

Last Stand for Prudential Standing? *Lexmark* and Its Implications

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ABSTRACT

In *Lexmark International, Inc. v. Static Control Components, Inc.*, the Supreme Court called into question its “prudential standing” doctrine, a set of self-imposed limits “beyond the constitutional requirements” of Article III that have been “in some tension” with the Court’s “virtually unflagging” obligation to hear any case or controversy that satisfies the requirements of Article III. To ameliorate this tension, the Court in *Lexmark* reclassified two of the three types of prudential standing restrictions it had previously categorized under that rubric. Notably, however, the Court did not say how third-party prudential standing fits into the picture, instead leaving that question for “another day.” Courts and commentators since then have acknowledged that *Lexmark* essentially heralded the end of this rule as well, at least in its current form. In *Starr International*, a recent case before the Federal Circuit, that court applied the third-party prudential standing rule despite acknowledging that the plaintiff had satisfied Article III’s requirements. A pending certiorari petition in that case asks the Court to reverse the Federal Circuit and resolve this lingering issue leftover from *Lexmark*. Whether or not the Court grants certiorari in *Starr International*, at some point the Court will need to resolve the issue left open in *Lexmark*, and when it does this will probably mark the end of prudential standing as we know it. Additionally, if (or when) the Court abrogates prudential standing, it likely will have ripple effects on other self-imposed prudential limitations, as well as other doctrines without clear footing in Article III.

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INTRODUCTION

Article III, Section 2 of the U.S. Constitution gives federal courts jurisdiction over enumerated cases and controversies. Of course, merely affixing the label “case” or “controversy” to a dispute does not give federal courts jurisdiction. Rather, certain elements of a “case” or “controversy” serve to “identify those disputes which are appropriately resolved through the judicial process” as opposed to those disputes that cannot be resolved by federal courts because they do not come within the ambit of Article III.¹ These elements derive from structural, separation of powers considerations, as they demarcate “fundamental limits on federal judicial power in our system of government.”²

One facet of Article III’s case-or-controversy requirement is standing, without which a party is not “entitled to have the court decide the merits of the dispute.”³ The “irreducible constitutional minimum of standing contains three elements.”⁴ First, the party asserting the existing case or controversy “must have suffered an injury in fact,” that is, “an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical.”⁵ Second, “there must be a causal connection between the injury and the conduct complained of”⁶ Third, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”⁷ These serve to ensure that a plaintiff has “such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.”⁸

1. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

2. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

3. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

4. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

5. *Id.* (citations omitted) (internal quotation marks omitted).

6. *Id.*

7. *Id.* at 561 (internal quotation marks omitted).

8. *Warth*, 422 U.S. at 498–99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

“Apart from this minimum constitutional mandate,” the Court “has recognized other limits on the class of persons who may invoke the courts’ decisional and remedial powers.”⁹ In this vein, three specific types of “judicially self-imposed limits” have been recognized: (1) “the general prohibition on a litigant’s raising another person’s legal rights,” (2) “the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches,” and (3) “the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”¹⁰ These judicially self-imposed limits are commonly referred to as prudential standing.¹¹ While “founded in concern about the proper—and properly limited—role of the courts in a democratic society,”¹² these restrictions, when adopted, were recognized as prudential justiciability principles rather than constitutionally-compelled rules.

There is, however, a significant problem with these concededly supra-constitutional self-imposed restrictions.¹³ The problem is that, “[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction”¹⁴ The Court has repeatedly recognized that federal courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”¹⁵ Chief Justice Marshall called either avenue “treason to the constitution.”¹⁶ This rule—the “*Cohens* rule,” for short—“is a time-honored maxim of the Anglo-American common-law tradition.”¹⁷ Yet the self-imposed doctrine of prudential standing flies in the face of this rule.

9. *Id.* at 499.

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

11. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 163 (1997).

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

13. *Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474 (1982).

14. *Wilcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) (citation omitted).

15. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also* *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (mentioning “the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them”). As Chief Justice Marshall said, “[i]t is emphatically the province *and duty* of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

16. *Cohens*, 19 U.S. (6 Wheat.) at 404.

17. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496–97 (1971). Professor Shapiro called this proposition into question, arguing that “these suggestions of an overriding obligation . . . are far too grudging in their recognition of judicial discretion in matters of jurisdiction,” which “has ancient and honorable roots at common law as well as in equity.” David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985). This Article does not undertake the task of defending the *Cohens* rule on originalist grounds or explaining its proper application in light of the traditional understanding of jurisdiction and the judicial power; instead, this Article assumes the validity of the *Cohens* rule on these grounds for purposes of the following analysis.

Certainly, Professor Shapiro was justified to “wonder about Chief Justice Marshall’s accusation of treason” in light of “the remarkable variety of instances in which the federal courts exercise discretion in matters of jurisdiction.” *Id.* at 570. In *Wyandotte* alone, for instance, immediately after citing *Cohens*, the Court said, “Nevertheless, although it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that

Recently, the Court has evinced some cognitive dissonance regarding these two incongruent propositions. In *Lexmark International, Inc. v. Static Control Components, Inc.*, for instance, a unanimous Court deemed the label prudential standing to be misleading.¹⁸ It then “clarif[ied] the nature of the question at issue,” rejecting Lexmark’s argument “that we should decline to adjudicate Static Control’s claim on grounds that are ‘prudential,’ rather than constitutional.”¹⁹ This was because that “request is in some tension with our recent reaffirmation of the principle that ‘a federal court’s obligation to hear and decides’ cases within its jurisdiction ‘is virtually unflagging.’”²⁰

To ameliorate this tension, the Court in footnote three of *Lexmark* reclassified the generalized-grievances and zone-of-interests facets of prudential standing.²¹ Notably, however, the Court observed that “[t]he limitations on third-party standing are harder to classify.”²² Because that case did “not present any issue of third-party standing,” the Court concluded that “consideration of that doctrine’s proper place in the standing firmament can await another day.”²³

A recent certiorari petition in *Starr International* out of the Federal Circuit may give the Court the chance to hash out this leftover issue.²⁴ That petition asks the Court to decide “[w]hether a private party with Article III standing may be barred from asserting constitutional claims for money damages against the federal Government because of the equitable doctrine of ‘third-party prudential standing.’”²⁵

Whether or not this case proves to be the vehicle for the Court to answer this question, at some point it will need to resolve this tension once and for all. This Article explores this tension by explaining how the Court has attempted to resolve it, by discussing what the Court might do in the wake of *Lexmark* and in response to the certiorari petition in *Starr International*, and by identifying likely implications should the Court decide to abrogate the “self-imposed”

changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another, even though the dispute may be one over which this Court does have original jurisdiction.” *Wyandotte Chems. Corp.*, 401 U.S. at 497. See also *Colo. River Water Conservation Dist.*, 424 U.S. at 818 (noting that a court may, in “exceptional” circumstances, decline jurisdiction “for reasons of judicial administration,” despite citing *Cohens* immediately beforehand for the proposition that federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them”).

18. 134 S. Ct. 1377, 1386 (2014).

19. *Id.*

20. *Id.* (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)).

21. See *id.* at 1387 n.3.

22. *Id.*

23. *Id.*

24. Petition for a Writ of Certiorari, *Starr Int’l Co. v. United States*, No. 17-540 (Oct. 6, 2017), available at <http://www.scotusblog.com/wp-content/uploads/2017/10/17-540-petition.pdf> [<https://perma.cc/3UXK-52MG>] [hereinafter No. 17-540].

25. *Id.* at i.

doctrine of prudential standing in light of the *Cohens* rule.²⁶ In short, if prudence is an inadequate basis to decline jurisdiction, the Court needs to revisit, along with prudential standing, the doctrine of prudential ripeness, the state litigation requirement under the Takings Clause, the political question doctrine, abstention doctrines, and (by inverse implication) even the overbreadth doctrine.

I. “PRUDENTIAL STANDING” IS A MISNOMER”

Part of the problem with the Court’s prudential standing jurisprudence is that “standing” in those cases is not the same thing as “standing” in the Article III sense.²⁷ The tension thus stems, at the very least, from poor labeling.²⁸

For instance, calling the “zone of interests” test a rule of “‘prudential standing’ is a misnomer.”²⁹ After all, whether “the plaintiff came within the ‘zone of interests’” of a statute “has nothing to do with whether there is case or controversy under Article III.”³⁰ Even the label “statutory standing,” while arguably “an improvement over the language of ‘prudential standing,’” still is misleading.³¹ Whether or not a party is within the “zone of interests” “does not implicate . . . the court’s statutory or constitutional *power* to adjudicate the case,”³² whereas the question of a party’s Article III standing does. This test, labeled one of “standing,” is actually a merits question—does the plaintiff have a judicially-cognizable claim under the law invoked?³³ To answer it, courts do not look to their jurisdictional bounds, but rather they “apply traditional principles of statutory interpretation” to determine whether the complaint states a valid cause of action with respect to the law in question.³⁴ If the plaintiff has a viable claim, “a court . . . cannot limit a cause of action that Congress has

26. See Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 DUKE J. CONST. L. & PUB. POL’Y 149, 161 (2014) (“If the federal courts’ jurisdictional obligations are to be truly ‘unflagging,’ a great deal of established doctrine will have to go besides prudential standing.”). Though he does not discuss at length *Lexmark*’s implications for other prudential rules, Professor Young is almost certainly right to note that “a general assault on other prudential doctrines,” as sketched out herein, “would prove considerably more controversial.” *Id.* at 163.

27. See, e.g., Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 278 n.6 (1984) (“Use of the term ‘standing’ to describe the scope of the issues that a litigant may raise can be faulted.”).

28. *Lexmark Int’l*, 134 S. Ct. at 1386.

29. *Ass’n of Battery Recyclers v. EPA*, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J., concurring).

30. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 (1998).

31. *Lexmark Int’l*, 134 S. Ct. at 1387 n.4.

32. *Verizon Md. Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002).

33. *Lexmark Int’l*, 134 S. Ct. at 1387 (“[W]e ask whether Static Control has a cause of action under the statute.”).

34. *Lexmark Int’l*, 134 S. Ct. at 1388. See, e.g., *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523–25 (1991) (“We must inquire, then, as to Congress’ intent in enacting the [Private Express Statutes] in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes.”).

created merely because ‘prudence’ dictates.”³⁵ Thus, upon closer inspection, one aspect of prudential standing has nothing to do with standing at all.

A similar result obtains when one looks more closely at the rule barring adjudication of generalized grievances. It turns out that this “prudential” rule is merely another way of identifying whether a given plaintiff has the “injury-in-fact” required by Article III or whether there exists a judicially-cognizable case or controversy at all. This is why, for example, the Court has held that a plaintiff lacked the requisite injury where it was simply “a grievance . . . ‘suffer[ed] in some indefinite way in common with people generally.’”³⁶ A plaintiff who only raises 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.”³⁷ The prohibition of adjudication of generalized grievances “ensures that courts exercise power that is judicial in nature,” which is what animates the case-or-controversy requirement.³⁸ The whole “gist of the question of standing” is whether a party has “alleged . . . a *personal* stake in the outcome of the controversy”—without that, there simply is no justiciable “case.”³⁹ The prudential prohibition on adjudicating generalized grievances turns out not to be prudential at all, but rather another way of framing the fundamental Article III inquiry.

In *Lexmark*, the Court recognized the foregoing.⁴⁰ But what about the general prohibition on a litigant’s raising another person’s legal rights? The *Lexmark* Court found these “limitations on third-party standing . . . harder to classify.”⁴¹ Prudentially, then, this limitation is still standing.

II. LAST MAN STANDING—THE THIRD-PARTY RULE

For good reason, courts and commentators in the wake of *Lexmark* have read the decision as heralding the end of prudential standing, third-party standing

35. *Lexmark Int’l*, 134 S. Ct. at 1388.

36. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

37. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992). *See, e.g.*, *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (holding that a challenge to the means by which the Nineteenth Amendment was ratified was “not a case within the meaning of . . . Article III” because the plaintiff’s right was the “general right” that was “possessed by every citizen[] to require that the Government be administered according to law and that the public moneys be not wasted”).

38. *Lance v. Coffman*, 549 U.S. 437, 441 (2007) (per curiam). *See also* *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968) (“Embodied in the words ‘cases’ and ‘controversies’ are two complementary but somewhat different limitations . . . in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”).

39. *Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis added).

40. *Lexmark Int’l*, 134 S. Ct. at 1387 n.3.

41. *Id.*

included.⁴² The Court, too, has hinted at as much.⁴³ While the rubric of prudential standing may soon be scrapped, the third-party standing limitation may be salvageable.

In 1912, the Supreme Court announced what, on its face, amounted to a sweeping prohibition on a plaintiff litigating a third party's potential claims. In *Yazoo & Mississippi Valley Railroad Co. v. Jackson Vinegar Co.*,⁴⁴ the Court brushed aside the railway company's facial challenge to a Mississippi state law because, "as applied to cases like the present," the law was constitutional.⁴⁵ The Court dismissed the argument that "if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void in toto."⁴⁶ With respect to the plaintiff's claim, "the statute is valid," and the Court would not "speculate as to how the statute might be applied in other cases."⁴⁷

This strict rule has slackened significantly since that time, such that Henry Monaghan could write in 1984 that the *Yazoo* model had been "substantially eroded, if not completely decentered."⁴⁸ Yet, indisputably, *Marbury*'s recognition that a court's province is to decide discrete controversies between parties is still the law.⁴⁹ Federal courts do not possess freewheeling power to pass on the meaning of statutes, the constitutionality of legislation, the validity of executive or legislative action, or the rights of parties, at least not without the vehicle of an Article III case or controversy between parties to resolve.⁵⁰ Even when an

42. See, e.g., *City of Oakland v. Lynch*, 798 F.3d 1159, 1163 n.1 (9th Cir. 2015) ("[T]he Supreme Court's recent decision in *Lexmark* . . . calls into question the viability of the prudential standing doctrine."); Brian C. Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS. J. 277, 279 (2015) (noting, that in *Lexmark*, the Court "suggested that it might re-examine whether the rule barring assertion of third-party rights is a true matter of judicial 'prudence,' a matter of judicial power under Article III, or a matter concerning the merits of a litigant's claim or defense"); *Standing: Civil Procedure—Lexmark International, Inc. v. Static Control Components, Inc.*, 128 HARV. L. REV. 321, 328 (2014) ("Lexmark has abruptly upended prudential standing doctrine."); S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 132 (2014) ("[I]t is time to write the epilogue for the story of prudential standing.").

43. See *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (avoiding resolution of concerns about "the continuing vitality of the prudential ripeness doctrine," but quoting *Lexmark* to indicate that prudential ripeness, too, is "in some tension" with the *Cohens* rule).

44. 226 U.S. 217 (1912).

45. *Id.* at 219–20.

46. *Id.* at 219.

47. *Id.* at 220.

48. Monaghan, *supra* note 27, at 278. Professor Monaghan went on to observe that "[s]erious problems of legitimacy are raised when the principles governing the power of courts to pass on the constitutionality of statutes are subject to unanalyzed and ungrounded notions of judicial 'discretion,' however 'principled' their content." *Id.* at 278–79.

49. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

50. See *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (cleaned up) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical state of facts."); see also *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) ("[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court . . . Constitutional rights are personal and may not be asserted vicariously."); *Younger v. Harris*, 401 U.S. 37, 52 (1971) (noting that judicial authority "does not

individual brings an overbreadth challenge to a law, tantamount to bringing a third party's claims,⁵¹ the Court has still required⁵² that the plaintiff have some sort of "personal stake in the controversy . . . to confer standing" to permit the plaintiff to "advance the overbreadth argument."⁵³

Accordingly, the Court could opt to analyze the third-party standing question as informing whether the plaintiff has an "injury in fact" with respect to the asserted claim.⁵⁴ This would make the rule not one of prudence, but rather a way of enforcing the constitutional requirements of Article III. So long as a party has a personal, "concrete interest, however small, in the outcome of the litigation,"⁵⁵ the plaintiff would satisfy Article III's requirements, and the Court would have to adjudicate the claim in question, whether or not that plaintiff is "the most effective advocate of the rights at issue."⁵⁶ However, if the plaintiff lacks any "personal stake in the outcome of the lawsuit," such that there is no "actual controversy" between the litigant and the defendant, then the claim is barred by Article III.⁵⁷

Alternatively, the Court could reconceive the rule as categorically different than a standing rule and avoid the potential implications of constitutionalizing the bar to third-party standing.⁵⁸ As the Court has recognized, after all, the third-party prudential standing rule is "closely related to the question whether a

amount to an unlimited power to survey the statute book and pass judgment on laws before the courts are called upon to enforce them"); *Liverpool, N.Y. & Phila. Steamship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (observing that a federal court "has no jurisdiction to pronounce any statute . . . void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies").

51. Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirements*, 48 AM. U. L. REV. 359, 369 (1998) (describing "First Amendment overbreadth doctrine" as an "important exception to the rule barring third-party standing").

52. Not consistently, to be sure. See *infra* Part IV.E. Nevertheless, as a general rule (even under the overbreadth doctrine, as will be discussed), a "personal stake" is necessary under Article III because, otherwise, a decision in a controversy would amount to an advisory opinion, which federal courts are not permitted to give. See *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion . . ."); *Rodos v. Michaelson*, 527 F.2d 582, 584 (1st Cir. 1975) ("Federal courts do not give advisory opinions, or grant relief to persons who fail to demonstrate a 'personal stake in the outcome.'" (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

53. *L. v. Matheson*, 450 U.S. 398, 406 (1981) (quoting *Harris v. McRae*, 448 U.S. 297, 320 (1980)).

54. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

55. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Serv. Emps.*, 567 U.S. 298, 307–08 (2012)) (discussing circumstances where a case is not rendered moot).

56. *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 80 (1978). See Monaghan, *supra* note 27, at 278 ("Few judges or commentators seem inclined to scrutinize the premises of this expanding 'third party standing': So long as he suffers an injury in fact that is both fairly traceable to the challenged statute and likely to be redressable by a favorable judgment, the litigant has standing in the constitutional sense.").

57. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (internal quotation marks omitted).

58. For example, if the Court constitutionalized the prohibition, it would seem to foreclose pure overbreadth challenges in cases where "a defendant's standing . . . does not depend upon whether his own activity is shown to be constitutionally privileged." *Bigelow v. Virginia*, 421 U.S. 809, 815 (1975). But see *infra* Part IV.E (discussing the First Amendment overbreadth doctrine).

person in the litigant's position would have a right of action on the claim."⁵⁹ As such, it sounds similar to the "zone of interests" test that the Court concluded is more properly conceived of as a merits question, not a threshold standing requirement.⁶⁰ In *Lexmark*, Justice Scalia seemed interested in taking the doctrine that direction, but he did not go all the way and do so.⁶¹ Doing so would eliminate this last prong of prudential standing, rendering that category obsolete, by converting this last aspect of prudential standing into a merits question.

One thing is clear: if this third-party standing rule were a true prudential rule not tethered to Article III, then it likely cannot survive *Lexmark*, which undercut the idea that a court can decline jurisdiction on purely discretionary grounds.⁶² If the Court takes the *Cohens* rule seriously and literally,⁶³ then it will need to acknowledge that it "would be treason to the constitution" to "decline the exercise of jurisdiction which is given."⁶⁴ As such, there is no denying that the Court appears poised "to reconsider . . . third-party standing . . . sooner rather than later"⁶⁵—especially since the Court has recently expressed a desire to "bring some discipline" to the use of jurisdictional labels.⁶⁶ Following *Lexmark* and its reemphasis of *Cohens*, either this "prudential standing" rule needs to be integrated into Article III's requirements, it needs to be reclassified, or else it must be abandoned.

59. Warth v. Seldin, 422 U.S. 490, 500 n.12 (1975).

60. See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 (1998) (describing the "zone of interests" test as one which examines whether a "cause of action encompasses a particular plaintiff's claim"); Lea, *supra* note 42, at 281 ("[T]he rule is best understood as going to the merits of a litigant's claim or defense.").

61. See Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?: Lexmark International, Inc. v. Static Control Components, Inc.*, 18 U. PA. J. CONST. L. 213, 257 (2015) (speculating that, in *Lexmark*, Justice Scalia wanted to convert "third-party standing" into this type of test but "he could not convince his colleagues to eliminate the last major prong of prudential standing" in that case); cf. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (criticizing the "bifurcation" between constitutional and prudential standing and asserting that "the Court must always hear the case of a litigant who asserts the violation of a legal right").

62. See Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 874 (2017) ("The charge that judicial prudence undermines democracy achieved the force of law two years ago in *Lexmark* . . .").

63. Cf. Charles Lane, *Take Trump Seriously and Literally*, WASH. POST (Nov. 16, 2016), https://www.washingtonpost.com/opinions/take-trump-seriously-and-literally/2016/11/16/cbdcf2c8-ac25-11e6-8b45-f8e493f06fcd_story.html?utm_term=.8e28dae36913 [<https://perma.cc/WSW8-Q4FM>] ("If they gave Pulitzer Prizes for pithiness, journalist Salena Zito's analytical couplet on the surprise winner of Campaign 2016 would get one. The press took Republican Donald Trump 'literally, but not seriously,' she wrote, whereas Trump's supporters took him 'seriously, but not literally.'").

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

65. Lea, *supra* note 42, at 280.

66. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (discussing the characterization of a 120-day filing deadline to appeal from a benefits determination by the Board of Veterans' Appeals).

III. A *STARR* EMERGES

If this prediction proves true, the Court will soon have the opportunity to reconsider this doctrine. A certiorari petition currently before it may provide the right vehicle for the Court to make the necessary changes. Behold *Starr International Co. v. United States*.⁶⁷

During the economic crisis in the last decade, the government bailed out the insurer AIG, and, in exchange, the government “received a majority stake in AIG’s equity under the loan, which the Government eventually converted into common stock and sold.”⁶⁸ One of AIG’s largest shareholders, Starr International, then sued in the Court of Federal Claims, alleging that the government’s actions were unlawful as they amounted to an illegal exaction and a Fifth Amendment taking.⁶⁹ The Court of Federal Claims agreed in part, concluding that the government’s actions amounted to an illegal exaction, and the government appealed, asserting that Starr International lacked standing to raise these claims.⁷⁰ The Federal Circuit, in turn, agreed with the government.⁷¹ Although it acknowledged that Starr International had “satisfied the requirements of constitutional standing derived from Article III,” the court nevertheless held that Starr International was barred from pursuing its claim thanks to the “prudential” doctrine of third-party standing.⁷² In a one-sentence footnote, the court addressed the implications of *Lexmark*, noting that the Court there “shed the ‘prudential’ label for certain other requirements of standing but did not expressly do so for the principle of third-party standing.”⁷³

Starr International appealed this decision. Adding to its already formidable slate of advocates,⁷⁴ Starr International brought in former Solicitor General Paul Clement to help write the petition. The petition has only one Question Presented: “Whether a private party with Article III standing may be barred from asserting constitutional claims for money damages against the federal Government because of the equitable doctrine of ‘third-party prudential standing.’”⁷⁵

In its petition, Starr International argues that, “[a]lthough the *Lexmark* Court did not definitively resolve how to classify third-party standing, the Court’s reasoning makes plain that third-party standing *cannot* survive as a ‘prudential’ doctrine.”⁷⁶ In order for “the third-party standing doctrine . . . to survive as a standing doctrine, as opposed to a merits doctrine or something else, it will need

67. No. 17-540, *supra* note 24; see Matthew 2:9 (ESV).

68. *Starr Int’l Co. v. United States*, 856 F.3d 953, 957 (Fed. Cir. 2017).

69. *Id.* at 957, 961.

70. *Id.* at 957, 962.

71. *Id.* at 957.

72. *Id.* at 964–65.

73. *Id.* at 965 n.18.

74. Starr International was represented by Supreme Court regular David Boies and former Solicitor General Charles Fried, among others, before the Federal Circuit. See *id.* at 956.

75. No. 17-540, *supra* note 24, at *i*.

76. *Id.* at 23.

to be justified in terms of Article III's constitutional minima."⁷⁷ According to *Starr International*, regardless of how the Court ultimately resolves this issue, "one thing that is clear after *Lexmark* is that a party with conceded Article III standing should not be barred from the courthouse based on vague prudential or equitable factors."⁷⁸

As discussed above, it is hard to see how *Starr International* is wrong, but, at the very least, given *Lexmark*, the Court needs to resolve this issue. If the Court has been looking for "another day" to come,⁷⁹ *Starr International* may be its chance.

IV. DOMINO EFFECTS

If the Court abrogates prudential standing on the basis that a federal court cannot decline to hear a case otherwise within its jurisdiction on discretionary or prudential grounds, ripple effects will likely emanate from that holding. Notwithstanding what some have deemed to be a "judicial resurgence" of the *Cohens* rule, "self-imposed limits on federal judicial power are rather common."⁸⁰ Prudential ripeness, the state-litigation requirement under the Takings Clause, aspects of the political question doctrine, and abstention are all examples of such self-imposed limits.⁸¹ These other self-imposed rules and prudential doctrines may need to be reexamined, depending on how the Court resolves the issue of third-party prudential standing.⁸²

A. Ripeness

One such rule is ripeness. When applying ripeness, courts essentially conclude that some cases are better left undecided than resolved prematurely. For instance, if a claim "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all,'" then that "claim is not ripe for adjudication," and a court may decline jurisdiction.⁸³ This rule is ostensibly drawn "both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."⁸⁴ It allows federal courts to evaluate both "the fitness of the issues for judicial decision" as well as "the

77. *Id.*

78. *Id.*

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

80. Smith, *supra* note 62, at 853.

81. The overbreadth doctrine is a self-imposed expansion rather than a self-imposed restriction, but it still reflects a deviation from the *Cohens* rule, albeit in the opposite direction from these restrictions. Nevertheless, given its relation to the third-party standing rule and the confusion surrounding the doctrine, it is discussed herein as well. *See infra* Part IV.E.

82. Hard as it may be to believe about pretty much any given subject within legal academia, it appears that "discussions about self-imposed limits as a topic in and of itself" are "rare." Smith, *supra* note 62, at 870.

83. *Texas v. United States*, 523 U.S. 296, 300 (1998).

84. *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 58 n.18 (1993); *see generally* *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

hardship to the parties of withholding court consideration.”⁸⁵ According to the Court, “even in a case raising only prudential concerns, the question of ripeness may be considered on a court’s own motion.”⁸⁶

Following *Lexmark*, that last proposition appears doubtful. In a case decided shortly after *Lexmark*, the Court reversed the Sixth Circuit for holding that the petitioners’ claims were not justiciable because they were “not ripe for review.”⁸⁷ The Court, once again unanimous, rejected the view that the Susan B. Anthony List—a pro-life advocacy group that sought to display a billboard opposing then-Congressman Steve Driehaus’s reelection campaign because he “voted FOR taxpayer-funded abortion”—had not satisfied the requirements of “prudential ripeness” in seeking to challenge a state law that prohibited “false statements” “during the course of any campaign for nomination or election to public office.”⁸⁸ The Court disapproved the Sixth Circuit’s reliance on “prudential ripeness” to hold the claim nonjusticiable and rejected the invitation to do so: “[W]e have already concluded that petitioners have alleged a sufficient Article III injury,” and “[t]o the extent respondents would have us deem petitioners’ claims nonjusticiable on grounds that are prudential, rather than constitutional, that request is in some tension with our recent reaffirmation of the principle that a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging.”⁸⁹ The Court, however, did not need to “resolve the continuing vitality of the prudential ripeness doctrine . . . because the ‘fitness’ and ‘hardship’ factors are easily satisfied here.”⁹⁰ Nevertheless, the Court’s disapproval of prudential ripeness here does not bode well for the enduring vitality of “prudential ripeness.”⁹¹

There appears a simple way out of the thicket for the Court. Article III already requires that “those who seek to invoke the power of federal courts must allege an actual case or controversy” before federal courts may exercise jurisdic-

85. *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003).

86. *Id.*

87. *Susan B. Anthony List v. Driehaus*, 525 F. App’x 415, 423 (6th Cir. 2013).

88. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338–39, 2347 (2014). Driehaus had threatened legal action and filed a complaint with a state commission, alleging the law had been violated. *Id.* at 2339. The Sixth Circuit concluded, however, that the case was not ripe because Driehaus had lost the election, had withdrawn the complaint, and had taken “a 2-year assignment with the Peace Corps in Africa,” so “it was speculative whether any person would file a complaint with the Commission in the future.” *Id.* at 2340–41.

89. *Id.* at 2347 (cleaned up).

90. *Id.*

91. *See Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 539 n.3 (3d Cir. 2017) (“In *SBA List*, the Supreme Court . . . suggested that the prudential components of ripeness may no longer be a valid basis to find a case nonjusticiable.”); *Miller v. City of Wickliffe*, 852 F.3d 497, 503 n.2 (6th Cir. 2017) (“Given the Supreme Court’s questioning of the continued vitality of the prudential-standing doctrine . . . we are hesitant to ground our decision in prudential-standing principles.”); *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, No. C11-2043JLR, 2014 U.S. Dist. LEXIS 98963, at *30 (W.D. Wash. July 21, 2014) (“The Supreme Court recently called into question the continued viability of the prudential ripeness doctrine.”).

tion over a dispute.⁹² To have that, a plaintiff needs the requisite “Article III injury,”⁹³ that is, Article III standing.⁹⁴ Like standing, the Court has recognized that ripeness also “originate[s] in Article III’s ‘case’ or ‘controversy’ language.”⁹⁵ Thus, it may be that “the Article III standing and ripeness issues . . . ‘boil down to the same question’” in *every* case.⁹⁶ Whether an issue is “fit” for judicial review or whether a party might experience “hardship” from delaying judicial review, it turns out, sounds like a different way of asking whether a plaintiff has an injury that is “concrete and particularized,” as well as “actual or imminent” or “certainly impending.”⁹⁷ Courts and commentators have reasoned similarly.⁹⁸

Given the Court’s awareness of *Lexmark*’s implications for this rule, this seems likely to be the next doctrine ripe for reconsideration. But there are more.

B. Takings and the State-Litigation Requirement

The Fifth Amendment guarantees that “private property [shall not] be taken for public use, without just compensation.”⁹⁹ This clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁰⁰ Understood initially to apply only to the federal government,¹⁰¹ the Court later construed the Fourteenth Amendment’s due process of law clause to require compensation if a state were to take “private property for public use” as well.¹⁰²

Being rooted in both the Fifth and Fourteenth Amendments, then, a Takings Clause claim quite clearly “aris[es] under” the Constitution, meaning that the judicial power of federal courts extends to such cases.¹⁰³ If “a federal court’s

92. *O’Shea v. Littleton*, 414 U.S. 488, 493 (1974).

93. *Driehaus*, 134 S. Ct. at 2342.

94. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

95. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

96. *Driehaus*, 134 S. Ct. at 2341 n.5 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)). See F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635, 636, 641 (2016) (footnote omitted) (“In several recent decisions, the Supreme Court has stated that Article III’s ripeness requirement is redundant with the Article III requirement of imminent injury for standing Although standing is not in its nature a timing rule, the Court has held that, to establish standing in cases seeking prospective relief to prevent future injuries, a plaintiff must make the same showing as is required for ripeness. Both doctrines thus pose the same inquiry.”).

97. *Lujan*, 504 U.S. at 560; *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013).

98. See, e.g., *Campaign for Accountability v. U.S. Dep’t of Justice*, No. 16-cv-1068 (KBJ), 2017 U.S. Dist. LEXIS 165980, at *35 (D.D.C. Oct. 6, 2017) (“[T]o this Court’s eye, a true prudential ‘ripeness’ defect has a remarkably different appearance. It occurs, generally speaking, when the alleged *wrong* is insufficiently concrete . . . to be capable of legal evaluation, without regard to how the plaintiff’s complaint characterizes it.”); 13A C.A. Wright, A.R. Miller & E.H. Cooper, *Federal Practice & Procedure* § 3531.12, at 50 (2d ed. 1984) (“Ripeness and mootness easily could be seen as the time dimensions of standing.”).

99. U.S. CONST. amend. V.

100. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

101. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247–48 (1833).

102. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

103. U.S. CONST. art. III, § 2.

obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging,'" logic dictates that would apply to takings claims within its jurisdiction as well.¹⁰⁴ However, the Court has erected "prudential hurdles" to plaintiffs seeking to bring a takings claim "against a state entity in federal court."¹⁰⁵

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Court held that, where "a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."¹⁰⁶ The Court later justified this rule by reasoning that "state courts undoubtedly have more experience than federal courts do" in addressing takings claims.¹⁰⁷

In *Suitem*, for instance, it was assumed that the plaintiff satisfied Article III's requirements to bring a takings claim; the question was whether that the "action fails to satisfy our prudential ripeness requirements."¹⁰⁸ In *Horne*, the Court acknowledged that the *Williamson* rule is "not, strictly speaking, jurisdictional."¹⁰⁹ In fact, the Court in *Horne* acknowledged that "[a] 'Case' or 'Controversy' exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court."¹¹⁰ This rule is "merely a prudential requirement."¹¹¹

Therein lies the problem. As has been discussed, how can a Court with a "virtually unflagging" obligation to hear cases and controversies craft prudential barriers to avoid this ostensible obligation and deny litigants the right to have their cause heard?¹¹² Federal courts "are bound to proceed to judgment and to

104. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Sprint Commc'ns, Inc v. Jacobs*, 134 S. Ct. 584, 591 (2013)).

105. *Suitem v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733–34 (1997).

106. 473 U.S. 172, 195 (1985).

107. *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 347 (2005).

108. *Suitem*, 520 U.S. at 733 n.7. *See also* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1013 (1992) (observing that the existence of an alternate, state-based remedy for a takings claim "goes only to the prudential 'ripeness' of Lucas's challenge").

109. *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 (2013) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1013 (1992), and *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 & n.10 (2010)).

110. *Id.* at 2062 n.6.

111. *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring in the judgment). *See also* *Knick v. Twp. of Scott*, 862 F.3d 310, 323 (3d Cir. 2017) (describing the "two prudential requirements set forth in . . . *Williamson County*"); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013) ("Because *Williamson County* is a prudential rather than a jurisdictional rule, we may determine that in some instances, the rule should not apply and we still have the power to decide the case."); *Guggenheim v. City of Goleta*, 582 F.3d 996, 1008–09 (9th Cir. 2009) ("[T]he Court has explicitly held that the *Williamson* requirements are merely prudential requirements As *Lucas* clearly illustrates, some takings cases will have indisputably satisfied Article III jurisdictional requirements but will have failed to satisfy *Williamson* prudential requirements."); *Peters v. Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) ("*Williamson County*'s ripeness requirements are prudential in nature.>").

112. *See* Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirements for Regulatory Takings Claims*, 85 TEX. L. REV. 199, 225–26 (2006) (characterizing *Williamson County* as "judicially developed jurisdiction

afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.”¹¹³ A plaintiff’s right “to choose a Federal court where there is a choice cannot be properly denied.”¹¹⁴ This is true all the more so in this context, since not only is the *Williamson* requirement a prudential hurdle above and beyond Article III, but it also has the effect, in a significant number of cases, of completely depriving plaintiffs of a federal forum for a cause of action arising under the Federal Constitution.¹¹⁵

How is it that the Court feels it may create exceptions to the Article III jurisdiction of federal courts, but it cannot “create an exception to the full faith and credit statute . . . in order to provide a federal forum for litigants who seek to advance federal takings claims”?¹¹⁶ Under the Court’s jurisprudence, federal courts are free to disregard their “virtually unflagging” obligation to hear cases and controversies properly before them, but these same federal courts “are not free to disregard” a congressional statute in the name of trying “to guarantee that all takings plaintiffs can have their day in federal court.”¹¹⁷ No doubt, then, that this state-litigation requirement “has created some real anomalies”—anomalies significant enough that four justices in *San Remo Hotel* wanted to “revisit[] the issue” then.¹¹⁸ If the Court revisits other “prudential hurdles” it has raised, then this state-litigation rule, not compelled by “either constitutional or prudential principles,”¹¹⁹ will need to be reconsidered as well.¹²⁰

stripping” before arguing, “in accordance with Chief Justice Marshall’s opinion in *Cohens v. Virginia*, that the Court should simply not engage in any judicial jurisdiction stripping as it violates the separation of powers”).

113. *Chicot Cty. v. Sherwood*, 148 U.S. 529, 534 (1893).

114. *Wilcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909).

115. *See, e.g., San Remo Hotel*, 545 U.S. at 327 (recounting petitioners’ argument that the combination of *Williamson County* and statutory full faith and credit [28 U.S.C. § 1738] force plaintiffs “to litigate their claims in state court without any realistic possibility of ever obtaining review in a federal forum”); *id.* at 352 (Rehnquist, C.J., concurring in the judgment) (observing that “the justifications for [*Williamson County*’s] state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic”); *see also Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130 (2d Cir. 2003), *overruled in part by San Remo Hotel*, 545 U.S. 323 (“It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded Santini from ever bringing a Fifth Amendment takings claim.”).

116. *San Remo Hotel*, 545 U.S. at 337–38. *See also id.* at 344 (dismissing the idea “that courts may simply create exceptions to 28 U.S.C. § 1738 wherever courts deem them appropriate”).

117. *Id.* at 338.

118. *Id.* at 351 (Rehnquist, C.J., concurring in the judgment).

119. *Id.* at 349.

120. *See Katherine Mims Crocker, Justifying a Prudential Solution to the Williamson County Ripeness Puzzle*, 49 GA. L. REV. 163, 175 (2014) (“[T]he Supreme Court has quite recently thrown some quantity of cold water on the propriety of prudential ripeness (and, indeed, all prudential justifiability [sic] doctrines).”).

C. *The Political Question Doctrine*

The political question doctrine is, in part, a judicially self-imposed rule not to hear cases when they raise certain issues involving other branches of government. The canonical formulation of the doctrine comes from *Baker v. Carr*:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹²¹

Since then, courts and jurists have emphasized the importance of the prudential aspects of the doctrine. Justice Powell, concurring in *Goldwater v. Carter*, recognized that “the political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government.”¹²² The courts of appeals have echoed this refrain.¹²³ The trouble is, if the Court has an obligation to hear an Article III case or controversy before it, then it cannot decline to adjudicate the case because it might entangle the Court in political turmoil, no matter what prudence might suggest to the contrary.¹²⁴ It is no wonder, then, that courts and commentators alike “have found” the doctrine “an impenetrable thicket.”¹²⁵

121. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

122. *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring).

123. *In re Grand Jury Subpoenas*, 871 F.3d 141, 147 (2d Cir. 2017) (“The political question doctrine is prudential in that it implicates the exercise of jurisdiction rather than the question of whether jurisdiction exists.”); *Lin v. United States*, 561 F.3d 502, 506 (D.C. Cir. 2009) (citation omitted) (“The political question doctrine deprives federal courts of jurisdiction, based on prudential concerns, over cases which would normally fall within their purview. We do not disagree . . . that we *could* resolve this case . . . we merely decline to do so as this case presents a political question”); *Schroder v. Bush*, 263 F.3d 1169, 1173 (10th Cir. 2001) (“Prudence, as well as separation-of-powers concerns, counsels courts to decline to hear ‘political questions.’”); *Hopson v. Kreps*, 622 F.2d 1375, 1378 n.3 (9th Cir. 1980) (“It is difficult to reconcile the cases refusing to decide various issues . . . without acknowledging that the [political question] doctrine reflects prudential and functional concerns as well as Article III limitations on the use of judicial power.”).

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

125. *Massachusetts v. Laird*, 451 F.2d 26, 29 (1st Cir. 1971).

In 2012, the Court in *Zivotofsky* hinted at harmonizing these propositions by describing the doctrine as “a narrow exception” to the rule that “the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’”¹²⁶ Though not an explicit repudiation of the prudential prongs of the political question doctrine, some commentators have fairly read this pronouncement to be as much.¹²⁷ A clear-cut decision that ends prudential standing for being contrary to the *Cohens* rule would further reinforce this view.

If this happens, it will likely force the prudential aspects of *Baker* to fall unequivocally. After all, the doctrine is “essentially a function of the separation of powers,”¹²⁸ much like Article III’s case-or-controversy requirement,¹²⁹ and the comparable concerns animating these doctrines suggest that similar analyses should apply to them.¹³⁰ Furthermore, the Court has recognized that the political question doctrine, like standing, derives from Article III’s case-or-controversy requirement.¹³¹ Abandoning the prudential aspects of the political question doctrine follows logically from abandoning prudential components of standing generally.

At least three, though perhaps four,¹³² of the six *Baker* prongs for determining what cases raise a “political question” are rooted in purely prudential considerations.¹³³ First, there does not appear to be any mooring in the text of

126. *Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

127. See, e.g., Carol Szurkowski, *Recent Development: The Return of the Classical Political Question Doctrine in Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), 37 HARV. J.L. & PUB. POL’Y 347, 348 (2014) (“[S]ince *Baker*, the Supreme Court has retreated from the prudential political question doctrine, while lower federal courts, particularly in cases implicating foreign affairs powers, have increased its use. The Court seized the opportunity presented by *Zivotofsky* to reassert the classical, pre-*Baker* interpretation of the political question doctrine, implicitly but conspicuously disavowing the prudential theory even in foreign affairs cases. *Zivotofsky* thus displaces *Baker*’s six-factor test and substitutes classical political question analysis in its place.”). But see Samantha Goldstein, *The Real Meaning of Zivotofsky and Its Impact on Targeted Killings Cases*, 2 NAT’L SEC. L.J. 147, 148 (2014) (“*Zivotofsky* is probably not a meaningful jurisprudential move on this score.”).

128. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

129. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

130. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (noting that both standing and the political question doctrine are subspecies of justiciability limitations on courts). Compare *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (noting that, without prudential standing, “the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions”), with *Baker*, 369 U.S. at 217 (stating that “one . . . formulation[]” of the political question doctrine is where a court would be forced to make “an initial policy determination of a kind clearly for nonjudicial discretion”).

131. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). The Court in *Cuno* went on to refer to political questions as “issues [federal courts] would not otherwise be authorized to decide.” *Id.* at 353 (emphasis added).

132. See *Lamont v. Woods*, 948 F.2d 825, 833 n.6 (2d Cir. 1991) (identifying in *Baker* “four prudential considerations incorporated in the political question doctrine”); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1513 (D.C. Cir. 1984) (“*Baker v. Carr* identifies four circumstances in which prudential considerations may bar adjudication of a claim.”).

133. See *Zivotofsky v. Clinton*, 566 U.S. 189, 204 (2012) (Sotomayor, J., concurring) (“The final three *Baker* factors address circumstances in which prudence may counsel against a court’s resolution

the Constitution for the notion that the Court could turn away an Article III case or controversy any time judicial resolution would result merely in “expressing lack of the respect due coordinate branches of government.”¹³⁴ Second, whether or not there may be “an unusual need for unquestioning adherence to a political decision already made,”¹³⁵ such need does not alleviate federal courts of their constitutional “duty . . . to say what the law is.”¹³⁶ Finally, whatever one thinks about “the potentiality of embarrassment from multifarious pronouncements by various departments on one question,”¹³⁷ the existence of “multifarious pronouncements” has not deterred federal courts from entering the fray and adding to the mix.¹³⁸ These three prudential considerations cannot (peaceably) coexist

of an issue presented.”); *see also* *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring in the judgment) (observing that the political question doctrine stems “in large part from prudential concerns about the respect we owe the political departments”).

134. *Baker*, 369 U.S. at 217. Some might contend that this is a logical application of the Constitution’s structure or is implicit in the concept of “judicial power.” *See, e.g., Zivotofsky*, 566 U.S. at 206 (Sotomayor, J., concurring) (“When such unusual cases arise, abstention accommodates considerations inherent in the separation of powers and the limitations envisioned by Article III, which conferred authority to federal courts against a common-law backdrop that recognized the propriety of abstention in exceptional cases.”); *cf. Troxel v. Granville*, 530 U.S. 57, 91–93 (2000) (Scalia, J., dissenting) (articulating a restrained view of judicial power).

However, the text explicitly commits the judicial power to the Court, and that power extends to all cases and controversies without providing an “out” for particularly thorny cases. The behavior of the Supreme Court confirms as much. After all, one is hard-pressed to imagine cases fraught with more political complications than ones that the Court has taken up involving national healthcare regimes, enemy combatants in wartime, presidential elections, political gerrymandering, abortion, endemic racial segregation, national economic recovery programs, and slavery. *See Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Bush v. Gore*, 531 U.S. 98 (2000); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). The Court addressed all these either by explicitly rejecting the contention that the case raised a political question or “without suggesting that they might raise political questions.” *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990). Indeed, *Marbury* itself was an incredibly “delicate” case involving serious political questions, but as Chief Justice Marshall declared, the Court could not shirk from its “duty . . . to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169, 177 (1803).

135. *Baker*, 369 U.S. at 217.

136. *Marbury*, 5 U.S. (1 Cranch) at 169, 177. Rather, for better or worse, such a situation might affect how disposition on the merits should proceed, but it should not be treated as a jurisdictional issue. *See, e.g., Ex parte Quirin*, 317 U.S. 1 (1942) (affirming denial of the habeas petitions of German saboteurs, per curiam on July 31, 1942, three days before their execution, with the full opinion released October 29, 1942); *see also* William G. Hyland Jr., *Law v. National Security: When Lawyers Make Terrorism Policy*, 7 RICH. J. GLOBAL L. & BUS. 247, 281–82 (2008) (noting that six of the eight defendants in *Quirin* were executed in early August 1942).

137. *Baker*, 369 U.S. at 217.

138. *See* Pamela Wolf, *DOJ and EEOC Battle in the Second Circuit over Sexual Orientation Discrimination*, EMP. LAW DAILY (July 27, 2017), <http://www.employmentlawdaily.com/index.php/2017/07/27/doj-and-eooc-battle-in-the-second-circuit-over-sexual-orientation-discrimination/> [<https://perma.cc/CJ84-4MUX>] (discussing *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir.), *reh’g en banc granted*, No. 15-3775, 2017 U.S. App. LEXIS 13127 (2d Cir. May 25, 2017)).

Upon closer inspection, in fact, this rationale makes little sense. As the Court recognized in *Chadha*, “since the constitutionality of that statute is for this Court to resolve, there is no possibility of ‘multifarious pronouncements’ on this question.” *INS v. Chadha*, 462 U.S. 919, 942 (1983). Addition-

alongside the recognition that “federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.”¹³⁹

Trying to harmonize these prudential considerations with the judiciary’s duty to exercise its jurisdiction, some have stated that these considerations apply as a “narrow exception” and only when a court “has been asked to conclusively resolve a question that is ‘wholly and indivisibly’ committed by the Constitution to a political branch of government,” but otherwise “a federal court must not abstain from the exercise of jurisdiction that has been conferred.”¹⁴⁰ Others have reasoned that, “[a]lthough prudential considerations may inform a court’s justiciability analysis, the political question doctrine is essentially a constitutional limitation on the courts.”¹⁴¹

Perhaps owing to recent reinvigoration of the *Cohens* rule, the Court already appears well on its way to abandoning *Baker*’s prudential factors. In *Zivotofsky v. Clinton*, for instance, the Court reversed the D.C. Circuit for deeming non-justiciable the question whether the State Department had to follow a law “providing that Americans born in Jerusalem may elect to have ‘Israel’ listed as the place of birth on their passports.”¹⁴² The State Department opted not to follow the statute, and, when sued by an American born in Jerusalem who wanted his birthplace listed as “Israel,” the State Department argued that “the

ally, “it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). Of course, the Court may not infallibly perform these tasks, but it is final with respect to them. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). As such, when it speaks, there can be no risk of “multifarious pronouncements”—at least short of a complete constitutional crisis. *Cf.* Abraham Lincoln, *First Inaugural Address (Mar. 4, 1861)*, reprinted in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES*, S. Doc. No. 101-10, at 139 (1989) (“The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”). How the Court operates in those circumstances should not be controlling in ordinary circumstances. *Cf.* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528–29 (1935) (“Extraordinary conditions may call for extraordinary remedies. But . . . [e]xtraordinary conditions do not create or enlarge constitutional power.”).

139. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989).

140. *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1235 (D.C. Cir. 2009) (Edwards, J., concurring). Judge Edwards went on to quote each of the standards under *Baker*, but he later observed, “the political question doctrine bars judicial review *only* when the precise matter to be decided has been constitutionally committed to the exclusive authority of a political branch of government.” *Id.* at 1236, 1238 (emphasis added). *Cf.* *Nixon v. United States*, 506 U.S. 224, 240 (1993) (White, J., concurring in the judgment) (“[T]he issue in the political question doctrine is *not* whether the constitutional text commits exclusive responsibility for a particular government function to one of the political branches Rather, the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.”).

141. *767 Third Ave. Assocs. v. Consulate Gen. of the Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 164 (2d Cir. 2000) (citing *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972), for the proposition that resolving political questions is “inconsistent with the judicial function under Art. III”). *See also* *Corrie v. Caterpillar*, 503 F.3d 974, 981 (9th Cir. 2007) (noting that, while “the political question doctrine may have a prudential element to its application . . . it is at bottom a jurisdictional limitation imposed on the courts by the Constitution, and not by the judiciary itself”).

142. *Zivotofsky v. Clinton*, 566 U.S. 189, 191, 193–94 (2012).

courts lacked authority to decide the case because it presented a political question.”¹⁴³ The D.C. Circuit agreed.

The Supreme Court, however, did not. Reciting the standard for what constitutes a political question, the Court emphasized that there must be “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it,” and it found neither to be present in this controversy.¹⁴⁴ Noticeably, the Court did not mention the other, prudential types of political questions possible under *Baker*. Justice Sotomayor did in her concurrence,¹⁴⁵ joined in part by Justice Breyer who also mentioned these factors in his lone dissent.¹⁴⁶ While even those defending the prudential aspects of *Baker* acknowledged that “it will be the rare case in which [those] factors alone render a case nonjusticiable,”¹⁴⁷ Justice Breyer felt that *Zivotofsky* was such a case in that there was “serious risk that intervention will bring about ‘embarrassment,’ show lack of ‘respect’ for the other branches, and potentially disrupt sound foreign policy decisionmaking.”¹⁴⁸ The fact that Justice Breyer was unable to persuade any of his colleagues to find a political question based on the prudential grounds he highlights, coupled with the majority’s omission of those factors in its recitation of what constitutes a political question, is telling.

Lest *Zivotofsky* be considered a one-off, a similar result obtained earlier in *Nixon v. United States*.¹⁴⁹ In *Nixon*, the Court held that a challenge to the Senate’s impeachment procedures by a former federal judge was nonjusticiable.¹⁵⁰ Like in *Zivotofsky*, so too in *Nixon*, the majority identified a political question as one in which “there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it,’” without

143. *Id.* at 191.

144. *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

145. *Id.* at 204–08 (Sotomayor, J., concurring) (discussing *Baker*’s prudential factors and noting that “my understanding of the political question doctrine might require a court to engage in further analysis beyond that relied upon by the Court”).

146. *Id.* at 212 (Breyer, J., dissenting). Justice Alito also concurred, acknowledging that “[u]nder our case law, determining the constitutionality of an Act of Congress may present a political question,” but he agreed with the majority that this case did “not constitute a political question that the Judiciary is *unable* to decide.” *Id.* at 211–12 (Alito, J., concurring) (emphasis added).

147. *Id.* at 207 (Sotomayor, J., concurring); *accord id.* at 213 (Breyer, J., dissenting). Indeed, it is the “rare” case. Judge Edwards identified only two cases in which the Court dismissed the matter for “presenting nonjusticiable political questions.” *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1237 (D.C. Cir. 2009) (Edwards, J., concurring). Tellingly, in both of those cases, the Court found an explicit textual commitment of an issue to other branches of the federal government. *See Nixon v. United States*, 506 U.S. 224, 236 (1993) (finding “the textual commitment argument” dispositive, though going on to consider points “[i]n addition to” this one); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“[T]he nature of the questions to be resolved on remand are subjects committed expressly to the political branches of government.”).

148. *Zivotofsky*, 566 U.S. at 220 (Breyer, J., dissenting).

149. 506 U.S. 224 (1993).

150. *Id.* at 226.

mentioning the prudential *Baker* factors.¹⁵¹ The Court did note that, “[i]n addition to the textual commitment argument” it relied upon, the “lack of finality and the difficulty of fashioning relief counsel against justiciability,” especially in view of potential “chaos” resulting from a different holding.¹⁵² But the Court’s holding in *Nixon* was based on the lack of “an identifiable textual limit on the authority which is committed to the Senate,”¹⁵³ and at any rate, the concern over adequate remedy is more properly understood as a core requirement of Article III rather than a prudential consideration.¹⁵⁴ Justice Souter, writing for himself separately, concurred in the judgment to emphasize “the functional nature of the political question doctrine,” which “deriv[es] in large part from prudential concerns about the respect we owe the political departments.”¹⁵⁵ Those concerns merited, at most, a passing and oblique reference by the majority.

Furthermore, the Court elsewhere has dismissed the application of the political question doctrine when only prudential concerns were raised. So, the Court has recognized that “disrespect . . . cannot be sufficient to create a political question.”¹⁵⁶ Saying “what the law is,” either by resolving constitutional disputes or interpreting statutes, is “one of the Judiciary’s characteristic roles,” and it “cannot shirk that responsibility merely because” a “decision may have significant political overtones.”¹⁵⁷ The potential conflict with another branch due to judicial resolution of an issue “in a manner at variance with . . . another branch . . . cannot justify the courts’ avoiding their constitutional responsibility.”¹⁵⁸ Rather, the political question doctrine’s proper application is concerning “those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”¹⁵⁹ This was the sort of limitation Chief Justice Marshall envisioned in *Marbury* when he observed that the “political” acts of the executive and officers of the executive “can never be examinable by

151. *Id.* at 228 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

152. *Id.* at 236.

153. *Id.* at 238.

154. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (observing that redressability is part of “the irreducible constitutional minimum of standing”). *But see* *Zivotofsky v. Clinton*, 566 U.S. 189, 207 n.2 (2012) (Sotomayor, J., concurring) (considering this “chaos” language in *Nixon* an instance where the Court factored in prudential considerations).

155. *Nixon*, 506 U.S. at 252–53 (Souter, J., concurring in the judgment) (citing A. Bickel, *THE LEAST DANGEROUS BRANCH* 125–26 (2d ed. 1986), et al.).

156. *United States v. Munoz-Flores*, 495 U.S. 385, 390 (1990).

157. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). *See also* *INS v. Chadha*, 462 U.S. 919, 943 (1983) (“Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . .”).

158. *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

159. *Japan Whaling Ass’n*, 478 U.S. at 230. Committed *exclusively* for resolution, along with “final responsibility for interpreting the scope and nature of such a power,” one would add. *Nixon*, 506 U.S. at 240 (White, J., concurring in the judgment).

the courts.”¹⁶⁰ Beyond that, “where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy,” no matter how “political” the underlying issue.¹⁶¹

Of course, *Baker* itself points in different directions on this very issue, most clearly demonstrated by the fact that the Court there found a challenge to state legislative reapportionment justiciable¹⁶²—despite the fact that a plurality of the Court had previously found a similar case “beyond its competence,”¹⁶³ and despite the fact that Justice Frankfurter circulated a sixty-page memorandum to his colleagues to convince them of the non-justiciability of the issue in *Baker*.¹⁶⁴ As noted above, the Court in *Baker* articulated a number of essentially prudential “formulations” of the political question doctrine.¹⁶⁵ Yet the Court immediately went on to say that the doctrine “is one of ‘political questions,’ not one of ‘political cases.’ The courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”¹⁶⁶ Rather, for a case to fall under the political question exception, the Court must be convinced of “the impossibility of resolution.”¹⁶⁷ Little surprise, then, that commentators have noted that “[t]he prudential strand of the doctrine cannot be reconciled with the principle, announced . . . in *Cohens v. Virginia*”—the *Baker* opinion itself is internally conflicted on this point.¹⁶⁸

If the Court were to declare that prudential standing must fall to the *Cohens* rule, then it is not hard to see how that might call into question the prudential aspects of the political question doctrine. The Court, in fact, appears to have intuited this already,¹⁶⁹ though it has not yet affirmatively held as much.

D. Abstention

If the Court is going to abandon the pretense that it may decline the exercise of its jurisdiction solely on prudential grounds, does that also threaten “[t]he judge-made doctrine of abstention”¹⁷⁰? In *Younger*, for instance, the Court held that, “in view of the fundamental policy against federal interference with state

160. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

161. *Id.*

162. *Baker v. Carr*, 369 U.S. 186, 237 (1962).

163. *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

164. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1960 (2015).

165. *Baker*, 369 U.S. at 217; see *supra* note 121 and accompanying text.

166. *Baker*, 369 U.S. at 217.

167. *Id.* (emphasis added).

168. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 333–34 (2002).

169. See, e.g., *Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (“In general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’” (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821))).

170. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

criminal prosecutions,” “the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.”¹⁷¹ In *Pullman*, the Court endorsed a principle of “wise discretion,”¹⁷² allowing a federal court to abstain “in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.”¹⁷³ *Burford* laid down the principle that even where “a federal equity court does have jurisdiction,” it nevertheless “may, in its sound discretion . . . refuse to enforce or protect legal rights” in circumstances where federal intervention would cause “[c]onflicts in the interpretation of state law, dangerous to the success of state policies.”¹⁷⁴ And in *Colorado River*, the Court spoke of balancing “the obligation to exercise jurisdiction” with “the combination of factors counselling against that exercise” when another court, be it state or federal, is exercising concurrent jurisdiction over the matter.¹⁷⁵

Yet, much like the doctrines mentioned above, abstention is considered “an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.”¹⁷⁶ It is only in “exceptional circumstances,” for instance, that a federal court may refuse “to decide a case in deference to the States.”¹⁷⁷ “Abstention from the exercise of federal jurisdiction is the exception, not the rule.”¹⁷⁸ The doctrine appears to be yet another prudential, self-imposed rule, rather than one required by Article III.¹⁷⁹

171. *Younger v. Harris*, 401 U.S. 37, 45–46 (1971).

172. *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

173. *Cty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959).

174. *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–18, 334 (1943) (internal quotation marks omitted). As the Court posed the question, “Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?” *Id.* at 318.

175. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976).

Thibodaux abstention is so closely related to these other abstention rules that it is not referenced separately in this Article. Some, however, view *Thibodaux* as a distinct species of abstention. *See, e.g.*, Amy Coney Barrett, *Procedural Common Law*, 94 U. VA. L. REV. 813, 824–25 (2008).

In addition to these four (and a half?) strands of abstention, the *Newdow* Court relied on the fact that the Court “has customarily declined to intervene i[n] the realm of domestic relations” to hold that “it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff’s claimed standing.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 17 (2004). That decision was framed in terms of “prudential standing,” though there was some dispute over how to characterize the holding. *Id.* at 18. Chief Justice Rehnquist observed that “[t]he Court loosely bases this novel prudential standing limitation on . . . the abstention doctrine.” *Id.* at 19 (Rehnquist, C.J., concurring in the judgment). However, the majority denied this. *See id.* at 13 n.5 (majority op.) (“Our holding does not rest, as The Chief Justice suggests, on . . . the abstention doctrine.”). No matter how one characterizes the *Newdow* doctrine—whether a species of prudential standing or of abstention—it too would be in need of review in light of the *Cohens* rule. *But cf. id.* at 25 (Rehnquist, C.J., concurring in the judgment) (characterizing the majority opinion as “good for this day only” and “ad hoc”).

176. *Cty. of Allegheny*, 360 U.S. at 188–89.

177. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989).

178. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

179. *See, e.g.*, *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 351 F.3d 65, 74 (2d Cir. 2003) (“*Younger* is not a jurisdictional bar based on Article III requirements, but instead a prudential

To ease the observable strain here, some commentators have tried to justify these abstention doctrines by way of the text,¹⁸⁰ arguing that “the Supreme Court has crafted the abstention doctrines, or at least some of them, as a continuing exercise in constitutional law, and not merely as prudential limits upon the federal judicial power.”¹⁸¹ The Tenth Amendment may provide a viable basis for certain abstention principles.¹⁸² Furthermore, some forms of abstention could possibly be conceptualized in ways that might insulate it from a *Cohens*-based critique—for example, the Court maintained that *Pullman* abstention “does not . . . involve the abdication of federal jurisdiction, but only the postponement of its exercise.”¹⁸³

Nevertheless, if “federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred,” then this would be true, one would think, even if “comity,” “equity,” or discretion suggest otherwise.¹⁸⁴ Much like the dissent in *Colorado River*, then, one may be befuddled that the Court could simultaneously recognize federal courts’ “virtually unflagging obligation . . . to exercise the jurisdiction given them,” while nevertheless endorsing a rule allowing them to avoid hearing a case or controversy on essentially discretionary or prudential grounds.¹⁸⁵ If the Court sees fit to reconsider how prudential

limitation on the court’s exercise of jurisdiction grounded in equitable considerations of comity.”); *Schneider v. Colegio de Abogados de P.R.*, 187 F.3d 30, 45 (1st Cir. 1999) (Lipez, J., concurring) (“*Pullman* abstention is a discretionary practice of federal courts, premised on both prudential and federalism/comity concerns . . .”); *Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 599 (2d Cir. 1988) (“The *Burford* rule applies in situations where it is prudent for a federal court to refrain from interfering in cases presenting state law issues relating to complex state regulations where the federal court decision may disrupt important state policies.”) Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 156 (1986) (“Despite being clothed in high-sounding phrases and rationales, fourth branch abstention [articulated in *Colorado River*] is ultimately grounded in prudential factors . . .”).

180. Smith, *supra* note 62, at 853 (“[S]ome scholars have advocated treating *Younger* abstention as constitutional rather than prudential . . .”).

181. Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811, 812. *But cf.* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 114 (1984) (“Judge-made abstention constitutes judicial lawmaking of the most sweeping nature . . . In a constitutional democracy . . . such decisions are most appropriately rendered by the legislature, not the judiciary.”).

182. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37, 44 (1971) (characterizing *Younger* as the logical consequence of “Our Federalism”); *see also* George D. Brown, *When Federalism and Separation of Powers Collide—Rethinking Younger Abstention*, 59 GEO. WASH. L. REV. 114, 114 (1990) (describing *Younger* abstention as “the paradigm of a federalism-based restrictive jurisdictional doctrine”); *cf.* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1051 (1994) (footnotes omitted) (“The rationale for any of the many forms of abstention rests on a single amorphous goal: avoiding friction between federal and state courts.”).

183. *Harrison v. NAACP*, 360 U.S. 167, 177 (1959). *See also* *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25, 29 (1959) (reasoning that awaiting a state court judgment on a question of state law “does not constitute abnegation of judicial duty” but rather “is only postponement of decision for its best fruition”). *Cf. supra* Part IV.A (discussing how prudential ripeness is properly understood as a non-discretionary component of Article III standing).

184. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989).

185. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 821 (1976) (Stewart, J., dissenting) (citing *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 415 (1964)).

rules might be squared with Article III, it should revisit its abstention jurisprudence also to assess which of these doctrines can be justified on constitutional, and not merely prudential, grounds.

E. Overbreadth

Much ink has been spilled trying to make sense of the Court's overbreadth doctrine,¹⁸⁶ which allows "[a] litigant whose own activities are unprotected" to "nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court."¹⁸⁷ This is for good reason: on the one hand, the Court has declared that a plaintiff must have some sort of "personal stake in the controversy" in order "to confer standing" to permit that particular plaintiff to "advance the overbreadth argument,"¹⁸⁸ while on the other hand the Court "consistently has permitted 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"¹⁸⁹

However, if the Court continues its *Cohens*-based reconsideration of prudential justiciability doctrines, jettisoning rules that cannot be moored to the language of the text, this should call into question rules or exceptions that the Court has created apparently extending its Article III jurisdiction, such as overbreadth, just as it threatens rules that the Court has created to reduce its Article III jurisdiction. How then can a party without the "constitutional minimum" of a concrete injury in fact to her speech be permitted to pursue redress in federal court for an injury to another's speech?¹⁹⁰

The Court's explanation for this exception does not help if Article III's requirements are to be taken seriously. Ostensibly, the First Amendment overbreadth rule, an acknowledged "exception to the usual rules governing standing," is justified in light of "the transcendent value to all society of constitutionally protected expression."¹⁹¹ This is not, however, an exception unique to the First Amendment: the Court has permitted facial challenges to statutes "to proceed under a diverse array of constitutional provisions," and facial challenges, like overbreadth challenges, require the Court to address whether a given "law is unconstitutional in all of its applications," not just with respect to the present litigant's conduct.¹⁹² No matter how highly one holds each of the rights

186. See Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1251 n.151 (2010) (collecting authorities).

187. *Vill. of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980).

188. *L. v. Matheson*, 450 U.S. 398, 406 (1981) (quoting *Harris v. McRae*, 448 U.S. 297, 320 (1980)).

189. *Bigelow v. Virginia*, 421 U.S. 809, 815–16 (1975) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

190. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

191. *Bigelow*, 421 U.S. at 816 (quoting *Dombrowski*, 380 U.S. at 486).

192. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

guaranteed by the Constitution (as one should), they cannot be of such “transcendent value” to warrant departure from other constitutional requirements.¹⁹³ Even though they may be of transcendent value, there does not appear to be a “transcendence” exception to the case-or-controversy requirement anywhere in the Constitution.

In *The Subjects of the Constitution*, Professor Nicholas Quinn Rosenkranz accounts for the confusion here, and he provides a straightforward way to “solve” the “riddle” of the overbreadth doctrine.¹⁹⁴ In short, the issue is that the first word of the First Amendment has been overlooked: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”¹⁹⁵ Because Congress is the “constitutional culprit” responsible for First Amendment violations,¹⁹⁶ any challenge brought under the Free Speech Clause “must be a ‘facial challenge’” because it is “a challenge to *legislative action*.”¹⁹⁷ If Congress passes a “law . . . abridging the freedom of speech,”¹⁹⁸ then it becomes “the painful duty” of the Court “to say that such an act was not the law of the land.”¹⁹⁹ It is the very act of making such a law that is unconstitutional, and as such “the ‘very existence’ of such ‘laws’” are “cognizable constitutional harms” under the First Amendment.²⁰⁰

Thus, the entire concept of “overbreadth” appears to be a category mistake: another instance, again at the very least, of poor labeling.²⁰¹ It is not an “exception” to Article III’s standing requirement; rather, it is “the application of conventional standing concepts in the First Amendment context.”²⁰² Congress has no power to make laws that violate the First Amendment, and anyone who is subject to that legislative act can challenge it as being “not a law,”²⁰³ “irrespective of the privileged character of his own activity.”²⁰⁴ Upon closer examination through the proper analytical framework, then, this supposed

193. See Rosenkranz, *supra* note 186, at 1252 (“To say that ‘the First Amendment needs breathing space’ is all well and good, but why does free speech require more ‘breathing space’ than any other constitutional right? Conventional wisdom justifies all this with a heady mix of intuition and political philosophy.” (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973))).

194. Rosenkranz, *supra* note 186, at 1250.

195. U.S. CONST. amend. I (emphasis added).

196. Rosenkranz, *supra* note 186, at 1211.

197. *Id.* at 1255.

198. U.S. CONST. amend. I.

199. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

200. Rosenkranz, *supra* note 186, at 1257 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

201. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (remarking that “prudential standing” as a label is “misleading”); see also Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (observing how “the rhetoric accompanying the doctrine” has “obscured” the issue).

202. Monaghan, *supra* note 201, at 3.

203. *Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886) (“An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”).

204. Monaghan, *supra* note 201, at 3.

exception to Article III's "constitutional minimum" is not an exception at all, but the logical conclusion of the phraseology of the First Amendment.²⁰⁵

CONCLUSION

The Court left open a discrete issue in *Lexmark*: how third-party prudential standing fits within the framework of Article III. *Starr International* presents the Court with an opportunity to close the loop. If the Court takes up this issue—which it very well may in *Starr International*, though it seems it needs to at some point, no matter what—it will likely finish what it started in *Lexmark* and abrogate entirely the doctrine of prudential standing, at least as it currently exists. If the Court does so, the ripple effects of that decision are likely to raise further doubts about other prudential aspects of the Court's jurisprudence, calling into question prudential ripeness, the state-litigation requirement in the context of the Takings Clause, the prudential aspects of the political question doctrine, abstention doctrines that cannot be tethered to the text of the Constitution, and even the current conventional wisdom about the overbreadth doctrine. If (or when) the Court grants certiorari to resolve what it left open in *Lexmark*'s footnote three, the real impact of the decision might not be in how the Court answers whether prudential standing can survive *Lexmark*—an answer that seems to be a foregone conclusion, as many have observed—but rather in how widely the Court sweeps in answering that question. Prudential standing may prove to be the proverbial canary in the coal mine.

205. In other words, when an individual is charged under a legislative act that violates the Constitution, the prosecutor is acting *ultra vires* because she is enforcing an act that is not "the supreme Law of the Land" as it was not "made in Pursuance" of the Constitution. U.S. CONST. ART. VI. This is true whether or not the litigant's conduct may be constitutionally proscribed by some other, validly enacted law. See Monaghan, *supra* note 201, at 3 ("[A] litigant has always had the right to be judged in accordance with a constitutionally valid rule of law . . . irrespective of the privileged character of his own activity."). The overbreadth litigant is not asserting the rights of a hypothetical "third party" but rather "is asserting his own right not to be burdened by an unconstitutional rule of law." Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 848 (1970).