (2008) (arguing that the Court sometimes shifts line between prudential and constitutional standing, especially in generalized grievances cases); *see also* Mank, *Is Prudential Standing Jurisdictional?*, *supra* note 1, at 423–33.

68 *See infra* Part III.

tial standing for its convenience to reach desired policy results without any genuine logical basis.⁶⁹ A recent possible example of the manipulation of standing doctrine to achieve policy results is the *Windsor* majority's treatment of adverseness as a prudential rather than a constitutional Article III requirement because of its desire to have the Supreme Court quickly resolve the question of DOMA's constitutionality.⁷⁰ In light of the *Lexmark* decision, Professor Richard H. Fallon, Jr. has argued that rather than explicitly invoke controversial prudential considerations to authorize or avoid considering certain cases, some Justices might subtly alter the three-part constitutional standing test to achieve the same results.⁷¹

II. LEXMARK

A. Basic Facts of the *Lexmark* Litigation

Lexmark sells the only type of toner⁷² cartridges that work with the company's laser printers; however, "remanufacturers" acquire and refurbish used Lexmark cartridges to sell in competition with Lexmark's own new and refurbished ones.⁷³ To discourage its customers from dealing with remanufacturers, Lexmark's "Prebate" program gives customers a discount on new cartridges if they agree to return empty cartridges to the company.⁷⁴ To enforce the Prebate terms, Lexmark inserts into each Prebate cartridge a microchip that disables the empty cartridge unless Lexmark replaces the chip.⁷⁵

⁶⁹ Chemerinsky, *supra* note 67, at 692 ("The only apparent answer sounds terribly cynical: a requirement is constitutional if the Court says it is, and it is prudential if the Court says it is that. Nothing in the content of the doctrines explains their constitutional or prudential status."); *but see* Warth v. Seldin, 422 U.S. 490, 499–500 (1975) (explaining reasoning for prudential rules against third-party standing and generalized grievance), *partially abrogated by Lexmark*, 134 S. Ct. 1377.

⁷⁰ *United States v. Windsor*, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting).

⁷¹ Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1106–07 (2015) ("Notwithstanding the Court's evident unease in *Lexmark* with formal recognition of a prudential element in standing doctrine, grounds for suspicion remain that ad hoc pressures to authorize or withhold adjudication on the merits may encourage some of the Justices to draw finer distinctions than they would draw otherwise—including finer distinctions than they might think appropriate in applying other doctrines—in determining whether the injury-in-fact, causation, and redressability requirements are met.").

⁷² Toner is the powdery ink that laser printers use to create images on paper. *Lexmark*, 134 S. Ct. at 1383.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Static Control, a maker and seller of components for the remanufacture of Lexmark cartridges, developed a microchip that mimicked the microchip in Lexmark's Prebate cartridges and therefore allowed remanufacturers "to refurbish and resell used Prebate cartridges."⁷⁶ Lexmark sued Static Control for copyright infringement, but Static Control counterclaimed, alleging that Lexmark engaged in false or misleading advertising in violation of § 43(a) of the Lanham Act,⁷⁷ and that its misrepresentations had caused Static Control lost sales and damage to its business reputation.⁷⁸ The United States District Court for the Eastern District of Kentucky granted Lexmark's motion to dismiss Static Control's Lanham Act counterclaim, holding that Static Control lacked prudential standing to bring the Lanham Act claim.⁷⁹ The Sixth Circuit reversed the dismissal of Static Control's Lanham Act claim, but acknowledged that various federal court of appeals had adopted three competing approaches to determining whether a plaintiff has standing to sue under the Lanham Act.⁸⁰ The Supreme Court granted certiorari to decide "the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act."⁸¹

B. Prudential Standing in Lexmark

While both parties had focused on the issue of prudential standing as the central issue in the case, Justice Scalia's majority opinion questioned whether the very "label" of prudential standing was "misleading."⁸² The Court initially concluded that "Static Control's allegations of lost sales and damage to its business reputation give it standing under Article III to press its false-advertising claim."⁸³ Justice Scalia then observed that Lexmark's contention that the Court should nevertheless dismiss Static Control's claim on prudential standing grounds was "in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."⁸⁴ The Court acknowledged that in prior cases it had recognized prudential stand-

76 *Id.* at 1384.

77 15 U.S.C. § 1125(a).

78 *Lexmark*, 134 S. Ct. at 1384–85.

79 *Id.* at 1385.

80 *Id.*

81 *Id.* (quoting *Petition for Writ of Certiorari*, 133 S. Ct. 2766 (2013) (No. 12–873)).

82 *Id.* at 1386.

83 *Id.*

84 *Lexmark*, 134 S. Ct. at 1386 (quoting another source) (internal quotation marks omitted).

ing doctrine as including the prohibition against third-party suits, the rule against generalized grievance suits and the zone of interests test.⁸⁵

Static Control argued that the Court should use the zone of interests test in deciding any prudential standing issues in the case.⁸⁶ While conceding that it had treated the test as a prudential standing question in prior cases, the Court determined that the zone of interests test is not truly a prudential issue.⁸⁷ Instead, Justice Scalia observed, “Whether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”⁸⁸ The Court favorably quoted the view of Judge Laurence Silberman from the D.C. Circuit that “prudential standing is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons ha[s] a right to sue under this substantive statute.”⁸⁹

In a footnote, the Court observed that “[t]he 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.”⁹⁰ As an example, as will be further examined in Part III, the Court discussed how it had gradually moved from treating its reluctance to hear generalized grievances from being a prudential reservation to an Article III prohibition.⁹¹ The Court acknowledged that “[t]he limitations on third-party standing are harder to classify” as being prudential in nature or based on other grounds; Part V will explore whether those limitations are based on prudential principles.⁹²

85 *Id.* (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

86 *Id.* at 1387.

87 *Id.*

88 *Id.* (internal quotation marks and citations omitted).

89 *Id.* (internal quotation marks and citations omitted); *see infra* Part IV (discussing recent debate in the D.C. Circuit about the zone of interests test).

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

91 *Id.*; *see infra* Part III (discussing the Supreme Court’s evolution in explaining its reluctance to hear generalized grievances from being a prudential principle to an Article III mandate).

92 *Lexmark*, 134 S. Ct. at 1387 n.3; *see infra* Part V (discussing the Supreme Court’s divided jurisprudence on whether limitations on third-party standing are prudential in nature or based on other grounds).

C. *The Zone of Interests in General and in Lexmark*

After explaining that the zone of interests test did not belong with the prudential standing doctrine, the Court next addressed how the zone of interests test applied in *Lexmark* and how the test generally determines whether a plaintiff is authorized to sue in the federal courts.⁹³ Justice Scalia reasoned that the central issue in *Lexmark* was whether “Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a). In other words, we ask whether Static Control has a cause of action under the statute.”⁹⁴ In a footnote, the Court explained why treating the zone of interests test as a question of “statutory standing” and “as effectively jurisdictional” was “misleading,” even though some prior cases had used that label.⁹⁵ Justice Scalia reasoned: “That label is an improvement over the language of ‘prudential standing,’ since it correctly places the focus on the statute. But it, too, is misleading, since the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the court’s statutory or constitutional *power* to adjudicate the case.”⁹⁶

Next the Court addressed how the zone of interests test affected whether Static Control could sue under § 1125(a).⁹⁷ Only those plaintiffs whose interests fall within the zone of interests protected by the statute invoked, in this case § 1125(a) of the Lanham Act, may use that statute to sue in the federal courts.⁹⁸ While the Court has adopted a broad definition of the zone of interests for suits pursuant to the federal Administrative Procedure Act (“APA”),⁹⁹ the Lanham Act explicitly limits itself to false-advertising cases alleging an injury to a commercial interest in reputation or sales.¹⁰⁰ Additionally, the Court concluded that the Lanham Act is limited to those plaintiffs who can establish that their injuries are proximately caused by a defendant’s violation of the statute.¹⁰¹ The Court held that “direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue” under §

93 *Lexmark*, 134 S. Ct. at 1386–89.

94 *Id.* at 1387.

95 *Id.* at 1387 n.4.

96 *Id.* (internal quotation marks and citations omitted).

97 *Id.* at 1388–89.

98 *Id.*

99 *Lexmark*, 134 S. Ct. at 1388–89 (discussing Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*).

100 *Id.* at 1389–90.

101 *Id.* at 1390–91.

1125(a).¹⁰² Addressing whether Static Control's false-advertising claim was within the scope of the statute, the Court concluded that Static Control had met the zone of interests test for the Lanham Act by alleging an injury to a commercial interest in lost sales and damage to its business reputation that were allegedly proximately caused by Lexmark's misrepresentations.¹⁰³ The Court cautioned that it was only addressing whether Static Control's allegations were sufficient to sue pursuant to § 1125(a) and that it still had to provide evidence of actual injury by Lexmark at a trial.¹⁰⁴

III. WHETHER THE USUAL RULE AGAINST GENERALIZED GRIEVANCES IS A PRUDENTIAL OR ARTICLE III BARRIER AND HOW BROAD IS THE BARRIER¹⁰⁵

A. *Taxpayer Suits Are Usually Prohibited Because They Are Generalized Grievances, But Lexmark Fails to Prohibit All Taxpayer Suits*

During the 1920s, before it had explicitly formulated its Article III standing doctrine,¹⁰⁶ the Court in *Frothingham v. Mellon* held that an individual taxpayer generally cannot sue the government to challenge how tax dollars are appropriated because his generalized interest in government funds "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, [is] so remote, fluctuating and uncertain."¹⁰⁷ In its subsequent *Flast v. Cohen* decision,¹⁰⁸ which allowed a narrow exception for taxpayer suits where federal taxpayers sued to enjoin the expenditure of federal funds for the purchase of textbooks and other instructional materials for use in parochial schools on the ground that such expenditures were prohibited by Establishment Clause of the First Amendment,¹⁰⁹ the Court acknowledged that the *Frothingham* decision could be read to rely on either constitutional Article III or prudential standing doctrine to deny standing, but the *Flast* decision preferred to read *Frothingham* as using

102 *Id.*

103 *Id.* at 1393–95.

104 *Id.* at 1395.

105 My discussion of the *Akins*, *Massachusetts*, and *AEP* decisions in Part III is based in part on my prior work cited in note 1.

106 *See Stark v. Wickard*, 321 U.S. 288, 310 (1944) (stating explicitly the Article III standing requirement in a Supreme Court case for the first time).

107 262 U.S. 447, 486–89 (1923).

108 392 U.S. 83, 92–94 (1968).

109 *Id.* at 102–06.

prudential or policy reasons to deny taxpayer standing.¹¹⁰ For many years, before *Lexmark* classified the usual prohibition against general grievance suits as an Article III standing barrier,¹¹¹ the Court failed to clearly explain whether the general prohibition against taxpayer suits was based on constitutional or prudential considerations,¹¹² although recent Court decisions had emphasized constitutional barriers to taxpayer standing.¹¹³ In his *Hein* concurrence, Justice Scalia contended that the Court should overrule *Flast* and hold that the rule against taxpayer standing is based upon constitutional standing doctrine and not just prudential factors.¹¹⁴ While the *Lexmark* decision held that the barrier against all generalized grievances, including presumably taxpayer suits, is based on Article III grounds and not prudential considerations,¹¹⁵ the decision did not explicitly prohibit all taxpayer suits and thus did not clearly adopt Justice Scalia's goal in his *Hein* concurrence of overruling *Flast*.¹¹⁶

The *Lexmark* decision's failure to prohibit all taxpayer suits might make a difference in future tax expenditure suits. In *Arizona Christian School Tuition Organization v. Winn*,¹¹⁷ the Court, in a five to four decision written by Justice Kennedy, distinguished *Flast* and held that Arizona taxpayers lacked Article III standing to bring an action alleging that an Arizona statute that granted tuition tax credits to income taxpayers who contributed money to "student tuition organizations" ("STO") that used the contributions to provide scholarships to students attending private schools, including religious schools, violated

110 *Id.* at 92–94; see Solimine, *supra* note 23, at 1042 (suggesting that *Flast v. Cohen* interpreted the *Frothingham* decision as a prudential rather than constitutional standing case).

111 *Lexmark*, 134 S. Ct. at 1387 & n.3.

112 Anne Abramowitz, *A Remedy for Every Right: What Federal Courts Can Learn From California's Taxpayer Standing*, 98 CALIF. L. REV. 1595, 1605–07 (2010).

113 *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441–49 (2011) (discussing Article III barriers to taxpayer standing); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 634 n.5 (2007) (Scalia, J., concurring in the judgment) (observing that the Court "has occasionally in dicta described the prohibition on generalized grievances as merely a prudential bar," but explaining that the doctrine "squarely rest[s] on Article III considerations, as the analysis in *Lujan* . . . confirms[.]"); *DaimlerChrysler Corp.*, 547 U.S. at 344 (refusing to create an exception to the general prohibition on taxpayer standing for challenges to state tax or spending decisions, and observing that taxpayer standing has been rejected "because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people'" (citation omitted)).

114 *Hein*, 551 U.S. at 618–37, 634 n.5; Solimine, *supra* note 23, at 1045.

115 *Lexmark*, 134 S. Ct. at 1387 & n.3.

116 See *Hein*, 551 U.S. at 618–37, 634 n.5 (Scalia, J., concurring); *infra* notes 117–20 and accompanying text (discussing *Arizona Christian School Tuition Organization v. Winn* and its implications in future cases).

117 131 S. Ct. 1436 (2011).

the First Amendment's Establishment Clause.¹¹⁸ The majority distinguished the *Flast* decision on the grounds that the former case involved actual expenditures by the government that arguably promoted religious organizations, but the Arizona statute did not cause any injury to state taxpayers. Because Arizona was merely declining to impose a tax, rather than making an expenditure, any financial injury to the plaintiff taxpayers was speculative, and any injuries to taxpayers were not fairly traceable to the State, as the tax credit system was implemented by private action and with no State intervention.¹¹⁹ In a concurring opinion, Justice Scalia, who was joined by Justice Thomas, reiterated his view in his *Hein* concurrence that the Court should overrule *Flast* and reject taxpayer standing on constitutional grounds.¹²⁰ In a dissenting opinion, Justice Elena Kagan, who was joined by Justices Ruth Ginsberg, Stephen Breyer, and Sonia Sotomayor, argued that *Flast* and subsequent cases authorized state taxpayers to bring Establishment Clause challenges to the Arizona statute because otherwise legislatures could use tax expenditures to achieve the same unconstitutional support for religion that they may not achieve directly through expenditures.¹²¹

While Justice Scalia's classification of generalized grievances as an Article III limitation is inconsistent with the prudential implications of the *Flast* decision, the *Lexmark* decision did not explicitly overrule *Flast* or prohibit all taxpayer suits.¹²² A future Supreme Court could overrule its decision in *Arizona Christian School Tuition Organization* without overruling the *Lexmark* decision. Thus, the *Lexmark* decision's classification of generalized grievances as an Article III limitation did not completely vindicate Justice Scalia's argument in his *Hein*

118 *Id.* at 1442–49.

119 *Id.*

120 *Id.* at 1449–50 (Scalia, J., concurring).

121 *Id.* at 1450–63 (Kagan, J., dissenting).

122 *Lexmark*, 134 S. Ct. at 1387–88, 1387 n.3 (2014). It is possible that the *Flast* decision still survives as a narrow Establishment Clause exception to the general rule that Article III standing principles prohibit taxpayer suits, but *Flast's* prudential approach to taxpayer suits is clearly inconsistent with *Lexmark's* categorization of the usual prohibition of generalized grievances as arising from Article III. Compare *id.* (stating usual prohibition of generalized grievances is based on Article III and not on prudential factors) with *Flast*, 392 U.S. at 92–94 (suggesting that the *Frothingham* decision's prohibition of taxpayer suits was based on prudential rather than constitutional standing principles). See also Solimine, *supra* note 23, at 1042 (suggesting that *Flast v. Cohen* interpreted the *Frothingham* decision as a prudential rather than constitutional standing case).

concurrence of barring all taxpayer suits as unconstitutional under Article III.¹²³

B. The Prohibition Against Generalized Grievances Not Involving Taxpayer Suits

In addition to the controversy over whether the usual prohibition against taxpayer suits was based on prudential or constitutional considerations, before the *Lexmark* decision the Supreme Court had been unclear regarding whether its restriction on non-taxpayer suits alleging “generalized grievances,”¹²⁴ a term which courts sometimes use to refer to suits involving large proportions of American citizens or voters or to suits where a litigant who has no personal injury seeks to require the government to obey a duly enacted law, was a prudential standing limitation or an Article III constitutional one.¹²⁵ In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,¹²⁶ for example, the Supreme Court concluded that a court could deny standing in a suit involving generalized harms to large numbers of the public because such a suit would raise “general prudential concerns ‘about the proper—and properly limited—role of the courts in a democratic society.’”¹²⁷ In its subsequent *Public Citizen v. United States Department of*

¹²³ See *Hein*, 551 U.S. at 618–37, 634 n.5 (Scalia, J., concurring); *supra* notes 117–20 and accompanying text (discussing *Arizona Christian School Tuition Organization v. Winn* and its implications in future cases).

¹²⁴ Courts have failed to precisely define what constitutes a “generalized grievance.” YACKLE, *supra* note 31, at 342 (“The ‘generalized grievance’ formulation is notoriously ambiguous.”); Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1884–92 (1996) (“Beyond the uncertainty about whether generalized grievances are constitutional or prudential limitations, there is also uncertainty about their precise definition.”).

¹²⁵ See *Hein*, 551 U.S. at 634 n.5 (Scalia, J., concurring in the judgment) (observing that the Court “has occasionally in dicta described the prohibition on generalized grievances as merely a prudential bar,” but explaining that the doctrine “squarely rest[s] on Article III considerations, as the analysis in *Lujan* . . . confirms”); *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (implying that the ban on generalized grievance suits is an Article III limitation and citing *Lujan*, 504 U.S. at 573–74 for that principle); YACKLE, *supra* note 31, at 342–44 (discussing the debate in the Supreme Court regarding whether the rule against generalized grievances is a constitutional rule or non-constitutional policy waivable by Congress); Mank, *States Standing*, *supra* note 1, at 1710–15 (discussing confusion over whether the Court’s standing cases prohibiting generalized grievances are constitutional or prudential limitations); Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 878.

¹²⁶ 438 U.S. 59 (1978).

¹²⁷ *Id.* at 80 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975), partially abrogated by *Lexmark*, 134 S. Ct. 1377); see also Bradford C. Mank, *Standing and Global Warming*, 35 ENVTL. L. 1, 21–22 (2005).

*Justice*¹²⁸ decision, however, the Court appeared to apply a different view than the *Duke Power* decision of what constitutes a generalized grievance shared by many other citizens in determining that a citizen may assert an injury if the government denies a legitimate request for information even if many other citizens could request that same information.¹²⁹ The Court stated:

The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA [Federal Advisory Committee Act] does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.¹³⁰

The *Public Citizen* decision did not discuss *Duke Power's* rejection of suits asserting generalized grievances.¹³¹ Before *Lexmark*, the Court had never clearly defined the term "generalized grievance," or whether the bar against such suits is a flexible judicial prudential doctrine or a firmer constitutional rule, and some of its decisions regarding general grievances were arguably contradictory.¹³²

In *Federal Election Commission v. Akins*,¹³³ the government argued that the plaintiffs, who sought information from the Federal Election Commission because the information allegedly could assist their voting decisions, should not have standing because they had endured only a generalized grievance similar to all other voters.¹³⁴ The Court rejected the government's contention that the informational injury to the plaintiffs was too abstract or generalized to constitute a concrete injury or violated judicially imposed prudential norms against generalized grievances because the statute explicitly authorized the right of voters to request information from the Commission and, accordingly, superseded any prudential standing restrictions against generalized grievances.¹³⁵ The Court distinguished prior cases imposing prudential limitations against generalized grievances by reasoning that it would deny standing for widely shared, generalized injuries only if the harm is both widely shared and also of "an abstract and indefinite

128 491 U.S. 440 (1989).

129 Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 878–79.

130 *Pub. Citizen*, 491 U.S. at 449–50.

131 *See id.* at 440–89.

132 *See* YACKLE, *supra* note 31, at 342 ("The generalized grievance formulation is notoriously ambiguous."); Solimine, *supra* note 23, at 1027 (same).

133 524 U.S. 11 (1998).

134 Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 879.

135 *Akins*, 524 U.S. at 13–21; Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 KAN. L. REV. 677, 678 (2007); Mank, *Standing and Statistical Persons*, *supra* note 1, at 717.

nature—for example, harm to the ‘common concern for obedience to law.’”¹³⁶ *Akins* distinguished between legitimate concrete injuries and mere abstract harms in defining when large numbers of people may appropriately sue and meet Article III standing principles.¹³⁷ The Court reasoned that “often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’”¹³⁸ Accordingly, the *Akins* decision determined that a plaintiff who suffers a concrete, actual injury may sue even though numerous other members of the American public have suffered similar injuries:

[T]he fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law.¹³⁹

In his dissenting opinion in *Akins*, however, Justice Scalia, joined by Justices O’Connor and Thomas, contended that Article III standing principles bar even “concrete” generalized grievances because the Court has required plaintiffs to prove a “particularized” injury that “affect[s] the plaintiff in a personal and individual way” and has denied standing for all asserted injuries that are “undifferentiated and common to all members of the public.”¹⁴⁰ Because the *Akins* plaintiffs’ alleged informational injury was an “undifferentiated” generalized grievance that was “common to all members of the public,” Justice Scalia asserted that they must resolve it “by political, rather than judicial, means.”¹⁴¹

136 *Akins*, 524 U.S. at 23 (citation omitted). At the time of the *Akins* decision in 1998, the Supreme Court had not been clear on whether generalized grievances pose a constitutional or prudential barrier to standing, and the issue has been subject to much debate. Solimine, *supra* note 23, at 1027 n.14. The *Akins* decision implied that the rule against generalized grievances is only prudential in nature, but did not explicitly decide the issue. See *Akins*, 524 U.S. at 24–25; accord Mank, *Standing and Statistical Persons*, *supra* note 1, at 717 (discussing *Akins* as treating generalized grievances as prudential rule).

137 *Akins*, 524 U.S. at 24–25; see also Mank, *Standing and Statistical Persons*, *supra* note 1, at 717.

138 *Akins*, 524 U.S. at 24 (citing *Pub. Citizen*, 491 U.S. at 449–50); Mank, *Standing and Statistical Persons*, *supra* note 1, at 717.

139 *Akins*, 524 U.S. at 24–25; accord Mank, *Standing and Statistical Persons*, *supra* note 1, at 717.

140 *Akins*, 524 U.S. at 35 (Scalia, J., dissenting) (citations omitted) (internal quotation marks omitted); see also Mank, *Standing and Statistical Persons*, *supra* note 1, at 719.

141 *Akins*, 524 U.S. at 35–36 (Scalia, J., dissenting) (internal quotation marks and citations omitted); accord Mank, *Standing and Statistical Persons*, *supra* note 1, at 719.

For broader reasons of judicial philosophy, Justice Scalia argued in *Akins* that Article III's "case or controversy" requirement must be narrowly construed to exclude generalized grievances to avoid interfering with the President's Article II authority to "take Care that the Laws be faithfully executed."¹⁴²

It is noteworthy that Justice Scalia's *Lexmark* decision commanded a unanimous majority.¹⁴³ Three Justices who joined his *Lexmark* opinion were in the majority in *Akins*: Justices Kennedy, Ginsburg, and Breyer.¹⁴⁴ It is possible that each of these three Justices has changed his or her mind and now agrees with Justice Scalia's dissenting opinion in *Akins*. For example, subsequent to *Akins*, the Court, in an unanimous per curiam decision in *Lance v. Coffman*, held that four Colorado voters lacked standing to challenge a redistricting plan for congressional districts in the state because their suit was a generalized grievance, since they had no greater interest than any other member of the public in how the law was enforced and implied that the prohibition was based on constitutional standing grounds.¹⁴⁵ The *Lance* decision distinguished other voter suits, but did not mention the controversial *Akins* decision, which involved different facts than *Lance*.¹⁴⁶

It is more likely, however, that these three Justices joined *Lexmark*'s holding that the usual prohibition against general grievances is an Article III limitation¹⁴⁷ while taking the same view in *Akins* that voter suits in a factually similar case are either not generalized grievances or are an exception to the rule prohibiting such suits.¹⁴⁸ Because *Akins* implied but did not decide that the usual prohibition against generalized grievances was prudential in nature,¹⁴⁹ Justice Scalia has achieved some success in convincing three Justices in the majority of *Akins* to join his unanimous *Lexmark* decision treating all generalized grievances as involving Article III standing principles.¹⁵⁰

142 *Akins*, 524 U.S. at 35–37 (Scalia, J., dissenting) (quoting U.S. CONST. art. II, § 3); Mank, *Standing and Statistical Persons*, *supra* note 1, at 719.

143 *Lexmark*, 134 S. Ct. at 1383.

144 *Akins*, 524 U.S. at 13.

145 *Lance v. Coffman*, 549 U.S. 437, 439–42 (2007) (implying that ban on generalized grievance suits is Article III limitation and citing *Lujan*, 504 U.S. at 573–74 for that principle).

146 *Id.* at 442 ("It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." (citation omitted)).

147 *Lexmark*, 134 S. Ct. at 1387 & n.3.

148 *Akins*, 524 U.S. at 24–25.

149 *See id.*; accord Mank, *Standing and Statistical Persons*, *supra* note 1, at 717 (discussing *Akins* as treating generalized grievances as prudential rule).

150 Compare *Lexmark*, 134 S. Ct. at 1383 (unanimous decision including Justices Scalia, Kennedy, Thomas, Ginsburg and Breyer) with *Akins*, 524 U.S. at 13 (listing Justices Kennedy, Ginsburg, and Breyer in majority and Justice Scalia and Thomas in dissent).

Yet Justices Kennedy, Ginsburg, and Breyer could still achieve the same result in *Akins* without disagreeing with *Lexmark* by treating the voters' suit in the former case as either not a generalized grievance because it involves a concrete injury or as an exception to the usual prohibition against generalized grievance suits because of the policy importance of allowing voters to obtain information from the government that could assist their voting decisions.¹⁵¹

C. Climate Change Suits By States May Not Be Generalized Grievances

Another important area where the Court may disagree about whether a suit is a generalized grievance are suits involving climate change, especially suits brought by state governments. In *Massachusetts v. EPA*,¹⁵² the Court held that a state government had Article III standing to sue the federal government for its failure to regulate greenhouse gas ("GHG") emissions from motor vehicles that arguably cause global climate change, despite the highly diffuse and generalized nature of the harms involved because states are "entitled to special solicitude in our standing analysis."¹⁵³ In *American Electric Power Co. v. Connecticut (AEP)*,¹⁵⁴ the Supreme Court, by an equally divided vote, affirmed a Second Circuit decision concluding that both state and private plaintiffs had standing in a tort action seeking GHG reductions from five defendants, who constituted the largest electric power utilities emitting GHGs in the United States.¹⁵⁵ The Court stated, "Four members of the Court would hold that at least *some plaintiffs* have Article III standing under *Massachusetts*, which permitted a State to challenge the [U.S. Environmental Protection Agency's (EPA)] refusal to regulate [GHG] emissions; and, further, that no other threshold obstacle bars review."¹⁵⁶ The Court did not discuss whether the "some" plaintiffs included only state plaintiffs or also private

151 See *Akins*, 524 U.S. at 24–25 (treating the government's denial of information to voter plaintiffs as a concrete injury in fact because it could affect their voting decisions).

152 549 U.S. 497 (2007).

153 *Id.* at 518–21 (pointing out that Massachusetts owned a large portion of the affected territory, reinforcing the conclusion that the injury to the state was sufficiently concrete); see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1528.

154 131 S. Ct. 2527 (2011); see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1528.

155 See *Am. Elec. Power Co.*, 131 S. Ct. at 2534–35 (rejecting the petitioners' argument that the federal courts lacked jurisdiction to reach the merits of the case).

156 *Id.* at 2535 (emphasis added) (citation omitted); see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 873, 894 (highlighting that the Court "took [an] unusual step" when it explained that it was equally divided on the standing and jurisdictional issues).

plaintiffs, but some commentators have suggested that the four Justices may have decided only that the state plaintiffs had standing.¹⁵⁷ The *Massachusetts* decision did not decide whether private parties have standing rights to bring climate change suits against the federal government or large private GHG emitters. However, the Court implied that private parties may have lesser standing rights when it announced that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in [*Lujan v. Defenders of Wildlife*]¹⁵⁸, a private individual.”¹⁵⁹

In his *Massachusetts* majority opinion, Justice John Paul Stevens relied upon the Court’s 1907 decision in *Georgia v. Tennessee Copper Co.*,¹⁶⁰ in which the Court held that Georgia had standing to sue in favor of its citizens to protect them from out-of-state air pollution crossing the state’s border because of the state’s quasi-sovereign *parens patriae* interests in its natural resources and the health of its citizens.¹⁶¹ He also declared that the Court had for many years “recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”¹⁶² Justice Stevens reasoned that “[j]ust as Georgia’s independent interest ‘in all the earth and air within its domain’ supported federal jurisdiction a century ago, so too does Massachusetts’ well-founded desire to preserve its sovereign territory today.”¹⁶³ Furthermore, Justice Stevens concluded that the Court should recognize greater standing rights for states because they had ceded three important sovereign rights to the U.S. government: (1) states may not use military force; (2) states are constitutionally prohibited from negotiating treaties with foreign governments; and (3) state laws are sometimes preempted by federal law.¹⁶⁴ Because states have surrendered these three sovereign powers to the federal government, the

157 See, e.g., Michael B. Gerrard, ‘American Electric Power’ *Leaves Open Many Questions for Climate Litigation*, N.Y.L.J., July 14, 2011, http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_NewYorkLawJournal_Gerrard_7.14.11.pdf; see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 873, 897–98 (pointing out that the ambiguity in the opinion makes it unclear whether the four Justices were also approving standing for private plaintiffs in climate change cases).

158 504 U.S. 555 (1992).

159 *Massachusetts*, 549 U.S. at 518; see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 871, 881–82 (summarizing the Court’s view that states are “not normal litigants” for standing purposes because they have a “quasi-sovereign interest in the health and welfare of their citizens”).

160 206 U.S. 230 (1907).

161 *Massachusetts*, 549 U.S. at 518–19 (citing *Tennessee Copper*, 206 U.S. at 237); see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1536–37.

162 *Massachusetts*, 549 U.S. at 518.

163 *Id.* at 519.

164 *Id.*; see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1537–38.

Court applied the common law *parens patriae* doctrine¹⁶⁵ to retain a special role for the states in a federal system of government by acknowledging that states can sue in federal court to protect their quasi-sovereign interest in the health, welfare, and natural resources of their citizens.¹⁶⁶

In his dissenting opinion in *Massachusetts*, Chief Justice John Roberts, who was joined by Justices Antonin Scalia, Clarence Thomas and Samuel Alito, implied that the global problem of climate change was a nonjusticiable general grievance that should be decided by the political branches rather than by the courts.¹⁶⁷ Disagreeing with the majority's interpretation that states possess special standing rights in climate change cases, he argued that it was inappropriate for the Court to apply a broader standing test for states because there was no precedent, statute, or reason to justify giving states broader standing rights.¹⁶⁸ Notably, he argued that states do not have greater standing rights under the *parens patriae* principles because *Tennessee Copper* only recognized that states enjoy greater remedies than private litigants and did not address the then developing doctrine of standing.¹⁶⁹ While suggesting that states and private parties should have approximately similar standing rights,¹⁷⁰ Chief Justice Roberts's dissenting opinion rejected the entire field of GHG litigation by either private parties or states because such suits are generalized grievances.¹⁷¹

Chief Justice Roberts emphasized that all GHG suits are generalized grievances regardless of whether the plaintiffs are state governments or private parties.¹⁷² He argued that the Commonwealth of Massachusetts' injuries from climate change failed to meet Article III's injury standing requirement because the injuries were common

165 See generally Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978) (discussing development of *parens patriae* doctrine in English common law to allow English King to act as guardian for children and mentally incompetent persons).

166 *Massachusetts*, 549 U.S. at 519–20; see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1538.

167 *Massachusetts*, 549 U.S. at 535 (Roberts, C.J., dissenting); see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1545.

168 *Massachusetts*, 549 U.S. at 536–40 (Roberts, C.J., dissenting); see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1543–45.

169 *Massachusetts*, 549 U.S. at 538–39 (Roberts, C.J., dissenting); see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1543.

170 *Massachusetts*, 549 U.S. at 536–37 (Roberts, C.J., dissenting) (comparing private associations with states and asserting that, to bring a claim, both must justify that their members or citizens satisfy Article III standing requirements).

171 *Id.* at 535–36; see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1542–45.

172 *Massachusetts*, 549 U.S. at 535–36 (Roberts, C.J., dissenting); see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1545.

to the general public, and, therefore, were not “particularized” injuries.¹⁷³ Chief Justice Roberts also claimed that the majority’s allowing generalized grievance suits in climate change cases led the Court to interfere with the political branches of government, who should decide general questions of public policy.¹⁷⁴

By a divided vote of four to four, the *AEP* decision essentially reaffirmed *Massachusetts*’ central holding that at least states may bring climate change suits.¹⁷⁵ The Court stated:

The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA’s refusal to regulate [GHG] emissions; and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit’s exercise of jurisdiction and proceed to the merits.¹⁷⁶

Four Justices concluded that at least “some” of the *AEP* plaintiffs met Article III standing requirements in light of *Massachusetts*.¹⁷⁷ The “some” plaintiffs referred to in the *AEP* decision were more likely the state plaintiffs than the private plaintiffs in that case because the *Massachusetts* decision only clearly granted standing rights to state climate change suits.¹⁷⁸ The Ninth Circuit’s decision in *Washington Environmental Council v. Bellon*¹⁷⁹ interpreted both the *Massachusetts* and the *AEP* decisions to mean that only state plaintiffs may bring GHG suits, and, therefore, that private plaintiffs seeking to regulate GHGs do not enjoy the same standing rights in such cases as state plaintiffs.¹⁸⁰

173 *Massachusetts*, 549 U.S. at 540–41; see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1545.

174 *Massachusetts*, 549 U.S. at 535, 548–49.; see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1545.

175 *Am. Elec. Power Co.*, 131 S. Ct. at 2533–35; see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1553–57.

176 131 S. Ct. at 2535 (citations omitted).

177 *Id.* at 2535 & n.6; see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1553–57.

178 See Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit: American Electric Power v. Connecticut*, 2011 CATO SUP. CT. REV. 295, 309–10 (2011) (suggesting the four Justices in *AEP* who found that “at least some plaintiffs” had standing were most likely referring to the state plaintiffs); Gerrard, *supra* note 156 (same); see also Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1556 (same).

179 732 F.3d 1131 (9th Cir. 2013), *reh’g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

180 *Id.* at 1146 n.8; Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1572–73. See generally *Am. Elec. Power*, 131 S. Ct. at 2532, 2535 (reasoning, based on *Massachusetts*, that at least “some plaintiffs” had standing because three of the plaintiffs were states).

However, in an opinion dissenting from the Ninth Circuit's denial of en banc review in *Washington Environmental Council*, three circuit judges criticized the panel decision's denial of standing to private parties in GHG suits.¹⁸¹

Even if private climate change suits are barred, it is improbable that the majority in *Massachusetts* or the four Justices in *AEP* who supported standing for "some plaintiffs" are likely to re-think their votes in light of *Lexmark's* holding that generalized grievance suits are usually barred by Article III standing doctrine. Justices supporting climate change suits can argue that suits by states are not generalized grievances because states suffer concrete injuries when their beaches erode as a result of rising sea levels caused by climate change.¹⁸² Alternatively, they can reason that there is an exception to the generalized grievance doctrine when states protect their quasi-sovereign *parens patriae* interest in the health of their citizens and in their natural resources.¹⁸³

IV. ZONE OF INTERESTS

A. Pre-Lexmark Cases Treat the Zone of Interests as Prudential

Before *Lexmark*, the Supreme Court treated the zone of interests test as a prudential standing barrier.¹⁸⁴ To insure a plaintiff has an appropriate statutory or constitutional interest in a suit, "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."¹⁸⁵ In *Clarke v. Securities Industry Ass'n*, the Supreme Court explained that the zone of interests inquiry seeks to include "reliable" plaintiffs and to "exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives."¹⁸⁶ In *Clarke*, the Court in 1987 stated that "[t]he principal cases in which the 'zone of interest' test has been applied are those involving claims under the Administrative Procedure Act ("APA"), and the test is most

181 *Wash. Envtl. Council*, 741 F.3d at 1079–81 (Gould, J., dissenting from denial of en banc review) (Judge Gould was joined by Judges Wardlaw and Paez); Mank, *No Article III Standing for Private Plaintiffs*, *supra* note 1, at 1579–81.

182 *Massachusetts*, 549 U.S. at 522–23, 526.

183 *Id.* at 518–20.

184 *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997) (describing the zone of interests standard as a prudential limitation rather than a mandatory constitutional requirement).

185 *Id.* at 162.

186 479 U.S. 388, 397 n.12 (1987); see also Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the "Zone of Interests" Test Should Not Apply to Constitutional Cases*, 48 ARIZ. L. REV. 23, 58 (2006).

usefully understood as a gloss on the meaning of § 702 [of the APA].”¹⁸⁷ While acknowledging that the modern zone of interests test was originally developed “as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act,” the *Lexmark* decision disagreed with the premise in *Clarke* that the test was primarily concerned with APA cases and instead explained that “[w]e have since made clear, however, that [the zone of interests test] applies to all statutorily created causes of action; that it is a ‘requirement of general application’; and that Congress is presumed to ‘legislat[e] against the background of’ the zone-of-interests limitation, ‘which applies unless it is expressly negated.’”¹⁸⁸

In *Association of Data Processing Service Organizations v. Camp*¹⁸⁹, the Court first mandated that plaintiffs suing under the APA show that their suit is “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”¹⁹⁰ Disagreeing with Justice William Brennan’s dissenting opinion, which contended that the majority’s zone of interests test implicitly examined the merits of the case,¹⁹¹ Justice William Douglas in *Data Processing* emphasized that the zone of interests test does not look at the merits, but instead is a threshold or preliminary determination separate from whether a plaintiff is likely to prevail on the merits.¹⁹² Before the *Data Processing* decision, the Court in *Tennessee Power Co. v. Tennessee Valley Authority*¹⁹³ had denied plaintiffs standing to sue “unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one

187 *Clarke*, 479 U.S. at 395, 400 n.16 (discussing the Administrative Procedure Act, 5 U.S.C. § 702 (2012)); see also Mank, *supra* note 187, at 36; Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 318, 327–28 (2004) (observing that most, but not all, of the Court’s zone of interests cases have involved the APA).

188 *Lexmark*, 134 S. Ct. at 1388 (quoting *Bennett*, 520 U.S. at 163); see generally Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (providing empirical data regarding whether congressional staff, when they draft statutes, actually follow the Supreme Court’s presumptions regarding how the Court assumes Congress legislates).

189 397 U.S. 150 (1970).

190 *Id.* at 153; see also William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis after Bennett v. Spear*, 49 ADMIN. L. REV. 763, 778 (1997) (“The ‘zone of interests’ test was first articulated in *Association of Data Processing*” (footnote omitted)); Mank, *supra* note 187, at 34–35.

191 Mank, *supra* note 187, at 35–36.

192 See *Data Processing*, 397 U.S. at 153, 156, 158 (emphasizing that the standing and zone of interests tests do not look to the merits of a case); see also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 234 (1988) (same); Gene R. Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68, 74 (1984) (same); Mank, *supra* note 187, at 35 (same).

193 306 U.S. 118 (1939).

founded on a statute which confers a privilege.”¹⁹⁴ The so-called legal interest or legal right test confusingly combined both common law and statutory bases for suit.¹⁹⁵

Rejecting prior cases requiring plaintiffs to demonstrate a “legal interest” because the “test goes to the merits”;¹⁹⁶ the *Data Processing* decision clearly differentiated between the preliminary question of standing and the ultimate decision on the merits, stating: “The question of standing is different. It concerns, apart from the ‘case’ or ‘controversy’ test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”¹⁹⁷ The *Data Processing* decision held that the plaintiffs had standing to sue, but remanded all merit issues to the lower courts to decide, stating: “We hold that petitioners have standing to sue and that the case should be remanded for a hearing on the merits.”¹⁹⁸ The *Data Processing* opinion established the fundamental principle that standing is a threshold question separate from the ultimate decision on the merits.¹⁹⁹

In *Data Processing*, Justice Brennan’s dissenting opinion, which was joined by Justice Byron White, criticized the majority’s establishment of a new zone of interests test as unnecessary once a plaintiff demonstrates constitutional standing by proving an injury in fact.²⁰⁰ First, Justice Brennan criticized the vagueness of what a plaintiff must prove to meet the zone of interests test.²⁰¹ Second, he contended that

194 *Id.* at 137–38; see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 920.

195 See Fletcher, *supra* note 192, at 226–27; see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 920; Peter M. Seka, Note, *Federal Jurisdiction—The Second Circuit’s Competitive Advocate Standing Theory: Public or Private Model Theory? A Call for Choice*, 14 W. NEW ENG. L. REV. 185, 191–92 (1992).

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

197 *Id.*; see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 921.

198 *Data Processing*, 397 U.S. at 158; see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 921.

199 *Data Processing*, 397 U.S. at 152–54, 158; see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 921.

200 *Data Processing*, 397 U.S. at 167–68, 170–73 (Brennan, J., concurring in result and dissenting); see also Sanford A. Church, A Defense of the “Zone of Interests” Standing Test, 1983 DUKE L.J. 447, 456–57 (1983) (discussing Justice Brennan’s dissenting opinion in *Data Processing*); Mank, *supra* note 187, at 35–36 (same).

201 Justice Brennan wrote:

What precisely must a plaintiff do to establish that ‘the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute’? How specific an ‘interest’ must he advance? Will a broad, general claim, such as competitive interest, suffice, or must he identify a specific legally

the zone of interests inquiry conflated the question of standing with both whether a statute precludes judicial review for an issue or class of plaintiffs, and, also, with the merits of deciding a case.²⁰² Thus, he concluded that the Court should eliminate its new zone of interests standard and instead only address whether a plaintiff meets the constitutional standing test.²⁰³ Arguably, Justice Scalia in his *Lexmark* decision sought to respond to the criticisms and problems with the test first raised in Justice Brennan's dissent in *Data Processing* by clarifying the zone of interests doctrine and removing it from the murky realms of prudential standing doctrine.

B. Lexmark Defines the Zone of Interests as Determining Which Plaintiffs Congress Intended To Have the Right to Sue

In *Lexmark*, Justice Scalia acknowledged that the Court had treated the zone of interests test as a part of prudential standing doctrine in the past, but clearly stated that the test was not prudential in nature.²⁰⁴ Instead, the *Lexmark* decision declared that “[w]hether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”²⁰⁵ Justice Scalia then relied upon the view of Judge Silberman of the D.C. Circuit that “prudential standing is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons ha[s] a right to sue under this substantive statute.”²⁰⁶

In addition to deciding that the zone of interests test is not prudential in nature, the Court tried to provide more concrete direction on how courts should apply the test.²⁰⁷ The *Lexmark* decision explained that “the question this case presents is whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a). In other words, we ask whether Static Control

protected interest? When, too, is his interest ‘arguably’ within the appropriate ‘zone’? Does a mere allegation that it falls there suffice?

Data Processing, 397 U.S. at 177 (Brennan, J., concurring in result and dissenting); see also Church, *supra* note 200, at 456; Mank, *supra* note 187, at 35–36, 35 n.100.

²⁰² *Data Processing*, 397 U.S. at 174–78 (Brennan, J., concurring in result and dissenting); see also Mank, *supra* note 187, at 35–36.

²⁰³ *Data Processing*, 397 U.S. at 178 (Brennan, J., concurring in result and dissenting); see also Church, *supra* note 200, at 456; Mank, *supra* note 187, at 36.

²⁰⁴ *Lexmark*, 134 S. Ct. at 1387.

²⁰⁵ *Id.* (internal quotation marks and citations omitted).

²⁰⁶ *Id.* (internal quotation marks and citations omitted).

²⁰⁷ *Id.* at 1387–88 & n.4.

has a cause of action under the statute.”²⁰⁸ In a footnote, the Court rejected previous decisions suggesting that the zone of interests test be classified as a “statutory standing” inquiry and hence “effectively jurisdictional” in nature and instead reasoned that the statutory standing “label is an improvement over the language of ‘prudential standing,’ since it correctly places the focus on the statute. But it, too, is misleading, since ‘the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court’s statutory or constitutional *power* to adjudicate the case.”²⁰⁹

Justice Scalia in *Lexmark* explained that the Court generally presumes that the zone of interests test governs who may sue under all statutes, that Congress legislates against the background of the zone of interests test, and that courts analyze a statute to determine which groups are entitled to sue under the statute.²¹⁰ He also observed that the Court in several decisions had liberally construed the zone of interests test in judicial review of administrative actions under the APA, but cautioned that this liberal approach was not necessarily applicable to other statutory schemes.²¹¹ For example, as is discussed more fully in Part II.C, the *Lexmark* decision observed that the Lanham Act contains a “detailed statement of the statute’s purposes.”²¹² While the *Lexmark* decision did not answer every question about the zone of interests test, as Part IV.C will explain about the issue of competitor standing,²¹³ Justice Scalia’s opinion did partially answer Justice Brennan’s complaint in his dissenting opinion in *Data Processing* that the test was so vague it should be abandoned²¹⁴ by explaining that “[w]hether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”²¹⁵ Because his approach to the test involves a case by case determination of statutory intent, Jus-

208 *Id.* at 1387.

209 *Id.* at 1387–88, 1387 n.4 (quoting *Verizon Md. Inc. v. Public Serv. Comm’n*, 535 U.S. 635, 642–43 (2002)) (citing *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 183–85 (Kavanaugh, J., dissenting)).

210 *Lexmark*, 134 S. Ct. at 1388–89.

211 *Id.* at 1389.

212 *Id.*

213 *See infra* Part IV.C.

214 *Data Processing*, 397 U.S. at 167–78 (1970) (Brennan, J., concurring in result and dissenting); *see also* Church, *supra* note 200, at 456–57 (discussing Justice Brennan’s dissenting opinion in *Data Processing*); Mank, *supra* note 187, at 35–36 (same).

215 *Lexmark*, 134 S. Ct. at 1387 (internal quotation marks and citations omitted); *supra* notes 88–89, 90, and 205 and accompanying text.

tice Scalia's approach to the zone of interests test in *Lexmark* is likely to survive even after his departure from the Court because his flexible methodology would enable a court to reach a desired merits outcome depending upon how it interprets the specific language of a statute.²¹⁶ While a future Supreme Court would probably agree with Justice Scalia's *Lexmark* opinion that the liberal approach to interpreting the zone of interests in APA cases is not necessarily applicable to other types of statutes,²¹⁷ a Court in future cases could apply a liberalized version of the zone of interests test in at least some non-APA cases without overruling the *Lexmark* decision.²¹⁸

C. *The Battle in the D.C. Circuit Regarding Competitor Standing*

In its *Lexmark* decision, the Court rejected the test used in the Seventh, Ninth, and Tenth Circuits that a plaintiff must be a direct competitor of the defendant to sue under the Lanham Act, and instead relied upon broader principles in the zone of interests test and proximate causation to determine which plaintiffs may sue.²¹⁹ The *Lexmark* decision, however, did not directly address the broader issue of when competitors are within a statute's zone of interests. In *Clarke*, the Supreme Court clearly emphasized that competitors are usually within the zone of interests in APA cases to challenge a statute or administrative decision favoring a competitor.²²⁰ However, the D.C. Circuit has applied a far more restrictive approach in non-APA cases to determining when competitors are within the zone of interests to challenge a statute or administrative decision, but that strict test has been seriously questioned by at least one judge in that circuit.²²¹

216 See *Lexmark*, 134 S. Ct. at 1388–89.

217 *Id.* at 1389.

218 See *infra* Parts IV.C and Conclusion.

219 *Lexmark*, 134 S. Ct. at 1385, 1391 (discussing the direct competitor test in Seventh, Ninth, and Tenth Circuits and rejecting it in favor of the broader zone of interests and proximate causation principles in assessing liability under the Lanham Act).

220 *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.12, 403 (1987); see also *Mank*, *supra* note 187, at 59–60.

221 Compare *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, 1256–58 (D.C. Cir. 2014) (per curiam), *cert. granted on other grounds sub nom. Michigan v. EPA*, 135 S. Ct. 702 (2014) (discussing how the zone of interests test is applied to competitors in D.C. Circuit, especially in environmental cases), with *id.* at 1267–73 (Kavanaugh, J., concurring in part and dissenting in part) (criticizing D.C. Circuit's test for whether competitors fall within the zone of interests as inconsistent with Supreme Court case law and internally inconsistent within the Circuit's precedent).

1. Hazardous Waste Treatment Council v. EPA

Despite the Supreme Court's declaration in *Clarke* that the zone of interests test "is not meant to be especially demanding,"²²² the D.C. Circuit in several non-APA cases has denied standing for competitors, especially in environmental cases, on the grounds that their economic interests are not within the zone of interests of the relevant statute's environmental and health purposes.²²³ In a 1988 decision, *Hazardous Waste Treatment Council v. EPA*,²²⁴ the D.C. Circuit distinguished *Clarke* and applied a narrow approach to competitor standing in non-APA cases.²²⁵ The Hazardous Waste Treatment Council, a national trade organization of firms engaged in the treatment of hazardous waste and the manufacture of equipment for that purpose, petitioned for review of EPA's rules concerning the burning of hazardous waste, including used oil, as fuel, on the grounds that they were insufficiently comprehensive and stringent under the controlling statute, the Resource Conservation and Recovery Act ("RCRA").²²⁶ Three members of the Council claimed competitive injuries from the proposed EPA regulations on the ground "that the asserted laxity of the regulations will diminish the market for their high-tech control services."²²⁷ The Council argued that its interests, although pecuniary, were "in sync with those sought to be served by [the] RCRA [statute]."²²⁸ The D.C. Circuit observed, "[i]n essence they suggest that tightening of environmental standards will generally foster not only a cleaner environment but also the member companies' profits, as it will expand the market for their services."²²⁹

While the Supreme Court's decision in *Clarke* had suggested a generally liberal approach to applying the zone of interests test, the D.C. Circuit in *Hazardous Waste Treatment Council* interpreted *Clarke* as "somewhat unclear" in cases where a competitor argued that its pecuniary interests happen to align with the environmental goals of a statute.²³⁰ According to the D.C. Circuit, *Clarke*, in applying the zone of interests test, had employed a balancing test by not requiring "a

222 *Clarke*, 479 U.S. at 399.

223 See cases discussed in Part IV.C.

224 861 F.2d 277 (D.C. Cir. 1988) (per curiam).

225 *Id.* at 282–83.

226 *Id.* at 279–80 (discussing the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901, §§ 6921–6939a).

227 *Id.* at 281.

228 *Id.* at 282.

229 *Id.*

230 *Hazardous Waste Treatment Council*, 861 F.2d at 282; see *Clarke*, 479 U.S. at 399.

showing of congressional intent to benefit” but by also seeking “more than a ‘marginal[] rela[tionship]’ to the statutory purposes.”²³¹ Even “in the absence of an apparent congressional intent to benefit” a plaintiff, the D.C. Circuit acknowledged that competitor standing may be appropriate where there is “some indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect [to] support[] an inference that Congress would have intended eligibility.”²³² However, the court concluded that the Council’s competitor interests, even if they were somewhat “in sync” with the statute’s interests, were too “‘marginally related’ to Congress’s environmental purposes” to qualify for standing.²³³

The D.C. Circuit in *Hazardous Waste Treatment Council* based its restrictive approach to competitor standing in non-APA cases in part on the assumption that prudential standing necessarily prohibited some parties who met Article III standing from suing, stating: “And of course a rule that gave any such plaintiff standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing; any party with constitutional standing could sue.”²³⁴ The reasoning in the preceding sentence is now highly questionable in light of *Lexmark*’s conclusion that the zone of interests test is not prudential in nature; however, the D.C. Circuit could still reach the same conclusion by reasoning that Congress, in enacting RCRA, did not intend to include competitors, such as the three members of the Council in *Hazardous Waste Treatment Council*, to be among the class of plaintiffs entitled to sue.²³⁵ Nevertheless, the Council’s “in sync” argument should have prevailed because competitor suits, even if self-interested, frequently serve the environmental goals of RCRA and other environmental statutes.²³⁶

2. Clean Air Act Cases

Similarly, the D.C. Circuit has denied competitor standing under the zone of interests test in Clean Air Act (“CAA”) cases. For example, in its 2001 decision in *Cement Kiln Recycling Coalition v. EPA*,²³⁷ the

231 *Hazardous Waste Treatment Council*, 861 F.2d at 283 (quoting *Clarke*, 479 U.S. at 399 (alterations in original)).

232 *Id.*

233 *Id.*

234 *Id.*

235 See *Lexmark*, 134 S. Ct. at 1387–89 (applying the zone of interests test as to whether Congress intended plaintiffs to be among class eligible to sue under a particular statute).

236 *Hazardous Waste Treatment Council*, 861 F.2d at 282.

237 255 F.3d 855 (D.C. Cir. 2001).

court held that the purely economic interests of manufacturers of pollution control equipment seeking more rigorous regulation of their competitors under § 112 of the Act were not within the zone of interests of statute despite the argument of the industry coalition that *Hazardous Waste Treatment Council's* denial of competitor standing did not apply to its suit because the CAA utilizes a technology-based approach to controlling air emissions that differs from the RCRA statute at issue in the former case.²³⁸ The court concluded that the technology-based approach in the CAA did not demonstrate that Congress intended to broaden the zone of interests to include competitor standing because there was no evidence that Congress wanted every source to use the best pollution control equipment, but only to meet the performance standards of reducing air emissions, as distinct from adopting the methods of emission control, of the best performing sources.²³⁹ The D.C. Circuit concluded, “[a]s in the [*Hazardous Waste Treatment Council*] cases, the Council’s interest lies only in increasing the regulatory burden on others,” and, therefore, the industry competitors in its case failed to meet the zone of interests test because they lacked any interest in the environmental health goals of the statute.²⁴⁰

Likewise, in its 2013 decision in *Association of Battery Recyclers v. EPA*, the D.C. Circuit held that a corporation could not challenge the EPA’s failure to impose more stringent emission standards on its competitors because that interest fell outside the zone of interests protected by § 112 of the CAA—the same section at issue in *Cement Kiln Recycling Coalition*.²⁴¹ The D.C. Circuit in these two CAA cases ignored the value of recognizing standing for competitor suits that raise arguments in favor of more environmental protection even if a competitor is more interested in its profits than in protecting the public health.²⁴² It is noteworthy that the *Lexmark* decision discussed Judge Silberman’s concurring opinion in *Association of Battery Recyclers*, and also cited a dissenting opinion by Judge Kavanaugh of the D.C. Circuit in *Grocery Manufacturers Association v. EPA*.²⁴³ The citation

²³⁸ *Id.* at 870–71.

²³⁹ *Id.* at 871; *see also* *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, 1256–57 (D.C. Cir. 2014) (per curiam) (discussing *Cement Kiln Recycling Coalition v. EPA*), *cert. granted sub nom.* *Michigan v. EPA*, 135 S. Ct. 702 (2014).

²⁴⁰ *Cement Kiln Recycling Coalition*, 255 F.3d at 871.

²⁴¹ 716 F.3d 667, 674 (2013) (citing *Cement Kiln Recycling Coalition*, 255 F.3d at 870–71).

²⁴² *See id.*; *Cement Kiln Recycling Coalition*, 255 F.3d 855 at 870–71.

²⁴³ *Lexmark*, 134 S. Ct. at 1387–88 & nn.3–4 (citing *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 183–85 (D.C. Cir. 2012) (Kavanaugh, J., dissenting)) (discussing *Association of Battery Recyclers*, 716 F.3d at 675–76 (Silberman, J., concurring opinion)). In his dissenting opinion in

of those two cases in *Lexmark* suggests that the Court is aware of the controversy in the D.C. Circuit about the application of the zone of interests test to competitor standing, because both cases involved competitor standing in part, although the Court did not directly address that issue.²⁴⁴

3. White Stallion Energy Center

In *White Stallion Energy Center v. EPA*,²⁴⁵ the majority of a D.C. Circuit panel followed its precedent to deny competitor standing, but Judge Kavanaugh wrote a strong concurring opinion criticizing the D.C. Circuit's restrictive approach to competitor standing as both inconsistent with Supreme Court precedent and internally inconsistent within the Circuit's precedent.²⁴⁶ Additionally, *White Stallion Energy Center* is of interest because it is one of the first cases to address the implications of *Lexmark* on the zone of interests test.²⁴⁷ In *White Stallion Energy Center*, Julander Energy Company, an oil and natural gas development, exploration, and production company, challenged the EPA's decision not to adopt stricter emission standards pursuant to §

Grocery Manufacturers, Judge Kavanaugh argued that prudential standing should not be treated as jurisdictional in nature. *Grocery Mfrs. Ass'n*, 693 F.3d at 181–90 (Kavanaugh, J., dissenting) (arguing that prudential standing should not be jurisdictional in nature, observing six circuits since 1999 have held that prudential standing is non-judicial, discussing and arguing that the trend in the courts of appeals is to treat the issue as non-judicial). Subsequently, Judge Silberman in his concurring opinion in *Association of Battery Recyclers, Inc. v. EPA* implicitly disagreed with Judge Kavanaugh by suggesting that while prudential standing may not be jurisdictional in some instances, such as in suits involving third parties, it should be jurisdictional in statutory zone of interests cases; he also argued that the zone of interests test was more properly classified as “statutory standing” rather than a form of prudential standing. *Ass'n of Battery Recyclers*, 716 F.3d at 675–78 (Silberman, J., concurring). In *White Stallion Energy Center, LLC v. EPA*, Judge Kavanaugh observed in a footnote that *Lexmark* had “made clear that the zone of interests test is not jurisdictional.” 748 F.3d 1222, 1271 n.10 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *cert. granted sub nom. Michigan v. EPA*, 135 S. Ct. 702 (2014).

²⁴⁴ See *Lexmark*, 134 S. Ct. at 1387–88, 1387 n.4; *infra* Part IV.C.

²⁴⁵ 748 F.3d 1222 (D.C. Cir. 2014), *cert. granted sub nom. Michigan v. EPA*, 135 S. Ct. 702 (2014).

²⁴⁶ Compare *id.* at 1256–58 (discussing how zone of interests test is applied to competitors in D.C. Circuit, especially in environmental cases), with *id.* at 1267–73 (Kavanaugh, J., concurring in part and dissenting in part) (criticizing D.C. Circuit's test for whether competitors fall within the zone of interests as inconsistent with Supreme Court case law and internally inconsistent within the circuit's precedent). Judge Kavanaugh dissented regarding the majority's holding that the EPA did not have to consider cost in setting emission standards pursuant to § 112 of the Clean Air Act. *Id.* at 1258–66.

²⁴⁷ Compare *id.* at 1256 (arguing *Lexmark* is consistent with D.C. Circuit's approach to competitor standing) with *id.* at 1272 (arguing *Lexmark* is inconsistent with D.C. Circuit's approach to competitor standing).

112 of the Clean Air Act by requiring “fuel switching” by electric utility steam generating units (“EGUs”) from coal to natural gas.²⁴⁸ After concluding that Julander met the three-part Article III constitutional standing requirements, the D.C. Circuit next addressed the EPA’s contention that Julander did not come within the zone of interests test.²⁴⁹

While acknowledging that the Supreme Court in *Clarke* had declared that the zone of interests test “is not meant to be especially demanding,”²⁵⁰ the D.C. Circuit nevertheless concluded that in light of its precedent in two § 112 CAA cases, *Cement Kiln Recycling Coalition* and *Association of Battery Recyclers*, as well as the broader principles in *Hazardous Waste Treatment Council*, it must hold that Julander was outside the zone of interests protected by § 112.²⁵¹ Rejecting Judge Kavanaugh’s argument that the Circuit’s cases on competitor standing were internally inconsistent and therefore a “coin flip” about which precedents to follow, the majority relied upon *Lexmark* for the principle that “the breadth of the zone of interests varies according to the provisions of law at issue.”²⁵² The D.C. Circuit then explained that it must be guided by its precedents interpreting § 112, and not those applying other statutory provisions, including the APA. Because two § 112 CAA cases in the D.C. Circuit, *Cement Kiln Recycling Coalition* and *Association of Battery Recyclers*, had already denied standing to competitors seeking more stringent emission standards under § 112, the majority believed it was bound by circuit precedent to deny standing in its case.²⁵³ Rejecting Judge Kavanaugh’s argument that a recent Supreme Court decision had undermined the D.C. Circuit’s strict interpretation of the zone of interests test, the majority responded, “[t]his court has not read the Supreme Court’s decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*²⁵⁴ . . . to change the zone of interests standard.”²⁵⁵

Judge Kavanaugh “reluctantly” concurred with the portion of the majority opinion concluding that Julander did not come within the zone of interests test; he argued that the D.C. Circuit’s precedent was

248 *Id.* at 1256.

249 *Id.*

250 *Id.* (quoting *Clarke v. Secs. Indus.*, 479 U.S. 388, 399 (1987)).

251 *Id.* at 1256–58.

252 *Id.* at 1256 (quoting *Lexmark*, 134 S. Ct. at 1389 (citation omitted)).

253 *Id.* at 1256–58 (citing *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012); *id.* at 180 (Tatel, J., concurring) (arguing that the D.C. Circuit court is bound to follow its own precedent)).

254 132 S. Ct. 2199 (2012).

255 *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, 1257 (D.C. Cir. 2014).

inconsistent regarding competitor standing and, therefore, “[g]iven that our case law makes this issue a de facto coin flip, I cannot fault an opinion that lands on heads rather than tails.”²⁵⁶ He contended, however, that “our cases holding that competitors are outside the zone of interests—including today’s decision—are inconsistent with the governing Supreme Court precedents.”²⁵⁷ Judge Kavanaugh argued that the Supreme Court in *Clarke* had explicitly rejected the D.C. Circuit’s narrow approach to competitor standing in APA suits.²⁵⁸ Despite *Clarke*, the D.C. Circuit in non-APA cases such as *Hazardous Waste Treatment Council* continued to bar competitors from suing on the ground that they are outside the zone of interests.²⁵⁹ Judge Kavanaugh maintained that the *Hazardous Waste Treatment Council* decision wrongly required competitors to provide “explicit evidence of [a statutory] intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress’s ultimate goals.”²⁶⁰ He responded:

In my view, that language in *Hazardous Waste* is difficult to square with what the Supreme Court said in *Clarke* and earlier cases. In those cases, the Supreme Court had specifically said that there does *not* need to be evidence of an intent to benefit the plaintiff class. In fact, the Supreme Court said that suit should be allowed unless there was a discernible congressional intent to *preclude suit* by the plaintiff class. In other words, this Court’s cases seemingly flipped the presumption in favor of allowing suit by competitor plaintiffs to a presumption against allowing suit by competitor plaintiffs.²⁶¹

Judge Kavanaugh convincingly argued that the *Hazardous Waste* decision is inconsistent with the *Clarke* decision’s presumption in favor of competitor suits unless there is evidence in a particular statute that Congress did not wish to allow such suits.

Judge Kavanaugh argued that the majority was wrong to apply a stricter approach to the zone of interests test for Clean Air Act cases than the lenient “default rule” favoring competitor suits in APA cases in *Clarke* and similar Supreme Court decisions because no language in the CAA suggested that Congress wanted to bar competitor suits.²⁶² Judge Kavanaugh emphasized the Court’s 2012 decision in *Match-*

256 *Id.* at 1267 (Kavanaugh, J., concurring in part and dissenting in part).

257 *Id.*

258 *Id.* at 1268–72.

259 *Id.* at 1269–71.

260 *Id.* (quoting *Hazardous Waste Treatment Council*, 861 F.2d at 283).

261 *White Stallion Energy Center*, 748 F.3d at 1269–71 (footnote omitted).

262 *Id.* at 1271 (Kavanaugh, J., concurring in part and dissenting in part) (emphasis in original).

E,²⁶³ an APA case that did not involve competitor standing, where the Court:

[R]eaffirmed—in line with *Data Processing* and *Clarke*—that the plaintiff need not be among a class that Congress intended to benefit in the statute at hand. And *Match–E* further reaffirmed that a wide variety of interests, including economic interests related to the agency’s allegedly unlawful action with respect to *someone else*, fall within the zone of interests.²⁶⁴

He reasoned, “Given its music and its words, *Match–E* should have put a final end to this Court’s crabbed approach to the zone of interests test.”²⁶⁵ He concluded:

[O]ur current zone of interests case law is inconsistent and unpredictable. Perhaps most troubling, our cases holding that competitors are outside the zone of interests are inconsistent with Supreme Court precedent, as I read it. In my respectful view, too much is at stake in the administrative process, for health, safety, and environmental regulation, and for the economic interests affected by these cases for us to continue muddling along in this way. This state of affairs should receive a careful examination at some point in the near future. Whether a party can sue in court to challenge illegal agency action on such important matters should not come down to the equivalent of a coin flip. We can do better.²⁶⁶

The *White Stallion* majority, however, would reason to the contrary that the Clean Air Act favors reducing pollution to required limits, but does not necessarily support using the most expensive equipment to do so, which is usually the purpose of competitor suits.²⁶⁷ Also, the majority disagreed with Judge Kavanaugh’s assumption that lenient APA zone of interests cases establish a “default rule” for all cases, except where Congress explicitly bars competitor suits; the majority would instead require courts to analyze the language of each statute in determining the scope of the zone of interests, including whether competitors may sue.²⁶⁸ Finally, the majority did not believe that the *Match–E* decision changed the D.C. Circuit’s restrictive approach to competitor suits in non-APA zone of interests cases.²⁶⁹ The majority’s view that a different and stricter approach to the zone of interests may apply in some non-APA cases is arguably consistent with Justice Scalia’s observation in *Lexmark* that the liberal approach to the zone of interests test in APA cases was not necessarily applicable to other

²⁶³ *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012).

²⁶⁴ *White Stallion Energy Center*, 748 F.3d at 1272 (emphasis in original).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1272–73.

²⁶⁷ *Id.* at 1256–57.

²⁶⁸ *Id.* at 1256–58.

²⁶⁹ *Id.* at 1257.

statutory schemes.²⁷⁰ However, from a policy perspective, allowing competitor suits that are “in sync” with the public health goals of a statute would advance the statute’s purposes and, therefore, courts should allow competitor standing in at least environmental cases.²⁷¹

A 2014 Arizona district court decision that relied upon *Lexmark* in denying zone of interests standing for economic injuries in a National Environmental Policy Act (“NEPA”)²⁷² case is consistent with the *White Stallion* majority’s approach denying competitor standing in many environmental cases in the D.C. Circuit.²⁷³ In *Yount v. Salazar*, the district court had initially concluded that plaintiffs with economic interests in uranium mining had standing to challenge a twenty-year government moratorium on uranium mining near the Grand Canyon because their economic interests were within the zone of interests of NEPA, but the government asked the district court to reconsider its decision in light of *Lexmark*’s new approach to the zone of interests test.²⁷⁴ “Given *Lexmark*’s focus on legislative intent and the exclusively environmental purposes of NEPA,” the district court concluded that the plaintiffs’ economic interests in mining were not within the zone of interests of a purely environmental statute.²⁷⁵ Similar to the D.C. Circuit, the Arizona district court decision ignored the value of competitors making arguments that advance environmental goals even if the competitor has pecuniary reasons for raising those goals.

As a matter of policy, Judge Kavanaugh convincingly argued that competitor suits seeking stricter regulation of air emissions are congruent with the Act’s general goal of reducing pollution.²⁷⁶ The “in sync” arguments by the competitors in *Hazardous Waste Treatment Council* made a persuasive rationale for sometimes allowing competitor suits even if they are based on self-interest.²⁷⁷ Accordingly, at least in environmental cases, courts should recognize competitor standing as within the zone of interests unless a statute implicitly or explicitly forbids such suits.

Despite Judge Kavanaugh’s strong concurring opinion in *White Stallion Energy Center*, the D.C. Circuit may decline to clarify its appli-

270 *Lexmark*, 134 S. Ct. at 1389.

271 *Hazardous Waste Treatment Council*, 861 F.2d at 282.

272 42 U.S.C. § 4321 et seq.

273 *Yount v. Salazar*, No. CV11–8171 PCT–DGV, 2014 WL 4904423, at *4–7 (D. Ariz. Sept. 30, 2014).

274 *Id.* at *2–6.

275 *Id.* at *6–7.

276 *White Stallion Energy Center*, 748 F.3d at 1271 (Kavanaugh, J., concurring in part and dissenting in part).

277 *Hazardous Waste Treatment Council*, 861 F.2d at 282.

cation of the zone of interests test in non-APA cases and continue to address the issue on a statute by statute basis. First, the majority in *White Stallion* and the district court in *Yount* both made plausible, if ultimately unconvincing, arguments that the mere economic interests of competitors are not within the zone of interests of at least some environmental statutes.²⁷⁸ Furthermore, lower courts may arguably resist adopting a lenient rule for competitors seeking to establish that they are within the zone of interests because courts frequently invoke standing and zone of interests barriers to dismiss cases that present substantive problems.²⁷⁹ Additionally, clarifying the zone of interests test may be difficult in light of the wide differences in statutory language and individual factual circumstances in each case.²⁸⁰ It is notable that the *Lexmark* decision did not adopt a categorical test for competitor standing, but instead carefully analyzed the facts of the case in light of the Lanham Act's stated purposes and broader zone of interests and proximate causation principles.²⁸¹

However, a future Supreme Court might apply a more liberal approach to interpreting the zone of interests in non-APA competitor suits as it already does in APA cases because the burden of hearing such cases largely falls on the lower courts.²⁸² Furthermore, at least in

278 *White Stallion Energy Center*, 748 F.3d at 1256–58; *Yount*, 2014 WL 4904423.

279 David LaRoss, *Despite Judge's Call, Courts Unlikely To Clarify Key Industry 'Standing' Test*, INSIDEEPA.COM (May 30, 2014), <http://insideepa.com/201405302472576/EPA-Daily-News/Daily-News/despite-judges-call-courts-unlikely-to-clarify-key-industry-standing-test/menu-id-95.html?s=mu> (subscription required) (reporting that an attorney commenting on the *White Stallion Energy Center* decision and the zone of interests issue in that case observed that the D.C. Circuit “see[s] a lot of administrative [law] cases, and they don't want to deal with the merits of them all the time. . . . In a difficult case where they don't want to reach the merits, they can just say ‘let's deal with this on standing.’”). Because of its discretionary certiorari authority to deny review of cases, the Supreme Court usually does not face the same pressure as lower courts to manipulate standing doctrine to avoid deciding cases. Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 125 (2014).

280 See LaRoss, *supra* note 279 (arguing “[f]ederal courts are not likely to clarify the application of the so-called ‘zone of interest’ test that plaintiffs, especially industry plaintiffs, must meet to show standing when they sue over actions by EPA and other agencies” because each case presents unique issues that make it difficult to develop a uniform zone of interests test for industry competitors).

281 *Lexmark*, 134 S. Ct. at 1385 (discussing direct competitor test in Seventh, Ninth, and Tenth Circuits); *id.* at 1389 (“Identifying the interests protected by the Lanham Act, however, requires no guesswork, since the Act includes an ‘unusual, and extraordinarily helpful,’ detailed statement of the statute’s purposes.”); *id.* at 1391–95 (rejecting direct competitor test for broader zone of interests and proximate causation principles in assessing liability under the Lanham Act).

282 While more than 10,000 cases are on the Supreme Court’s docket each year, the Court grants plenary review, with oral arguments by attorneys, in only about 100 cases per term. *The Justices’ Caseload*, Supreme Court of the United States, <http://www.supremecourt.gov/>

environmental cases, there is a strong argument that competitor suits are often “in sync” with the pollution reduction goals of the statute even if a competitor is self-interested.²⁸³ Finally, allowing competitor suits in non-APA cases arguably would not require the Court to explicitly overrule the case by case approach to the zone of interests test in the *Lexmark* decision.²⁸⁴

V. THIRD-PARTY STANDING AND RELATED ISSUES: PRUDENTIAL STANDING OR SOMETHING ELSE?

In *Lexmark*, Justice Scalia acknowledged that “limitations on third-party standing are harder to classify.”²⁸⁵ In a few cases, the Court had “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.”²⁸⁶ However, “most” of the Court’s cases had treated the usual limitation on third-party suits as related to prudential standing.²⁸⁷ Because third-party standing was not an issue in *Lexmark*, Justice Scalia concluded that “consideration of that doctrine’s proper place in the standing firmament can await another day.”²⁸⁸ If he has the same negative views about prudential standing expressed in his 1983 law review article,²⁸⁹ Justice Scalia probably would prefer to see third-party standing limitations treated as “whether a person in the litigant’s position will have a right of action on the claim,” but presumably he could not convince his colleagues to eliminate the last major prong of prudential standing.²⁹⁰

A brief discussion of the reasons for limitations on third-party standing and the exceptions to that doctrine might illuminate at least some of the pitfalls facing the Court if it decides to address the rationale for that doctrine in a future case. In most, but not all cases,

about/justicecaseload.aspx. The Court writes formal written opinions in eighty to ninety cases each year. *Id.* Additionally, the Court disposes of approximately fifty to sixty cases each term without granting plenary review. *Id.*

283 *Hazardous Waste Treatment Council*, 861 F.2d at 282.

284 *See Lexmark*, 134 S. Ct. at 1388–89 (citing precedent to support a case by case approach of determining the “range of interests” encompassed by the zone of interests test).

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

286 *Id.* (internal quotation marks and citations omitted).

287 *Id.* (citing, for example, *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004) and suggesting that the limitation on third-party suits is an element of “prudential standing”).

288 *Id.*

289 Scalia, *supra* note 4, at 885 (criticizing prudential standing doctrine as unnecessary addition to Article III standing principles); Mank, *Judge Posner’s “Practical” Theory of Standing*, *supra* note 1, at 106–07 (discussing Justice Scalia’s 1983 article’s criticism of prudential standing doctrine).

290 *Lexmark*, 134 S. Ct. at 1387 n.3 (internal quotation marks and citations omitted).

the Court has adopted the rule that a party “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”²⁹¹ The Court has explained this rule as assuming that “the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation,” but that third parties are more likely to raise “abstract questions of wide public significance” that are better addressed by “other governmental institutions” than the federal courts.²⁹²

The Court has allowed exceptions to the general limitation on third-party standing in some constitutional cases involving fundamental rights.²⁹³ However, the Court has limited those exceptions “by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a ‘close’ relationship with the person who possesses the right. Second, we have considered whether there is a ‘hindrance’ to the possessor’s ability to protect his own interests.”²⁹⁴ In cases involving First Amendment and other important constitutional rights, the Court has been especially willing to allow third-party suits, but in non-constitutional areas of law, the Court has been much less willing to do so.²⁹⁵

If reclassifying limitations on third-party standing from prudential standing to some other constitutional or non-constitutional test for reviewability changed the underlying substance of which third parties may sue, there would likely be resistance from some members of the Court. For example, if the Court were to change its current preference for allowing third parties to defend First Amendment rights it would arguably be more difficult to find plaintiffs willing to challenge questionable laws restricting free speech rights. In *Secretary of State of Maryland v. Joseph H. Munson Co.*, the Court allowed a fundraising professional to challenge Maryland’s 25% limit on fundraising expenses for charitable organizations on First Amendment grounds despite Maryland’s argument that the affected charities could sue directly rather than rely on the third-party fundraiser.²⁹⁶ The Court

291 *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth*, 422 U.S. at 499, *partially abrogated by Lexmark*, 134 S. Ct. 1377).

292 *Id.* (quoting *Warth*, 422 U.S. at 500, *partially abrogated by Lexmark*, 134 S. Ct. 1377).

293 *Id.* at 129–30; Brandon L. Garrett, *The Constitutional Standing Of Corporations*, 163 U. PA. L. REV. 95, 147–49 (2014).

294 *Kowalski*, 543 U.S. at 130 (citation omitted) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)); *see also* Garrett, *supra* note 294, at 147–49.

295 *Kowalski*, 543 U.S. at 130 (citing several cases).

296 467 U.S. 947, 955–58 (1984).

emphasized the value to public discourse pursuant to the First Amendment rights in allowing a third party to sue:

Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson’s ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake. The crucial issues are whether Munson satisfies the requirement of “injury-in-fact,” and whether it can be expected satisfactorily to frame the issues in the case.²⁹⁷

The Court would be understandably reluctant to reject *Munson’s* rationale for allowing third-party suits and make it more difficult to bring future First Amendment challenges because it reclassified how it characterizes third-party suits from flexible prudential considerations to some other constitutional or non-constitutional grounds that are less flexible in allowing third-party challenges. Similarly, in the controversial area of abortion law, the Court has allowed physicians to sue as third parties on behalf of their patients who seek abortions.²⁹⁸ In the area of racial discrimination and civil rights law, the Court has allowed white plaintiffs to challenge racially restrictive property covenants that exclude black property purchasers²⁹⁹ or the exclusion of blacks from juries.³⁰⁰ In a gender discrimination case, the Court in *Craig v. Boren* held a liquor store owner could challenge a state law that allowed women to purchase low-alcohol beer at age eighteen, but forbade males from purchasing such beer until age twenty-one.³⁰¹ The Court is understandably reluctant to change how it classifies or treats third-party suits without a full understanding of the implications in a wide variety of cases.

²⁹⁷ *Id.* at 958.

²⁹⁸ *Singleton v. Wulff*, 428 U.S. 106, 117–18 (1976) (holding physicians have standing to sue on behalf of their patients for right to an abortion because direct suits by patients might risk public disclosure of their procreation decisions).

²⁹⁹ *Barrows v. Jackson*, 346 U.S. 249, 257–60 (1953) (holding white property owner who was sued for selling his land to an African-American buyer in violation of a racially restrictive covenant can raise defense that the covenant violates the civil rights of the third-party African-American buyer).

³⁰⁰ *Powers*, 499 U.S. at 411–15 (holding white criminal defendant could argue blacks were excluded from his jury in violation of their equal protection rights from allegedly race-based peremptory challenges during juror selection).

³⁰¹ *Craig v. Boren*, 429 U.S. 190, 192–97 (1976) (holding liquor vendor had standing to represent third-party men between the ages of eighteen to twenty to challenge a state law that allowed women to drink 3.2% beer at age eighteen, but forbade males from that beer until age twenty-one, both because the state did not challenge her standing in the lower courts and because she faced significant risk of sanctions, including the possible loss of her liquor sales license, if she sold beer to men between the ages of eighteen through twenty).

A possible solution to the issue of whether third-party suits are appropriate would be to recognize that at least some of the plaintiffs in such cases have a sufficient derivative interest to have a personal and concrete Article III standing injury, but such a rule would work in only some circumstances and not others.³⁰² The Court has already required that third parties seeking to assert the constitutional rights of a first party demonstrate a sufficient injury in fact to themselves from the asserted constitutional injury such as a doctor asserting the constitutional rights of a patient whose practice and professional relationship with that patient would be affected by the denial of the constitutional right.³⁰³ For example, as the Court recognized in *Craig*, the liquor store owner faced significant sanctions, including the potential loss of her liquor license if she sold beer to males between the ages of eighteen to twenty.³⁰⁴ The Court in future cases could expand that rationale to include loss of sales to such men and accordingly recognize that the liquor license holder would suffer an economic injury in fact sufficient for standing in her own right.

However, the Court possibly might prefer to retain the current third-party standing rationale because it focuses more on the constitutional rights lost by the first party whose constitutional rights are arguably being infringed than on economic injuries that primarily affect the third party.³⁰⁵ For instance, there is an argument that corporations should not be allowed to assert third-party standing for fundamental constitutional rights affecting their employees or customers, even if the corporation has an economic interest, because rights such as the right against self-incrimination are inherently individual and should not be delegated to or interfered with by a corporation since the government may prosecute the individual separately from the corporation and sentence the individual to prison if he is convicted.³⁰⁶ The Court arguably could limit or even abolish third-party standing if it took a broader view of when derivative injuries are

³⁰² See *Brown*, *supra* note 33, at 131–32 (suggesting that some third-party suits based on derivative injuries could be recognized as sufficient for personal Article III injury).

³⁰³ See *Garrett*, *supra* note 294, at 148; see also *HomeAway Inc. v. City and County of San Francisco*, 2015 WL 367121, at *6 n.6 (N.D. Cal. Jan. 27, 2015) (“Some cases list a third requirement for prudential third-party standing, that the plaintiff itself has suffered (or will suffer) an injury, *e.g.*, *Powers*, 499 U.S. at 410–11, while others treat that as a separate question of whether the plaintiff has Article III standing, *e.g.*, *Kowalski v. Tesmer*, 543 U.S. [125,] [] 129 [(2004)].”).

³⁰⁴ *Craig*, 429 U.S. at 192–97.

³⁰⁵ See *Kowalski*, 543 U.S. at 129–30 (discussing general limitation of third-party standing to cases involving fundamental constitutional rights); *Garrett*, *supra* note 293, at 147–49 (same).

³⁰⁶ *Garrett*, *supra* note 294, at 148–53.

sufficient for a personal Article III standing injury to sue.³⁰⁷ However, one must acknowledge that third-party rights cases involve a wide range of factual circumstances and that one rule will not fit all cases.³⁰⁸

CONCLUSION

Justice Scalia has partially achieved the goal announced in his 1983 law review article of eliminating prudential standing doctrine because of his view that constitutional Article III standing requirements are the only permissible jurisdictional limitation that can be imposed by the judiciary on suits in federal courts and that any attempt to add additional flexible judicially crafted prudential considerations to bar otherwise constitutional suits raises concerns of judicial activism.³⁰⁹ In other words, if a litigant meets Article III standing requirements, no judicial barrier should stand in the way of his suit, although Congress might limit who may sue.³¹⁰ Accordingly, the *Lexmark* decision's reclassification of the limitation on generalized grievances as arising from Article III constitutional grounds and not prudential considerations is a significant victory for Justice Scalia's theory of standing.³¹¹ However, the Court has not yet explicitly followed Justice Scalia's argument in his concurring opinion in *Hein* that the prohibition against taxpayer suits is a mandatory constitutional barrier.³¹²

Despite Justice Scalia's apparent victory against prudential standing in *Lexmark*, a future Supreme Court changed by retirements and new appointments might revive the prudential implications of the *Flast* decision or overrule its decision in *Arizona Christian School Tuition Organization* without overruling the *Lexmark* decision.³¹³ Moreover, there is still the question of what constitutes a generalized grievance and it is less likely that *Lexmark*'s reclassification of generalized grievances would cause those Justices who were in the majority in

307 See generally Brown, *supra* note 33, at 131–32 (suggesting that some third-party suits based on derivative injuries could be recognized as sufficient for personal Article III injury).

308 Brown, *supra* note 33, at 130–31.

309 See Scalia, *supra* note 4, at 885; see also Mank, *Judge Posner's "Practical" Theory of Standing*, *supra* note 1, at 106–07 (discussing Justice Scalia's 1983 article's criticism of prudential standing doctrine).

310 See Scalia, *supra* note 4, at 885; see also Mank, *Judge Posner's "Practical" Theory of Standing*, *supra* note 1, at 106–07 (discussing Justice Scalia's 1983 article's criticism of prudential standing doctrine).

311 See *supra* Parts II.B, III.A–B.

312 See *supra* Part III.A.

313 *Id.*

Akins or *Massachusetts*, which respectively allowed voter suits and climate change suits despite arguments that such suits were generalized grievances, to agree with Justice Scalia's dissenting opinion in *Akins* or Chief Justice Robert's dissenting opinion in *Massachusetts* to bar standing in similar cases.³¹⁴ Accordingly, the *Lexmark* decision's reclassification of generalized grievances as being generally barred by Article III rather than prudential considerations may have a less significant impact on substantive decisions than Justice Scalia would hope.³¹⁵

Justice Scalia was also successful in reclassifying the zone of interests test as regarding which plaintiffs Congress intends to have the right to sue pursuant to a particular statute rather than a type of prudential consideration.³¹⁶ Because his interpretation of the zone of interests test is flexible and depends upon the specific language of a statute, a future Supreme Court is unlikely to find a need to redefine the test as involving prudential standing because the Court could reach whatever merits conclusion it desired within the confines of Justice Scalia's approach to the test.³¹⁷ However, the Court will confront difficult questions about defining the scope of the test. Even though *Clarke* and other Court decisions take a lenient approach to defining the zone for plaintiffs in APA cases, the D.C. Circuit has often adopted a strict approach to denying competitor standing in non-APA cases, especially in environmental cases.³¹⁸ Despite Judge Kavanaugh's strong concurring opinion in *White Stallion Energy Center*, it remains to be seen whether the en banc D.C. Circuit or the Supreme Court will re-examine cases denying competitor suits in non-APA cases as outside the zone of interests or whether it is possible to adopt a consistent rule at all when the language of each statute varies considerably.³¹⁹ At least in environmental cases, there is a strong argument that competitor suits are frequently "in sync" with the anti-pollution goals of the statute even if the competitor sues only for reasons of self-interest.³²⁰ A future Supreme Court could apply its liberal approach to interpreting the zone of interests in APA cases to at least some competitor suits outside the scope of the APA without overrul-

314 See *supra* Parts III.B–C.

315 See *supra* Part III.

316 See *supra* Parts IV.A–B.

317 See *supra* Parts IV.B.

318 See *supra* Parts IV.C.

319 *Id.*

320 *Id.*

ing the *Lexmark* decision's approach of interpreting each statute according to its particular language.³²¹

Finally, although Justice Scalia conceded that "limitations on third-party standing are harder to classify," that question was not an issue in *Lexmark* and, therefore, the Court did not address the issue.³²² He did point out that some Court decisions had apparently treated the question as a non-prudential issue, but acknowledged that other decisions had addressed the issue as a prudential matter.³²³ While the Court is often strict in denying third-party standing, it has created exceptions in areas such as First Amendment challenges, abortion, and racial or gender discrimination issues.³²⁴ The Court may be reluctant to reclassify the general limitation on third-party suits from prudential in nature to some other constitutional or non-constitutional rule until it more fully understands the implications for its cases that allow third parties to challenge restrictions on free speech, race, gender, or abortions.³²⁵ The Court should not impair fundamental constitutional rights such as free speech to achieve more uniform standing rules that eliminate third-party standing.³²⁶ The Court should strongly consider treating some heretofore derivative third-party injuries such as economic losses as sufficient for a personal and concrete injury for the plaintiff to sue as a first party rather than a third party; however, corporations arguably should not have standing to sue in ways that are detrimental to their employees or customers.³²⁷ Third-party standing cases often involve complicated individual constitutional rights issues that cannot be reduced to a single simple standing rule.³²⁸

Like most important Supreme Court decisions, the *Lexmark* decision's changing of some prudential standing rules and classifications answers some questions, but leaves many for another day. Because there were no concurring opinions in *Lexmark*, it is difficult to know to whether all members of the Court will completely join Justice Scalia's approach in his 1983 law review article of eliminating prudential doctrines and applying only the constitutional Article III standing test in determining justiciability.³²⁹ Perhaps Justice Scalia has won half the

321 See *supra* Parts IV.B–C.

322 *Lexmark*, 134 S. Ct. at 1387 n.3; see *supra* Part V.

323 *Lexmark*, 134 S. Ct. at 1387 n.3; see *supra* Part V.

324 See *supra* Part V.

325 *Id.*

326 *Id.*

327 *Id.*

328 *Id.*

329 See Scalia, *supra* note 4, at 885; see also *supra* Part I.B.2.

battle by at least convincing the Court to reconsider the entire issue of whether federal judges should have prudential authority to dismiss cases where plaintiffs have constitutional standing. Yet because *Lexmark* does not explicitly bar all consideration of prudential factors by federal courts, a future Supreme Court might subtly reject Justice Scalia's strict Article III standing methodology in taxpayer, climate change, third-party, voter rights, or competitor suits without overruling his majority decision.³³⁰

330 See *supra* Parts III and V.