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# Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing

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# DISTINCT SOURCES OF LAW AND DISTINCT DOCTRINES: FEDERAL JURISDICTION AND PRUDENTIAL STANDING

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*Abstract:* Federal courts are courts of limited jurisdiction. Their jurisdiction is limited by subject-matter jurisdiction, personal jurisdiction, and, to an uncertain extent, standing. While it is well established that Article III standing is jurisdictional, the federal circuit courts are divided on whether judge-made prudential standing is jurisdictional, and the Supreme Court has not directly weighed in. The jurisdictional status of a doctrine has two important procedural consequences. First, litigants cannot forfeit a defense for lack of jurisdiction, meaning that such a defense can be raised for the first time on appeal. Second, federal courts have a sua sponte obligation to ensure that jurisdiction is proper. This Comment contends that prudential standing should not be considered jurisdictional but that federal courts should nevertheless have the discretion to raise the issue sua sponte. Prudential standing should not be considered jurisdictional because considering a court-created doctrine as jurisdictional violates the basic principle that only the Constitution and Congress hold the power to set federal courts' jurisdiction, because a recent line of Supreme Court cases reinforces that court-created doctrines cannot be jurisdictional, and because prudential standing concerns litigants' lack of rights on the merits, not federal courts' adjudicatory authority. Federal courts, however, should have a discretionary sua sponte ability to raise the issue because prudential standing is an inherently flexible doctrine, and because federal courts raise in their discretion three other non-jurisdictional doctrines—the requirement that habeas corpus petitioners exhaust state remedies, *Pullman* abstention doctrine, and prudential ripeness doctrine—that, like prudential standing, originated as judge-made doctrines designed to protect interests beyond the litigants' individual interests.

## INTRODUCTION

"Jurisdiction," the Supreme Court has warned, "is a word of many, too many, meanings."[1] Accordingly, in a line of more than ten cases over the last decade,[2] the Court has sought to "bring some discipline" to

1. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (internal quotation marks omitted); *see also, e.g.*, City of Arlington, Tex. v. FCC, __U.S.__, 133 S. Ct. 1863, 1979 (2013) (same).

2. *See* Sebelius v. Auburn Reg'l Med. Ctr., __U.S.__, 133 S. Ct. 817, 821 (2013); Gonzalez v. Thaler, __U.S.__, 132 S. Ct. 641, 646 (2012); Henderson *ex rel.* Henderson v. Shinseki, __U.S.__, 131 S. Ct. 1197, 1202 (2011); Morrison v. Nat'l Austl. Bank Ltd., __U.S.__, 130 S. Ct. 2869, 2876–77 (2010); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157 (2010); United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271 (2010) (dictum); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs, 558 U.S. 67, 81–86 (2009); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132–34 (2008); Bowles v. Russell, 551 U.S. 205, 206–07 (2007); Arbaugh v. Y & H Corp., 546 U.S. 500, 514–15 (2006); Eberhart v. United States, 546 U.S. 12, 13 (2005) (per curiam); Kontrick v.

the use of the term.[3] In this line of cases, the Court has refined the analysis concerning when a rule will be considered jurisdictional by distinguishing between jurisdictional rules,[4] on the one hand, and elements of the merits[5] or claim-processing rules,[6] on the other hand.

Despite this Supreme Court case law, a conspicuous jurisdictional question involving standing doctrine remains unresolved. Standing encompasses two distinct doctrines: prudential standing is a judge-made doctrine, while Article III standing derives from the U.S. Constitution.[7] Broadly speaking, both doctrines aim to limit the lawsuits in federal courts to only "real, earnest, and vital controvers[ies],"[8] so as to ensure "the proper—and properly limited—role of the courts in a democratic society."[9] While the Court has clearly established that Article III standing is jurisdictional,[10] the Court has not directly weighed in on whether prudential standing is jurisdictional,[11] and the federal circuits are mired in a "deep and important circuit split" on the issue.[12] Three circuit courts hold that prudential standing is jurisdictional,[13] and seven

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Ryan, 540 U.S. 443, 447 (2004); Scarborough v. Principi, 541 U.S. 401, 413–14 (2004); United States v. Cotton, 535 U.S. 625, 631 (2002).

3. *Henderson*, 131 S. Ct. at 1200.

4. *Id.* at 1202 ("We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction.").

5. *Arbaugh*, 546 U.S. at 503 ("This case concerns the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief.").

6. *Gonzalez*, 132 S. Ct. at 648 ("[W]e have pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not." (internal quotation marks omitted)).

7. *E.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004).

8. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc. 454 U.S. 464, 471 (1982) (quoting Chi. & Grand Trunk R.R. Co. v. Wellman, 143 U.S. 339, 345 (1892)); *see also id.* at 474–75.

9. Warth v. Seldin, 422 U.S. 490, 498 (1975); *see also id.* at 499–500.

10. *E.g.*, United States v. Hays, 515 U.S. 737, 742 (1995).

11. *See infra* Part I.E. *But see* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., __U.S.__, 130 S. Ct. 2592, 2610 (2010).

12. Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 185 (D.C. Cir. 2012) (Kavanaugh, J., dissenting), *reh'g en banc denied*, 704 F.3d 1005 (D.C. Cir. 2013), *cert. denied*, __U.S.__, 133 S. Ct. 2880 (2013). The First, Third, and Eighth Circuits have not yet reached the issue. *See* Lucas v. Jerusalem Café, LLC, 721 F.3d 927, 938–39 (8th Cir. 2013) (recognizing the circuit split but declining to reach a holding on the issue); Lewis v. Alexander, 685 F.3d 325, 340 n.14 (3d Cir. 2012) (same), *cert. denied*, __U.S.__, 133 S. Ct. 933 (2013); UPS Worldwide Forwarding, Inc. v. U.S. Postal Serv., 66 F.3d 621, 626 n.6 (3d Cir. 1995) (same).

13. The Second, Sixth, and D.C. Circuits adopted the minority rule that prudential standing is jurisdictional. *See infra* Part I.D.2.a.

circuit courts hold that it is not.[14]

Rather than a matter of semantics, whether prudential standing is jurisdictional has "considerable practical importance for judges and litigants"[15] because jurisdictional rules alter "the normal operation of our adversarial system."[16] In the normal adversarial system, if a party fails to raise an issue in district court proceedings, the party generally waives the issue on appeal.[17] For jurisdictional issues, by contrast, a party does not waive disputing the issue on appeal by failing to dispute it in proceedings below, and, moreover, federal courts must raise jurisdictional issues sua sponte if jurisdiction is lacking.[18] Because of these "drastic"[19] jurisdictional procedures, litigants may be "disturbingly disarm[ed]"[20] when the issue is raised for the first time on appeal, and "many months of work on the part of the attorneys and the court may be wasted" if jurisdiction is found to be lacking.[21] Despite this potential for waste and unfairness, overriding structure-of-government concerns underlie these jurisdictional procedures: jurisdiction defines the institutional power of federal courts, and ensuring that federal courts only enter judgments within their proper institutional role is simply too fundamental to be waived.[22]

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14. The Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits adopted the majority rule that prudential standing is not jurisdictional. *See infra* Part I.D.2.b. Within the seven circuits with the majority rule, however, the circuits are further divided on whether appellate courts nevertheless have the discretion to raise the issue sua sponte when a party has forfeited the issue. *See infra* Part I.D.2.c.

15. Henderson *ex rel.* Henderson v. Shinseki, __U.S.__, 131 S. Ct. 1197, 1202 (2011).

16. *Id.*; *accord* Sebelius v. Auburn Reg'l Med. Ctr., __U.S.__, 133 S. Ct. 817, 824 (2013).

17. *See* FED. R. CIV. P. 12(h)(2)(C); *see also, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 487 (2008). *See generally* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987).

18. *E.g.*, Gonzales v. Thaler, __U.S.__, 132 S. Ct. 641, 648 (2012); *see also* FED. R. CIV. P. 12(h)(3). The unique procedure associated with jurisdictional status does not attach, however, to personal jurisdiction. *See infra* Part I.B. Nonetheless, in line with the common usage in courts, this Comment refers to the procedure associated with jurisdictional status as being the procedure that attaches to all areas of jurisdiction *except* personal jurisdiction. *See, e.g.*, *Henderson*, 131 S. Ct. at 1202–03 (acknowledging that personal jurisdiction is jurisdictional, yet describing the procedure of "jurisdiction" as being the procedure associated with subject-matter jurisdiction and Article III standing while failing to discuss the different procedure associated with personal jurisdiction).

19. *Henderson*, 131 S. Ct. at 1202.

20. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824.

21. *Henderson*, 131 S. Ct. at 1202.

22. 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD FREER, FEDERAL PRACTICE AND PROCEDURE § 3522, at 120–21 (3d ed. 2008); *see also, e.g.*, Anderson v. H&R Block, Inc., 287 F.3d 1038, 1041 (11th Cir. 2002) ("When a federal court acts outside its jurisdiction, it violates principles of separation of powers and federalism, interfering with Congress's authority to demarcate the jurisdiction of lower federal courts, and with the states'

This Comment is divided into two parts: Background[23] and Argument.[24] First, the Background briefly surveys the relevant aspects of the other elements of federal jurisdiction: subject-matter jurisdiction,[25] personal jurisdiction,[26] and Article III standing.[27] Second, the Background discusses prudential standing doctrine and the circuit courts' divergent positions on whether it is jurisdictional.[28] Third, the Background discusses the recent line of Supreme Court cases that has refined the analysis concerning when a rule should be considered jurisdictional.[29]

The Argument advances two propositions. First, the Argument contends that prudential standing should not be considered jurisdictional,[30] because only the Constitution and Congress hold the power to set federal courts' jurisdiction,[31] because the Supreme Court's recent cases concerning jurisdiction reinforce that court-created doctrines cannot be jurisdictional,[32] and because prudential standing concerns litigants' lack of substantive rights on the merits, not federal courts' adjudicatory authority.[33] Second, the Argument contends that federal courts should nevertheless have the sua sponte discretion to raise prudential standing after a litigant has waived the issue,[34] because prudential standing is an inherently flexible doctrine,[35] and because federal courts raise in their discretion three other non-jurisdictional doctrines—the requirement that habeas corpus petitioners exhaust state remedies, *Pullman* abstention doctrine, and prudential ripeness doctrine—that, like prudential standing, originated as judge-made doctrines designed to protect interests beyond the litigants' individual interests.[36]

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authority to resolve disputes in their own courts."), *rev'd on other grounds sub nom.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003).

23. *Infra* Part I.
24. *Infra* Part II.
25. *See infra* Part I.A.
26. *See infra* Part I.B.
27. *See infra* Part I.C.
28. *See infra* Part I.D.
29. *See infra* Part I.E.
30. *See infra* Part II.A.
31. *See infra* Part II.A.1.
32. *See infra* Part II.A.2.
33. *See infra* Part II.A.3.
34. *See infra* Part II.B.
35. *See infra* Part II.B.1.
36. *See infra* Part II.B.2.

## I. BACKGROUND

### *A. Subject-Matter Jurisdiction*

Subject-matter jurisdiction is the authority of a court to decide a particular type of case.[37] Article III of the Constitution provides that the "judicial Power of the United States shall extend to" nine categories of "Cases" and "Controversies," such as suits arising under the Constitution, laws, and treaties of the United States.[38] This provision of Article III, however, does not itself confer jurisdiction on lower federal courts.[39] Instead, Congress must authorize by statute lower federal court jurisdiction, within the outermost scope of potential jurisdiction provided by Article III's nine categories of cases.[40] This is so because under Article III, Congress has the discretion whether to create lower federal courts,[41] which the Supreme Court has reasoned implies that Congress also holds the lesser power to define their jurisdiction.[42] Congress currently has set the district courts' subject-matter jurisdiction to include matters arising under the Constitution, laws, and treaties of the United States,[43] suits between diverse parties,[44] and various subject-

37. *E.g.*, Morrison v. Nat'l Austl. Bank Ltd., __U.S.__, 130 S. Ct. 2869, 2877 (2010).

38. U.S. CONST. art. III, § 2.

39. *E.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 84 (2010); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 278 (6th ed. 2012). For the Supreme Court, Article III itself confers to the Court its rarely used original subject-matter jurisdiction. *E.g.*, California v. Arizona, 440 U.S. 59, 65 (1979). The extent of Congress's power to regulate the Supreme Court's appellate jurisdiction under the Exceptions Clause, *see* U.S. CONST. art. III, § 2, cl. 2, is an unresolved question of constitutional law that scholars have thoroughly debated, *see generally*, Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385 (1983).

40. *E.g.*, *Hertz Corp.*, 559 U.S. at 84.

41. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* U.S. CONST. art. I, § 8, cl. 9 (granting Congress the power to create lower federal courts).

42. *See, e.g.*, Bowles v. Russell, 551 U.S. 205, 212–13 (2007) ("Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850); *see also* CHEMERINSKY, *supra* note 39, at 278–79 ("Ever since the first statute creating federal courts, the Judiciary Act of 1789, federal jurisdiction never has included the authority to adjudicate all matters allowed by Article III.").

43. *See* 28 U.S.C. § 1331 (2006).

44. *See* 28 U.S.C. § 1332 (2006 & Supp. V 2007–2012).

specific claims,[45] such as admiralty and maritime disputes.[46] Congress currently has set the courts of appeals' subject-matter jurisdiction to include all appeals from final decisions of the district courts.[47]

A party cannot consent to subject-matter jurisdiction or waive the defense of lack of subject-matter jurisdiction.[48] This rule is rooted in the rationale that parties, by their failure to dispute subject-matter jurisdiction, should not be able to confer jurisdiction on a federal court when Congress and the Constitution have not vested jurisdiction in the court.[49] The rule is so inflexible that even the party who originally invoked federal jurisdiction can successfully challenge subject-matter jurisdiction after losing on the merits.[50] Moreover, all federal courts—trial and appellate—have a sua sponte obligation to dismiss a case if subject-matter jurisdiction is lacking in the case before the court.[51] The appellate courts additionally have a sua sponte obligation to dismiss a case if subject-matter jurisdiction was lacking in the court below, even if it is satisfied in the appellate court.[52]

In the American adversarial legal system, federal courts rarely have the sua sponte obligation to address an issue in a party's suit.[53] However, structural considerations require that courts ensure that subject-matter jurisdiction is proper even if litigants overlook it or attempt to consent to it.[54] Because federal courts are courts of limited jurisdiction, allowing litigants to expand by consent the subject-matter jurisdiction of federal courts would be an invasion of state courts' jurisdiction.[55] Equally important, allowing litigants to expand the subject-matter jurisdiction of federal courts would authorize the federal judiciary to hear matters that

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45. *See* 28 U.S.C. §§ 1330, 1333–1337, 1339–1345, 1347–1365 (2006); 28 U.S.C. §§ 1338, 1346 (2006 & Supp. V 2007–2012).

46. 28 U.S.C. § 1333.

47. *Id.* § 1291; *see also id.* § 1292 (establishing the courts of appeals' jurisdiction over interlocutory decisions).

48. *E.g.*, Gonzales v. Thaler, __U.S.__, 132 S. Ct. 641, 648 (2012); *see also* Reale Int'l, Inc. v. Fed. Rep. of Nigeria, 647 F.2d 330, 331–32 (2d Cir. 1981) (stating that this rule is "[g]raven in stone" and "enforced with draconian zeal").

49. *See, e.g.*, Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17–18 (1951).

50. *See id.* at 17–19.

51. *E.g.*, *Gonzales*, 132 S. Ct. at 648; *see also* FED. R. CIV. P. 12(h)(3).

52. *E.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 73 (1997).

53. *E.g.*, Henderson *ex rel.* Henderson v. Shinseki, __U.S.__, 131 S. Ct. 1197, 1202 (2011).

54. *See, e.g.*, Anderson v. H&R Block, Inc., 287 F.3d 1038, 1041 (11th Cir. 2002), *rev'd on other grounds sub nom.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003).

55. *E.g.*, CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 28 (7th ed. 2011); 13 WRIGHT ET AL., *supra* note 22, at iv.

Congress and the Constitution reserved for the political branches of the federal government.[56] In sum, Congress and the Constitution—not litigants—hold the power set federal courts' subject-matter jurisdiction and thus to define the institutional role of the federal judiciary.[57]

### *B. Personal Jurisdiction*

Personal jurisdiction is the power of a court to decide a particular defendant's case.[58] Federal courts have personal jurisdiction over a defendant so long as the state court of general jurisdiction in the state where the federal court is located could subject the defendant to its jurisdiction consistently with the Due Process Clause of the Fourteenth Amendment.[59] Personal jurisdiction, however, serves a different purpose than subject-matter jurisdiction.[60] While subject-matter jurisdiction derives from Article III and restricts the federal judiciary from infringing on its co-equal branches of government and on state judiciaries,[61] personal jurisdiction derives from the Due Process Clause and protects an individual's liberty interest against being unfairly haled into a particular court.[62] Thus, under *International Shoe Co. v. Washington*[63] and its progeny,[64] the test for a federal court's personal jurisdiction over a defendant requires that the "maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'"[65] Because personal jurisdiction represents an individual right, the party who holds that right can waive the defense of lack of personal jurisdiction or can give consent—whether express[66] or implied[67]—to personal jurisdiction.[68]

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56. *E.g.*, *Anderson*, 287 F.3d at 1041; Reale Int'l, Inc. v. Fed. Rep. of Nigeria, 647 F.2d 330, 332 (2d Cir. 1981); CHEMERINSKY, *supra* note 39, at 40.

57. *See, e.g.*, Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17–18 (1951).

58. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

59. *See* U.S. CONST. amend. XIV, § 1; FED. R. CIV. P. 4(k).

60. Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982).

61. *E.g.*, *Anderson*, 287 F.3d at 1041.

62. *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 702–03.

63. 326 U.S. 310 (1945).

64. *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

65. *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 702–03 (omission in original) (quoting *Int'l Shoe Co.*, 326 U.S. at 316).

66. *E.g.*, Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964).

67. *See, e.g.*, Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 363 (2d Cir. 1964).

68. *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 701–05; *see also* FED. R. CIV. P. 12(h)(1).

### *C. Article III Standing*

Article III standing derives from Article III of the Constitution and establishes the "Cases" and "Controversies" that the "judicial Power" may resolve.[69] Because Article III standing is a constitutional limit, Congress cannot override it by statute.[70] To establish Article III standing, the litigant must "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision."[71] Though these elements are easily stated,[72] Article III standing is a highly fact-specific doctrine where cases are "more or less determined by the specific circumstances of individual situations."[73]

Nonetheless, the stated purposes and policies underlying Article III standing are profound. Perhaps foremost, Article III standing "is built on [the] single basic idea . . . of separation of powers,"[74] because it prevents "the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches."[75] The Supreme Court has also reasoned that Article III standing ensures "that litigants are truly adverse and therefore likely to present the case effectively,"[76] "that the people most directly concerned are able to litigate the question at issue,"[77] and "that a concrete case informs the court of the real-world

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69. U.S. CONST. art. III, § 2, cl. 1; *see also* Flast v. Cohen, 392 U.S. 83, 94 (1968) ("[The words 'Cases' and 'Controversies'] have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government."). *But see* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (contending that Article III standing is "surely not a linguistically inevitable conclusion" but endorsing the doctrine because it likely reflects the Framers' understanding of the nature of judicial power).

70. *E.g.*, Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).

71. Hollingsworth v. Perry, __U.S.__, 133 S. Ct. 2652, 2661 (2013) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

72. *See* 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 16 (3d ed. 2008).

73. United States *ex rel.* Chapman v. Fed. Power Comm'n, 345 U.S. 153, 156 (1953).

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

75. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Scalia, *supra* note 69); *accord Hollingsworth*, 133 S. Ct. at 2661 ("[Article III] standing . . . serves to prevent the judicial process from being used to usurp the powers of the political braches." (internal quotation marks omitted)).

76. Fletcher, *supra* note 75, at 222 (citing Baker v. Carr, 369 U.S. 186, 204 (1962) (other citation omitted)).

77. *Id.* (citing Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (other citations omitted)).

consequences of its decisions."[78]

Litigants cannot consent to Article III standing or waive the defense of lack of Article III standing.[79] Litigants can thus challenge Article III standing at all stages of the litigation,[80] even if the challenge occurs for the first time on appeal.[81] Moreover, all federal courts—trial and appellate—have a sua sponte obligation to ensure that Article III standing is satisfied in the case before the court.[82] Federal appellate courts additionally have a sua sponte obligation to dismiss a case if Article III standing was lacking in the court below, even if it is satisfied in the appellate court.[83] Thus, the procedure for raising Article III standing mirrors the procedure for raising subject-matter jurisdiction.[84] The same structural concerns drive both procedures: litigants cannot, by consent or waiver, alter the requirements of Article III because Article III defines the separation of powers within the federal government and the federalism balance between the federal and state judiciaries.[85]

### *D. Prudential Standing*

#### *1. The Substance of Prudential Standing*

Prudential standing derives from "judicially self-imposed limits on the exercise of federal jurisdiction," not from the Constitution or statute.[86] Accordingly, Congress may override prudential standing limits by statute,[87] and because the doctrines are judge-made, the Supreme Court can and does craft prudential standing exceptions.[88] The Court has created three primary prudential standing doctrines: (1) the prohibition against third-party standing,[89] (2) the prohibition against generalized

78. *Id.* (citing *Baker*, 369 U.S. at 204 (other citations omitted)).

79. *E.g.*, United States v. Hays, 515 U.S. 737, 742 (1995).

80. *E.g.*, Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994).

81. *E.g.*, Belitskus v. Pizzingrilli, 343 F.3d 632, 639 (3d Cir. 2003).

82. *See*, *e.g.*, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (per curiam).

83. *E.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998).

84. *See supra* Part I.A.

85. 13B WRIGHT ET AL., *supra* note 72, § 3531.15, at 302 ("All of the sensitivities that surround subject-matter jurisdiction are evident [in the procedures of Article III standing].").

86. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). *But see* Scalia, *supra* note 69, at 885 ("[Prudential standing is] unsatisfying . . . because it leaves unexplained the Court's source of authority for simply granting or denying standing as its prudence might dictate.").

87. *E.g.*, Bennett v. Spear, 520 U.S. 154, 162 (1997).

88. *See* CHEMERINSKY, *supra* note 39, at 85–91.

89. *E.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975).

grievances,[90] and (3) the zone-of-interests test.[91] Even if a litigant satisfies Article III standing, these prudential standing doctrines provide an independent reason for the case to be dismissed.[92]

First, the prohibition against third-party standing requires that a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[93] In *MainStreet Organization of Realtors v. Calumet City*,[94] for example, a city ordinance forbade the sale of homes without a city inspection for compliance with certain codes.[95] An association of real estate brokers sued the city, claiming that the ordinance deprived homeowners of property without due process of law, and won a preliminary injunction to enjoin the city from enforcing the ordinance.[96] On appeal, however, the Seventh Circuit vacated the injunction and dismissed the suit.[97] The court held that the brokers violated the prohibition against third-party standing because the brokers were not the ordinance's "immediate victim"; instead, homeowners were.[98] The brokers could not assert the

90. *E.g.*, United States v. Richardson, 418 U.S. 166, 176–77 (1974). However, because a subsequent case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), appeared to describe the prohibition on generalized grievances as a constitutional doctrine, uncertainty surrounds whether it is a prudential or constitutional limit. *See id.* at 573–75; *accord* Hollingsworth v. Perry, __U.S.__, 133 S. Ct. 2652, 2662 (2013) (appearing to describe the prohibition on generalized grievances as constitutional); *see also* CHEMERINSKY, *supra* note 39, at 99–101; Craig A. Stern, *Another Sign from* Hein*: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169 (2008). This Comment assumes that the prohibition on generalized grievances is a prudential doctrine. However, if it is a constitutional doctrine, then it must be jurisdictional like the rest of Article III standing. *See supra* Part I.C.

91. *E.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). The Supreme Court has also evoked prudential principles in other settings, but these decisions have not yet developed into extensive doctrines in the way that the three primary prudential doctrines have. *See* United States v. Windsor, __U.S.__, 133 S. Ct. 2675, 2687–88 (2013) (holding that the parties' absence of legal adverseness is a prudential concern that may be outweighed by countervailing considerations); *Elk Grove Unified Sch. Dist.*, 542 U.S. at 11–18 (holding that prudential standing concerns are implicated when a constitutional decision depends on disputed family law rights).

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

93. *Id.* The Court, however, has created four exceptions to the prohibition against third-party standing: (1) where the third party is unlikely to be able to sue; (2) where a close relationship exists between the plaintiff and third party; (3) where the case relates to the overbreadth doctrine; and (4) where the third party is an association suing on behalf of its members. *See* CHEMERINSKY, *supra* note 39, at 85–91, 108–11.

94. 505 F.3d 742 (7th Cir. 2007).

95. *Id.* at 743–44.

96. *Id.*

97. *Id.* at 749.

98. *Id.* at 745–46.

rights of these third parties.[99]

Second, the prohibition against generalized grievances precludes a party from establishing standing when the alleged harm is "a generalized grievance shared in substantially equal measure by all or a large class of citizens."[100] In *United States v. Richardson*,[101] for example, the plaintiff alleged that the statutes that provide for the secrecy of the Central Intelligence Agency's budget violate the Constitution's requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[102] The Supreme Court, however, held that the plaintiff lacked standing because he claimed injury only as a citizen and a taxpayer and was thus "seeking to employ a federal court as a forum in which to air his generalized grievances about the conduct of government."[103] The doctrine's rationale is that redressing injuries that are "undifferentiated and common to all members of the public"[104] must be "committed to the surveillance of Congress, and ultimately to the political process," not federal courts.[105]

Third, the zone-of-interests test requires that a plaintiff suing under a statute must be "arguably within the zone of interests" that Congress intended to benefit by enacting the statute.[106] This test forecloses a lawsuit "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[107] The zone-of-interests test has principally been applied to challenges to agency actions under the Administrative Procedure Act (APA),[108] and the Supreme Court instructed that "the test is most usefully understood as a gloss on the meaning of § 702,"[109] the provision of the APA that authorizes judicial review for a party "suffering legal wrong" or "adversely affected or aggrieved" because of an agency's action.[110]

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99. *Id.*

100. Warth v. Seldin, 422 U.S. 490, 499 (1975) (internal quotation marks omitted).

101. 418 U.S. 166 (1974).

102. *Id.* at 167–68 (quoting U.S. CONST. art. I, § 9, cl. 7).

103. *Id.* at 175 (internal quotation marks omitted).

104. *Id.* at 176–77 (internal quotation marks omitted).

105. *Id.* at 179.

106. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

107. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, __U.S.__, 132 S. Ct. 2199, 2210 (2012) (internal quotation marks omitted).

108. *See* CHEMERINSKY, *supra* note 39, at 103, 107–08.

109. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987); *see also* CHEMERINSKY, *supra* note 39, at 107–08.

110. 5 U.S.C. § 702 (2012).

For example, in *Association of Data Processing Service Organizations, Inc. v. Camp*,[111] an association of data processors challenged under the APA a ruling by the Comptroller of the Currency that allowed banks to engage in data processing services.[112] The lower courts held that the data processors lacked standing,[113] but the Supreme Court reversed and remanded.[114] The Court held that the data processors satisfied the zone-of-interests test because Congress arguably intended to protect the data processors' interests by enacting the Bank Service Corporation Act, which prohibited bank service corporations from engaging "in any activity other than the performance of bank services for banks."[115] By contrast, in *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*,[116] the Court used the zone-of-interests test to dismiss the lawsuit.[117] In that case, unions of postal workers challenged under the APA the Postal Service's regulation that suspended its monopoly over mailing a certain category of letters.[118] The lower courts held that the unions satisfied standing because the regulation would likely have an adverse effect on postal jobs,[119] but the Court reversed, holding that the unions did not satisfy the zone-of-interests test because neither the legislative history nor the relevant statutes provide support for the unions' "assertion that Congress intended to protect jobs with the Postal Service."[120]

*2. The Jurisdictional Status of Prudential Standing*

*a. The Minority Approach*

Three circuits—the Second, Sixth, and D.C. Circuits—adopted the minority rule. In these circuits, prudential standing is jurisdictional: litigants do not forfeit the issue on appeal by failing to dispute it below,

111. 377 U.S. 150 (1970).

112. *Id.* at 151.

113. *Id.*

114. *Id.* at 158.

115. *Id.* at 155 (quoting Bank Service Company Act § 4, 12 U.S.C. § 1864 (1964)); *see also id.* at 155–56. The Court held that the data processors satisfied Article III standing because the Comptroller's ruling would increase competition in the industry and thus likely reduce the data processors' profits. *Id.* at 152.

116. 498 U.S. 517 (1991).

117. *Id.* at 530–31.

118. *Id.* at 519–21.

119. *Id.* at 524.

120. *Id.* at 524–25; *see also id.* at 526–28 (discussing the legislative history).

and courts have a sua sponte obligation to ensure prudential standing is proper.[121] At times, these courts have simply assumed without analysis that there is no procedural distinction between prudential standing and Article III standing.[122]

Aside from this assumption, the reasons these courts have provided for their conclusion are sparse and not thoroughly considered. One court addressed the issue in four sentences and reasoned, without citing authority, that prudential standing is not akin to an affirmative defense that can be forfeited, and that to hold otherwise would allow a litigant's forfeiture to alter the congressional intent embodied in the zone-of-interests test.[123] Another court reasoned, without further elaboration, that a party cannot consent to prudential standing because it is not a "privilege" that the parties may waive, but rather is a "judicially crafted doctrine [that] serves the institutional obligations of the federal courts."[124] A third court based its conclusion on an attempt to parse the Supreme Court's ambiguous assertion, in a case that did not involve the waiver of prudential standing, that "the standing 'inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'"[125] Subsequent opinions in these circuits on this issue trace back to these opinions without discussion.[126]

### *b. The Majority Approach*

Seven circuits—the Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits—adopted the majority rule. In these circuits, prudential standing is not jurisdictional: litigants forfeit disputing it on appeal by failing to dispute it below, and courts do not have a sua sponte obligation to ensure that it is proper.[127] As with the circuit courts with

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121. *E.g.*, Am. Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1357–58 (D.C. Cir. 2000); Bzdzuich v. DEA, 76 F.3d 738, 742 (6th Cir. 1996); Thompson v. Cnty. of Franklin, 15 F.3d 245, 248 (2d Cir. 1994).

122. *See, e.g.*, *Bzdzuich*, 76 F.3d at 742; Mallick v. Int'l Bhd. of Elec. Workers, 749 F.2d 771, 772 n.1 (D.C. Cir. 1984); Nat'l Wildlife Fed'n v. United States, 626 F.2d 917, 924 n.13 (D.C. Cir. 1980).

123. *See* Cmty. First Bank v. Nat'l Credit Union Admin., 41 F.3d 1050, 1053 (6th Cir. 1994).

124. Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496, 499 (D.C. Cir. 1994).

125. Thompson v. Cnty. of Franklin, 15 F.3d 245, 247–49 (2d. Cir. 1994) (quoting Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979)).

126. *See, e.g.*, ANR Pipeline Co. v. Fed. Energy Reg. Comm'n, 205 F.3d 403, 407–08 (D.C. Cir. 2000).

127. *See, e.g.*, Cibolo Waste, Inc. v. City of San Antonio, 718 F.3d 469, 474 n.4 (5th Cir. 2013); United States v. Day, 700 F.3d 713, 720 (4th Cir. 2012), *cert. denied*, __U.S.__, 133 S. Ct. 2038 (2013); City of Los Angeles v. Cnty. of Kern, 581 F.3d 841, 845 (9th Cir. 2009); Finstuen v.

the minority rule, these circuit courts did not consider this issue in substantial depth when it arose for the first time, but taken together, they have articulated three underlying rationales.

First, some of these circuits have relied on *Steel Co. v. Citizens for a Better Environment*.[128] In *Steel Co.*, the Supreme Court forbade federal courts from assuming "hypothetical jurisdiction" to resolve the merits against a litigant with questionable Article III standing,[129] because for a court to decide the merits "when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."[130] The Court, however, did appear to endorse federal courts deciding the merits of a case before addressing the zone-of-interests test, so long as the decision on the merits is against the party with a questionable ability to satisfy the zone-of-interests test.[131] The Tenth and Eleventh Circuits held that prudential standing is not jurisdictional based at least in part on *Steel Co.*, although their reasoning was unclear.[132]

Second, the Federal Circuit based its rule on the Supreme Court's decisions in *Air Courier Conference of America*.[133] In that case, postal service unions challenged a Postal Service regulation under the APA,[134] and the Postal Service raised a defense—which it had not raised in the courts below—that a statute provided that the judicial review provisions of the APA "shall [not] apply to the exercise of the powers of the Postal Service."[135] The Court held that the Postal Service forfeited the issue because "[t]he judicial review provisions of the APA are not

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Crutcher, 496 F.3d 1139, 1147 (10th Cir. 2007); MainStreet Org. of Realtors v. Calumet City, Ill., 505 F.3d 742, 747 (7th Cir. 2007); Gilda Indus., Inc. v. United States, 446 F.3d 1271, 1280 (Fed. Cir. 2006); Am. Iron & Steel Inst. v. OSHA, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999).

128. *See Am. Iron & Steel Inst.*, 182 F.3d at 1274 n.10 (relying on Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)); *Finstuen*, 496 F.3d at 1147 (relying on Grubbs v. Bailes, 445 F.3d 1275, 1280–81 (10th Cir. 2006) (in turn relying on *Steel Co.*, 523 U.S. 83)).

129. *See Steel Co.*, 523 U.S. at 93–102 (rejecting "doctrine of hypothetical jurisdiction").

130. *Id.* at 101–02.

131. *See id.* at 96–97 & n.2.

132. *See Am. Iron & Steel Inst.*, 182 F.3d at 1274 n.10; *Finstuen*, 496 F.3d at 1147. This Comment attempts to make a more developed consideration of *Steel Co.*'s relevance in regard to whether prudential standing is jurisdictional. *See infra* Part II.A.3.

133. *See* Duty Free Int'l, Inc. v. United States, 88 F.3d 1046, 1048 (Fed. Cir. 1996) (relying on Air Courier Conference of Am. v. Am. Postal Workers Union, AFL–CIO, 498 U.S. 517, 523 n.3 (1991)).

134. *Air Courier Conference of Am.*, 498 U.S. at 520.

135. *Id.* at 522 & n.1 (quoting 39 U.S.C. § 410(a) (1988) ("[N]o Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5 [*i.e.*, the relevant provisions of the APA], shall apply to the exercise of the powers of the Postal Service.")).

jurisdictional"[136] and because whether a statute makes the Postal Service exempt from the APA is a question of whether Congress intended to allow a cause of action against the Postal Service, not a question of jurisdiction.[137] The Federal Circuit cited *Air Courier Conference of America* without elaboration to hold that the zone-of-interests test is not jurisdictional.[138]

Third, these circuits have justified their prudential standing rule based on Federal Rule of Civil Procedure 17(a).[139] This rule provides in pertinent part: "An action must be prosecuted in the name of the real party in interest."[140] This rule requires that the plaintiff must be the person who, according to the governing substantive law, is entitled to enforce the right.[141] Courts consistently rule that defendants waive this defense when they assert it too late in the litigation,[142] such as on a motion for directed verdict.[143] Despite uncertainty about the relationship between Rule 17(a) and third-party prudential standing,[144] the Fifth and Seventh Circuits held that the two are sufficiently similar that third-party prudential standing is likewise forfeited if asserted too late.[145]

### *c. Some Circuit Courts Using the Majority Approach Raise Prudential Standing on a Discretionary Basis After the Party Forfeits the Issue*

As previously discussed, seven circuits adopted the majority rule that

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136. *Id.* at 523 n.3 (citing Califano v. Sanders, 430 U.S. 99, 107 (1977) (holding that federal courts' source of subject-matter jurisdiction to review agency actions is provided by the general "arising under" jurisdiction of 28 U.S.C. § 1331 (1976) rather than by the APA)).

137. *Id.*

138. *See* Duty Free Int'l, Inc. v. United States, 88 F.3d 1046, 1048 (Fed. Cir. 1996).

139. *See* RK Co. v. See, 622 F.3d 846, 851–52 (7th Cir. 2010); Ensley v. Cody Res., Inc., 171 F.3d 315, 320 & n.10 (5th Cir. 1999).

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

141. 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1543, at 475 (3d ed. 2008).

142. *See, e.g.*, Steger v. Gen. Elec. Co., 318 F.3d 1066, 1080 (11th Cir. 2003).

143. *See* Gogolin & Stelter v. Karn's Auto Imports, Inc., 886 F.2d 100, 102 (5th Cir. 1989).

144. Some courts hold that Rule 17(a) codified third-party prudential standing. *See, e.g.*, Warnick v. Yassian, 362 F.3d 603, 607–08 (9th Cir. 2004). This may be justified. *See* 6A WRIGHT ET AL., *supra* note 141, § 1542, at 472 ("[T]he well-settled rule that a party ordinarily does not have standing to raise the . . . rights of another person . . . may be thought of as merely a particular application of the real-party-in-interest principle."). However, most courts continue to discuss third-party prudential standing as a doctrine unrelated to Rule 17(a). *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004).

145. *See* RK Co. v. See, 622 F.3d 846, 851–52 (7th Cir. 2010); Ensley v. Cody Res., Inc., 171 F.3d 315, 320 & n.10 (5th Cir. 1999).

prudential standing is not jurisdictional.[146] Three circuits within this group—the Fifth, Seventh, and Ninth Circuits—nevertheless hold that a court may on a discretionary sua sponte basis raise prudential standing even though the litigant forfeited the issue.[147] These circuits have provided two primary reasons for this practice.[148]

First, the Seventh and Ninth Circuits relied on the Supreme Court's decision in *Craig v. Boren*.[149] In *Craig*, the defendant contested the plaintiff's prudential standing for the first time on appeal.[150] Rather than announce a rule that a prudential standing defense is or is not necessarily waived in such circumstances, the Court discussed a balancing analysis to determine whether it should consider the issue.[151] The Court reasoned that under the circumstances of the case, the Court considering prudential standing would not further the doctrine's purpose—to minimize judicial intervention in "ill-defined and speculative" constitutional questions—because the parties had already sought a constitutional determination in the lower courts.[152] The Court held, however, that even if it did consider the issue, the plaintiff satisfied prudential standing.[153] The Seventh and Ninth Circuits interpreted this discussion in *Craig* to suggest that courts may decline to address a prudential standing argument that was not raised below but may also raise the issue.[154]

Second, the Seventh Circuit reasoned that third-party prudential standing belongs to an "intermediate class" of doctrines that are not

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146. *See supra* Part I.D.2.b.

147. *See, e.g.*, Bd. of Miss. Levee Comm'rs v. EPA, 674 F.3d 409, 417 (5th Cir. 2012); *RK Co.*, 622 F.3d at 851–52; City of Los Angeles v. Cnty. of Kern, 581 F.3d 841, 845 (9th Cir. 2009).

148. The Fifth Circuit has exercised sua sponte discretion simply by doing so, without explaining a rationale. *See Bd. of Miss. Levee Comm'rs*, 674 F.3d at 418 ("Although the EPA correctly points out that we have previously considered the issue *sua sponte*, . . . we decline to do so here."). The Ninth Circuit has raised sua sponte prudential standing based in part on the doctrine of constitutional avoidance, *see City of Los Angeles*, 581 F.3d at 846; *see also* Neese v. S. Ry. Co., 350 U.S. 77, 77–78 (1955) (per curiam) (using the doctrine of constitutional avoidance when the parties did not raise the non-constitutional issue), but that doctrine does not support *discretionary* authority to raise prudential standing, *see* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them.").

149. *See City of Los Angeles*, 581 F.3d at 846 (relying on Craig v. Boren, 429 U.S. 190 (1976)); MainStreet Org. of Realtors v. Calumet City, Ill., 505 F.3d 742, 749 (7th Cir. 2007) (Posner, J.) (same).

150. *Craig*, 429 U.S. at 193.

151. *See id.* at 193–94.

152. *Id.*

153. *See id.* at 194–97.

154. *See City of Los Angeles*, 581 F.3d at 846; *MainStreet Org. of Realtors*, 505 F.3d at 749.

jurisdictional but that courts may still raise sua sponte.[155] The court discussed two examples: the doctrine that a petitioner for federal habeas corpus must exhaust state remedies[156] and the doctrine of abstention in favor of another court or agency.[157] The court reasoned that what these doctrines share with third-party prudential standing is that they all protect interests that the litigants do not represent.[158] The court reasoned that for the habeas corpus exhaustion-of-state-remedies doctrine, the litigants do not represent the court's interests in benefiting from a lower tribunal's expertise, avoiding unnecessary rulings, and avoiding rulings that affront another judicial system; that for abstention doctrine, the litigants do not represent the court's interest in promoting a "harmonious" federal system; and that for third-party prudential standing, the litigants do not represent the interests of the missing party, *i.e.*, the party entitled to legal relief.[159] The court thus concluded that, as with the other two doctrines, it may raise third-party prudential standings.[160]

### *E. The Supreme Court's Recent Cases That Distinguish Between Jurisdictional Rules, and Claim-Processing Rules or Elements of the Merits*

#### *1. Federal Courts' Prior Imprecise Use of the Term "Jurisdiction"*

During the era when the circuit courts decided whether prudential standing is jurisdictional, federal courts at times used the term "jurisdiction" haphazardly. As Judge Kavanaugh explained: "In recent years, the terminology of jurisdiction has been put under a microscope at the Supreme Court. And the Court has not liked what it has observed—namely, sloppy and profligate use of the term 'jurisdiction' by lower courts and, at times in the past, the Supreme Court itself."[161] The Supreme Court explained that this occurred when judicial opinions

155. *MainStreet Org. of Realtors*, 505 F.3d at 747.

156. *Id.* at 747–48 (citing Granberry v. Greer, 481 U.S. 129, 130–33 (1987) (other citations omitted)).

157. *Id.* at 748 (citing Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976) (other citations omitted)).

158. *Id.*

159. *Id.*

160. *Id.*

161. Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 183 (D.C. Cir. 2012) (Kavanaugh, J., dissenting), *reh'g en banc denied*, 704 F.3d 1005 (D.C. Cir. 2013), *cert. denied*, __U.S.__, 133 S. Ct. 2880 (2013). *See generally* Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings,"* 105 NW. U. L. REV. 947 (2011).

"obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim."[162] Such "unrefined dispositions," the Court instructed, are "'drive-by jurisdictional' rulings that should be accorded 'no precedential effect' on the issue whether the federal court had authority to adjudicate the claim in suit."[163]

Accordingly, in a recent line of cases, the Court has tried "to bring some discipline" to the use of the term jurisdiction.[164] The Court's "significantly tightened and focused"[165] analysis distinguishes between jurisdictional rules, on the one hand, and elements of the merits[166] or "claim-processing rules,"[167] on the other hand. The procedural consequences of this distinction are familiar. If a litigant fails to dispute at trial a claim-processing rule or an element of the merits, the litigant forfeits the issue on appeal.[168] By contrast, if the rule is jurisdictional, the defense cannot be forfeited and courts must raise the issue sua sponte if it is lacking.[169]

### *2. The Supreme Court's Trend: Reversing "Drive-By Jurisdictional Rulings"*

In the last decade, the Supreme Court has repeatedly held that lower courts incorrectly labeled an element of the merits as jurisdictional.[170]

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162. Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (quoting Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 361 (2d Cir. 2000)).

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

164. Henderson *ex rel.* Henderson v. Shinseki, __U.S.__, 131 S. Ct. 1197, 1202 (2011).

165. *Grocery Mfrs. Ass'n*, 693 F.3d at 183 (Kavanaugh, J., dissenting).

166. *E.g.*, *Arbaugh*, 546 U.S. at 503 ("This case concerns the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief.").

167. *E.g.*, Gonzalez v. Thaler, __U.S.__, 132 S. Ct. 641, 648 (2012) ("[W]e have pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not." (internal quotation marks omitted)).

168. *See Arbaugh*, 546 U.S. at 504; *supra* note 17 and accompanying text.

169. *See Arbaugh*, 546 U.S. at 506–07; *supra* Part I.A; Part I.C.

170. *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 157 (2010) (holding that 17 U.S.C. § 411(a) (2006 & Supp. III 2007–2010), which requires that a copyright must be registered before the holder can file a copyright-infringement suit, is an element of the merits rather than a jurisdictional rule); Morrison v. Nat'l Austl. Bank Ltd., __U.S.__, 130 S. Ct. 2869, 2876–77 (2010) (holding that whether a statute applies extraterritorially is a question of the merits rather than a question of jurisdiction); United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271 (2010) (dictum) (stating that 11 U.S.C. § 523(a)(8) (2006), which requires that a bankruptcy court find an undue hardship on a debtor or the debtor's dependents before discharging a government-sponsored

One particularly instructive example is the Court's decision in *Arbaugh v. Y & H Corp.*[171] In *Arbaugh*, the plaintiff sued her employer in federal court for sexual harassment under Title VII of the Civil Rights Act of 1964.[172] She won a jury trial, and the court entered judgment in her favor.[173] Two weeks later, however, the defendant moved at the trial court to dismiss the suit for lack of subject-matter jurisdiction.[174] In the defendant's view, the court did not have subject-matter jurisdiction because Title VII applies only to employers that have at least fifteen employees,[175] which the defendant alleged that it did not have.[176] The court found that the defendant did not have at least fifteen employees,[177] and, assuming that the fifteen-or-more-employee rule was jurisdictional and thus not waived, the court vacated its judgment and dismissed the plaintiff's claim.[178] The Supreme Court reversed, holding that the fifteen-or-more-employee rule is not jurisdictional because Congress did not "clearly state" the requirement is jurisdictional.[179] Instead, Congress located the rule in the "Definitions" section of the Act, entirely separate from the Act's express jurisdiction-conferring provision.[180] The Court noted that Congress could have made the fifteen-or-more-employee rule jurisdictional if it had clearly stated so; but it held that Congress did not do so.[181] Thus, the fifteen-or-more-employee rule is "simply an element of a plaintiff's claim for relief"[182] that a defendant can raise, at the latest,

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student loan debt, is an element of the merits rather than a jurisdictional rule); United States v. Cotton, 535 U.S. 625, 631 (2002) (holding that a defective indictment is a question of the merits rather than a jurisdictional issue).

171. 546 U.S. 500 (2006).

172. *Id.* at 503–04.

173. *Id.* at 504.

174. *Id.* at 508.

175. *Id.* (relying on 42 U.S.C. § 2000e(b) (2006)).

176. *Id.*

177. *Id.* at 509.

178. *Id.*

179. *Id.* at 515–16.

180. *Id.* at 505. The Court explained that Congress enacted Title VII's jurisdiction-conferring provision without an amount-in-controversy provision, *see* 42 U.S.C. § 2000e-5(f) (1964), because until 1980, general "arising under" jurisdiction of 28 U.S.C. § 1331 had an amount-in-controversy requirement of $10,000. *Arbaugh*, 546 U.S. at 505–06. *Compare* 28 U.S.C. § 1331 (1976 & Supp. III 1977–1980), *with* 28 U.S.C. § 1331 (1776 & Supp. IV 1977–1981). Because § 1331 today does not have an amount-in-controversy requirement, *see* 28 U.S.C. § 1331 (2006), the two grants of jurisdiction are duplicative. *Arbaugh*, 546 U.S. at 505–06; *see also* CHEMERINSKY, *supra* note 39, at 279.

181. *Id.* at 514–15.

182. *Id.* at 509.

by the end of the trial.[183]

The Supreme Court has also recently held that lower courts have incorrectly labeled a "claim-processing rule" as jurisdictional.[184] Claim-processing rules are those "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[185] In five cases, the Court held that rules that prescribe a time limit for certain motions or filings are claim-processing rules rather than jurisdictional rules.[186] Thus, a defense that a party violated these claim-processing rules by filing a motion too late cannot be raised for the first time on appeal.[187] The Court has also held that several requirements that do not involve time limits are claim-processing rules, such as the statute that requires a habeas corpus petitioner to obtain a qualified "certificate of appealability" in order to appeal from a district court's final order.[188] The Court, in sum, has repeatedly refused to attach jurisdictional status to rules that Congress has not clearly state are jurisdictional.

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183. *Id.* at 504.

184. Henderson *ex rel.* Henderson v. Shinkseki, __U.S.__, 131 S. Ct. 1197, 1200, 1203 (2011).

185. *Id.*

186. *See* Sebelius v. Auburn Reg'l Med. Ctr., __U.S.__, 133 S. Ct. 817, 821 (2013) (holding that 42 U.S.C. § 1395*oo*(a)(3) (2006), which set a timeline for healthcare providers to file an appeal to the Provider Reimbursement Review Board concerning reimbursements due for services rendered to Medicare beneficiaries, is a claim-processing rule rather than a jurisdictional rule); *Henderson*, 131 S. Ct. at 1200 (holding that 38 U.S.C. § 7266(a) (2006), which sets a timeline for filing a notice of appeal from the Board of Veterans' Appeals to the United States Court of Appeals for Veterans Claims, is a claim-processing rule rather than a jurisdictional rule); Eberhart v. United States, 546 U.S. 12, 13 (2005) (per curiam) (holding that Federal Rule of Criminal Procedure 33(b)(2), which sets a timeline for filing a motion for a new trial, is a claim-processing rule rather than a jurisdictional rule); Kontrick v. Ryan, 540 U.S. 443, 447 (2004) (holding that Federal Rule of Bankruptcy Procedure 4004(a)–(b), which sets a timeline for filing a complaint objecting to a debtor's discharge, is a claim-processing rule rather than a jurisdictional rule); Scarborough v. Principi, 541 U.S. 401, 413–14 (2004) (holding that 28 U.S.C. § 2412(d)(1)(B) (2000 & Supp. III 2001–2004), which sets a timeline for filing a motion for attorneys fees under § 2412(d)(1)(A) for the prevailing party in an action against the United States, is a claim-processing rule rather than a jurisdictional rule).

187. *See, e.g.*, *Eberhart*, 546 U.S. at 19.

188. *See* Gonzalez v. Thaler, __U.S.__, 132 S. Ct. 641, 646 (2012) (holding that 28 U.S.C. § 2253(c)(3) (2006) is a claim-processing rule rather than a jurisdictional rule); *see also* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 272 (2010) (dictum) (stating that Federal Rule of Bankruptcy Procedure 7001(6), which requires that bankruptcy courts use an adversarial proceeding to determine the dischargeability of a debt, is a claim-processing rule rather than a jurisdictional rule); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs, 558 U.S. 67, 81–86 (2009) (holding that certain National Railroad Adjustment Board internal procedures are claim-processing rules rather than jurisdictional rules).

### *3. The Case That Broke the Supreme Court's Trend:* Bowles v. Russell

*Bowles v. Russell*[189] stands out within the Supreme Court's recent cases on jurisdiction. In a divided opinion, the Court held that the statutory time limit that a district court has for extending the timeline for filing an appeal is a jurisdictional rule, not a claim-processing rule.[190] In so holding, the Court distinguished its recent opinions that held that litigation-time-limit rules are claim-processing rules because those cases involved court-promulgated rules, such as the Federal Rules of Criminal Procedure, rather than congressionally enacted statutes.[191] This is a critical distinction, the Court reasoned, because under Article III, "[o]nly Congress may determine a lower court's subject-matter jurisdiction," not courts.[192] Based on this principle and a "century's worth of precedent and practice in American courts" that this statute is jurisdictional,[193] the Court concluded that "[j]urisdictional treatment of statutory time limits makes good sense."[194]

Justice Souter, in dissent, agreed with the majority that court-promulgated rules, such as the Federal Rules of Criminal Procedure, cannot be jurisdictional because only Congress defines lower-court federal jurisdiction.[195] But the dissent disputed the majority's apparent reasoning that because the time limit is prescribed by statute, it is therefore jurisdictional.[196] Instead, the dissent pointed to *Arbaugh*'s command that statutes are jurisdictional only if Congress "clearly states" so: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."[197] Thus, the dissent reasoned, the only issue is whether Congress put a "jurisdictional tag" on the statutory time limit.[198] According to the dissent, Congress did not: "A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that

189. 551 U.S. 205 (2007).

190. *Id.* at 206–07 (interpreting 28 U.S.C. § 2107(c) (2006)).

191. *Id.* at 210–11 (distinguishing *Eberhart*, 546 U.S. 12, and *Kontrick*, 540 U.S. 443).

192. *Id.* at 211 (quoting *Kontrick*, 540 U.S. at 452 (in turn citing U.S. CONST. art. III, § 1)).

193. *Id.* at 210 n.2.

194. *Id.* at 212.

195. *See id.* at 217 (Souter, J., dissenting) ("As the [majority opinion] recognizes, [jurisdictional status] is no way to regard time limits set out in a *court* rule rather than a statute." (emphasis added) (citing *Kontrick*, 540 U.S. at 452 (in turn citing U.S. CONST. art. III, § 1)).

196. *Id.*

197. *Id.* (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006)).

198. *Id.*

federal courts may hear."[199] Likewise, the dissent contended that the majority opinion's reliance on a "century's worth of precedent" was misplaced given the Court's recent refinement of the jurisdictional label.[200]

## II. ARGUMENT

### *A. Prudential Standing Should Not Be Considered Jurisdictional*

#### *1. Prudential Standing as a Jurisdictional Doctrine Defies the Principle That Congress, Within Constitutional Bounds, Sets Federal Court Jurisdiction*

Federal courts are courts of limited jurisdiction.[201] Regardless of whether the jurisdictional limit is subject-matter jurisdiction, personal jurisdiction, or Article III standing, the only two sources of law that set federal court jurisdiction are federal statutes and the Constitution.[202] The Supreme Court has thus stated: "Federal courts . . . possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree."[203] And stated: "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."[204] And again stated: "The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."[205] Though the quotations could continue,[206] it suffices to say that the U.S. Reports are shot through with this principle.[207] It is a fundamental principle in our structure of government.

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199. *Id.* at 218; *accord* Henderson *ex rel.* Henderson v. Shinseki, __U.S.__, 131 S. Ct. 1197, 1203 (2011) ("Filing deadlines . . . are quintessential claim-processing rules.").

200. *See Bowles*, 551 U.S. at 215–16 (Souter, J., dissenting).

201. *E.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

202. *See supra* Part I.A; Part I.B; Part I.C.

203. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citations omitted).

204. *Bowles*, 551 U.S. at 212.

205. *Owen Equip. & Erection Co.*, 437 U.S. at 374.

206. *See* Gunn v. Minton, __U.S.__, 133 S. Ct. 1059, 1064 (2013); United States v. Denedo, 556 U.S. 904, 912 (2009); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986); Palmore v. United States, 411 U.S. 389, 400–01 (1973); Lockerty v. Phillips, 319 U.S. 182, 187–88 (1943); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922); Strader v. Graham, 51 (10 How.) U.S. 82, 96 (1850); Cary v. Curtis, 44 (3 How.) 236, 245 (1845).

207. *Cf.* City of Arlington, Tex. v. FCC, __U.S.__, 133 S. Ct. 1863, 1872 (2013). The circuit courts failed to acknowledge this principle when they decided whether prudential standing is jurisdictional. *See supra* Part I.D.2.a; Part I.D.2.b.

Prudential standing as a jurisdictional doctrine defies this principle. Prudential standing is a judge-made doctrine, with no basis in statute or the Constitution.[208] This point is therefore as strong as it is simple: prudential standing should not be considered jurisdictional because only Congress and the Constitution hold the power to set the jurisdiction of federal courts. The Constitution establishes a structure of government where the jurisdiction of federal courts cannot be altered by "judicial decree."[209]

### *2. Prudential Standing Should Not Be Considered Jurisdictional Because the Supreme Court's Recent Line of Cases Reinforces That Only Congress, Within Constitutional Bounds, Sets Federal Court Jurisdiction*

The Supreme Court's new framework for analyzing whether a rule is jurisdictional reinforces that prudential standing should not be considered jurisdictional. The goal of this analysis is to distinguish between jurisdictional rules,[210] and elements of the merits[211] or claim-processing rules.[212] The Court makes this distinction as a matter of statutory interpretation under a "clear-statement" principle,[213] using this "readily administrable bright line" rule:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[214]

This analytical framework—based on what Congress clearly states—reinforces that only Congress, within the bounds set by the Constitution, holds the power to set lower federal courts' jurisdiction.

Indeed, the *Bowles* Court expressly acknowledged that court-created rules cannot be jurisdictional.[215] In the years before *Bowles*, the Court twice held that rules that set the timeline for litigants to file motions are

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208. *E.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004).

209. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

210. *See* Henderson *ex rel.* Henderson v. Shinseki, __U.S.__, 131 S. Ct. 1197, 1202 (2011).

211. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 503 (2006).

212. *See* Gonzalez v. Thaler, __U.S.__, 132 S. Ct. 641, 648 (2012).

213. *Id.* at 648–49.

214. *Arbaugh*, 546 U.S. at 515–16 (citations omitted).

215. *See* Bowles v. Russell, 551 U.S. 205, 210–13 (2007).

claim-processing rules rather than jurisdictional rules.[216] In *Bowles*, however, the Court held that a statute prescribing the time limit for filing a notice of appeal *is* jurisdictional.[217] The Court reconciled these cases based on the distinction that a statutory rule was at issue in *Bowles*, while the prior cases concerned court-promulgated rules, such as the Federal Rules of Criminal Procedure.[218] The Court reasoned that, because under Article III "[o]nly Congress may determine a lower court's subject-matter jurisdiction," the statutory time-of-filing rule is jurisdictional, while the court-promulgated time-of-filing rules are not.[219]

While *Bowles* was a divided opinion on other points,[220] the Court was unified on this principle. "As the [majority opinion] recognizes," the dissent stated, jurisdictional status "is no way to regard time limits set out in a *court* rule rather than a statute."[221] This is a ringing endorsement that the full Court is unwilling to label a court-created rule—such as prudential standing doctrine—as jurisdictional because it conflicts with the principle that only Congress and the Constitution hold the power to set federal court jurisdiction. Indeed, deeming prudential standing to be jurisdictional would be a deeper affront to this principle than deeming court-promulgated rules such as the Federal Rules of Criminal Procedure to be jurisdictional. The Supreme Court promulgates the latter rules through congressionally delegated power[222] and with an oversight mechanism that allows Congress to override the rules before they take effect.[223] Prudential standing has no source of congressional power whatsoever,[224] and therefore should not be considered jurisdictional.

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216. Eberhart v. United States, 546 U.S. 12, 13 (2005) (per curiam) (holding that Federal Rule of Criminal Procedure 33(b)(2), which sets a timeline for filing a motion for a new trial, is a claim-processing rule rather than a jurisdictional rule); Kontrick v. Ryan, 540 U.S. 443, 446–47 (2004) (holding that Federal Rule of Bankruptcy Procedure 4004(a)–(b), which sets a timeline for filing a complaint objecting to debtor's discharge, is a claim processing rule rather than a jurisdictional rule).

217. *Bowles*, 551 U.S. at 206–07.

218. *See id.* at 211–13.

219. *Id.* at 211 (quoting *Kontrick*, 540 U.S. at 452 (in turn citing U.S. CONST. art. III, § 1)).

220. *See supra* notes 196–200 and accompanying text.

221. *Bowles*, 551 U.S. at 217 (Souter, J., dissenting) (emphasis added) (citing *Kontrick*, 540 U.S. at 452 (in turn citing U.S. CONST. art. III, § 1)).

222. *See* 28 U.S.C. §§ 2072, 2075 (2006).

223. *See id.* §§ 2074, 2075.

224. *E.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004).

### *3. Prudential Standing Should Not Be Considered Jurisdictional Because It Concerns Litigants' Lack of Substantive Rights on the Merits, Not Courts' Adjudicatory Authority*

Even apart from the principle that only Congress and the Constitution set federal court jurisdiction, prudential standing should not be considered jurisdictional. Although the Supreme Court's cases refining when a rule should be considered jurisdictional based on what *Congress* "clearly states"[225] are difficult to apply to judge-made prudential standing, the Court's decisions do provide the key signatures of both sides of the Court's distinction. Thus, looking to these signatures allows for an analysis of which side of the distinction prudential standing falls. The Court has instructed that jurisdictional rules govern "a court's adjudicatory capacity, that is, its subject-matter jurisdiction or personal jurisdiction,"[226] while elements of the merits "speak to . . . the rights or obligations of the parties,"[227] and claim-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[228] As discussed below, all three prudential standing doctrines concern plaintiffs' lack of substantive rights and thus should not be considered jurisdictional.[229]

First, the prohibition on third-party prudential standing requires that a plaintiff "must assert his *own legal rights* and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[230] It follows, nearly self-evidently, that this doctrine concerns whether the plaintiff lacks substantive rights, not the court's adjudicatory authority, and it thus should not be considered jurisdictional.[231] This conclusion is confirmed by a recent decision where the Supreme Court stated, although in a cursory manner, that third-party prudential standing is not jurisdictional:

> [Respondents] argue that petitioner cannot state a cause of action . . . because [petitioner is attempting to assert the rights of

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225. Arbaugh v. Y & H Corp., 514 U.S. 500, 515–16 (2006).

226. Henderson *ex rel.* Henderson v. Shinseki, __U.S.__, 131 S. Ct. 1197, 1202 (2011).

227. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994)).

228. *Henderson*, 131 S. Ct. at 1203.

229. *See* Fletcher, *supra* note 75, at 252 ("In the sense the Court employs the term [prudential standing], it determines whether a plaintiff has a federal cause of action.").

230. Warth v. Seldin, 422 U.S. 490, 499 (1975) (emphasis added).

231. *See* Fletcher, *supra* note 75, at 243–47 ("Properly understood, . . . [i]n third party standing cases, . . . the issue is a question of law on the merits: Does the plaintiff have the right to enforce the legal duty in question?").

> a third party and because its claim is prudentially unripe]. Neither objection appeared in the briefs in opposition to the petition for writ of certiorari, and since *neither is jurisdictional*, we deem both waived.[232]

This statement, however perfunctory it may be, casts a presumption that the other two prudential standing doctrines are likewise not jurisdictional.

Second, the zone-of-interests test requires that parties who sue under a statute must be arguably within the zone of interests that the statute was enacted to benefit.[233] The Supreme Court has instructed that the zone-of-interests test should be considered a gloss on the meaning of "aggrieved" in the provision of the APA that provides a party a *cause of action* for judicial review of an agency's action.[234] The zone-of-interests test thus determines a substantive element of a plaintiff's statutory cause of action.[235] It therefore should not be considered jurisdictional; indeed, the Court has expressly held that "[t]he judicial review provisions of the APA are not jurisdictional."[236]

The Supreme Court's *Steel Co.*[237] decision confirms that the zone-of-interests test should not be considered jurisdictional. *Steel Co.* has two relevant holdings:

- Federal courts cannot assume that jurisdiction exists to resolve the merits against the party with questionable jurisdiction;[238] and
- Federal courts *can* assume that the zone-of-interests test is

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232. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., __U.S.__, 130 S. Ct. 2592, 2610 (2010) (emphasis added) (footnote omitted).

233. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

234. *See* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987).

235. *See* Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169 (D.C. Cir. 2012), *reh'g en banc denied*, 704 F.3d 1005, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("[T]he APA gives a cause of action to 'aggrieved' parties; the zone of interests requirement is simply a way to help determine whether a particular party is 'aggrieved.'"), *cert. denied*, __U.S.__, 133 S. Ct. 2880 (2013); *see also* Fletcher, *supra* note 75, at 234–39 (contending that the zone-of-interests test is a "preliminary look at the merits" and an "unnecessary surrogate for a determination on the merits of whether plaintiff has stated a cause of action" (internal quotation marks omitted)); Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1144–54 (1977) (same); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425, 493–97 (1974) (same).

236. Air Courier Conference of Am. v. Am. Postal Workers Union, AFL–CIO, 498 U.S. 517, 523 n.3 (1991) (citing Califano v. Sanders, 430 U.S. 99 (1997)); *see also supra* notes 133–138 and accompanying text.

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

238. *See id.* at 93–102 (rejecting the "doctrine of hypothetical jurisdiction").

> satisfied to resolve the merits against the party with a questionable ability to satisfy the zone-of-interests test.[239]

The zone-of-interests test accordingly should not be considered jurisdictional, because the second *Steel Co.* holding expressly allows a practice for the zone-of-interests test that the first *Steel Co.* holding would prohibit if the zone-of-interests test were jurisdictional.

Third, the prohibition against generalized grievances precludes standing when the asserted harm is a generalized grievance shared in "substantially equal measure by all or a large class of citizens."[240] The doctrine dictates that plaintiffs do not have standing for widely shared injuries, such as a citizen's general interest in having the taxes that she paid used by the government in a legal manner,[241] because such injuries are "committed to the surveillance of Congress, and ultimately to the political process."[242] The doctrine thus determines that, in such circumstances, a plaintiff's widely shared injury does not amount to a judicial cause of action. Under the Supreme Court's recent cases, the doctrine should therefore not be considered jurisdictional.[243]

### *B. Federal Courts Should Have the Discretion to Raise Sua Sponte a Waived Prudential Standing Defense*

Concluding that prudential standing should not be considered jurisdictional only partially resolves the current circuit split. Such a conclusion means that a litigant who fails to dispute prudential standing at trial forfeits disputing the issue on appeal, and that federal courts do not have a sua sponte obligation to raise the issue if it is lacking.[244] However, that conclusion does not address whether federal courts may still raise the issue sua sponte in their discretion.[245] This Comment contends that federal courts should have that discretion.

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239. *See id.* at 96–97 & n.2.

240. Warth v. Seldin, 422 U.S. 490, 499 (1975) (internal quotation marks omitted).

241. *See* CHEMERINSKY, *supra* note 39, at 92.

242. United States v. Richardson, 418 U.S. 166, 179 (1974).

243. *But see supra* note 90 (discussing the uncertainty over whether the prohibition on generalized grievances is a prudential or constitutional doctrine and concluding that if it is a constitutional doctrine, then it must be jurisdictional like the rest of Article III standing).

244. *See supra* note 17 and accompanying text.

245. *See supra* Part I.D.2.c.

### *1. The Flexible Nature of Prudential Standing Supports That Federal Courts Should Have the Discretionary Ability to Raise the Issue*

Prudential standing is a flexible doctrine where the Supreme Court's discretion is wide-ranging.[246] The Court's discretion is illustrated by the fact that the Court created the doctrines without any constitutional or statutory source of law[247] and then also created exceptions to the doctrines.[248] Additionally, the Court displayed the doctrine's substantial flexibility last Term in *United States v. Windsor*.[249] The plaintiff in that case, Edith Windsor, was in a same-sex marriage recognized by the State of New York when Windsor's spouse died and left her estate to Windsor.[250] Windsor did not qualify for the marital exemption for surviving spouses from the federal estate tax, however, because section 3 of the Defense of Marriage Act (DOMA) defined marriage for the purposes of federal law as only a legal union between one man and one woman.[251] Windsor filed a tax refund lawsuit, contending that DOMA was unconstitutional.[252] While the case was pending in the district court, President Obama instructed the Attorney General to change the Department of Justice's position and to refuse to defend the constitutionality of the law, because he agreed with Windsor that the law was unconstitutional.[253] In light of this, the district court allowed the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives to intervene as an interested party to defend the suit.[254] The district court held section 3 of DOMA unconstitutional,[255] and both the Department of Justice and BLAG appealed.[256] The Second Circuit

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246. *See* Allen v. Wright, 468 U.S. 737, 751 (1984) ("[Prudential] [s]tanding doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction . . . ."); Warth v. Seldin, 422 U.S. 490, 500 (1975) ("[Prudential standing doctrines are] essentially matters of judicial self-governance . . . ."); Ass'n Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) ("[P]roblems of [prudential] standing, as resolved by this Court for its own governance, have involved a rule of a self-restraint." (internal quotation marks omitted)).

247. *E.g.*, *Warth*, 422 U.S. at 499–500.

248. *See supra* note 93.

249. __U.S.__, 133 S. Ct. 2675 (2013).

250. *Id.* at 2682–83.

251. *Id.* at 2683 (discussing Defense of Marriage Act § 3, 1 U.S.C. § 7 (2012), and I.R.C. § 2056(a) (2006)).

252. *Id.*

253. *Id.* at 2683–84.

254. *Id.* at 2684.

255. *Id.*

256. *Id.*

affirmed.[257]

At the Supreme Court, the Court held that the United States satisfied Article III standing to appeal because the United States had not yet complied with the district court's order requiring it to pay Windsor a tax refund, a "real and immediate economic injury."[258] The Court recognized, however, that "prudential concerns . . . might counsel against hearing an appeal from a decision with which the principal parties agree."[259] Nonetheless, the Court noted that prudential standing doctrines are "flexible rules . . . of federal appellate practice"[260] and held that "countervailing considerations"[261] outweighed the prudential concern about deciding a case where the principal parties agreed on the correct legal result.[262] These countervailing considerations were BLAG's "sharp adversarial presentation of the issues" and the vast real-world consequences that the Court reasoned would ensue if it did not resolve the issue immediately.[263] "In these unusual and urgent circumstances," the Court concluded, "the very term 'prudential' counsels that it is a proper exercise of the Court's responsibility to take jurisdiction."[264] The Court thus proceeded to decide the case, ultimately striking down section 3 of DOMA.[265]

*Windsor* illustrates that prudential standing is not only a court-created doctrine with court-created exceptions, but also a doctrine subject to ad-hoc balancing, based on factors including whether the Court deems the advocacy to be sufficiently adversarial and the Court's forecast of the

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257. *Id.*

258. *Id.* at 2686 (quoting Hein v. Freedom From Religion Found., 551 U.S. 587, 599 (2007)); *see also id.* ("That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to [Windsor] if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. . . . Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction.").

259. *Id.* at 2688.

260. *Id.* at 2686 (internal quotation marks omitted) (brackets omitted).

261. *Id.* at 2687 (quoting Warth v. Seldin, 422 U.S. 490, 500–01 (1975)).

262. *Id.* at 2687–88. *Contra id.* at 2697–703 (Scalia, J., dissenting) (contending that adverseness between the parties' legal positions is a essential requirement of Article III, not a prudential concern subject to countervailing considerations, and that the court therefore lacked jurisdiction).

263. *Id.* at 2687–88 (majority opinion) (reasoning that if the Court were to dismiss the suit due to the prudential concerns, extensive litigation would ensue, the district courts would be without precedential guidance on DOMA's sweep over more than a thousand federal statutes and regulations, the rights and privileges of hundreds of thousands of people would be adversely affected, and the cost in judicial resources and expense of litigation would be immense).

264. *Id.* at 2688.

265. *See id.* at 2689–96.

magnitude of the case's practical consequences.[266] With such a considerably flexible doctrine, it makes sense that federal courts should likewise have the procedural discretion whether to raise the issue after a party has forfeited it.[267] Put differently, given *Windsor* and the flexible nature of prudential standing, it is difficult to imagine the Court establishing a bright-line rule that federal courts cannot under any circumstances raise prudential standing after a party has forfeited it.

Indeed, the Supreme Court has in three cases provided indirect signals that endorse federal courts' procedural discretion to raise prudential standing. First, in *Craig v. Boren*,[268] after a party raised a prudential standing argument for the first time on appeal, the Court discussed the doctrine's purpose and concluded that employing the doctrine to dismiss the case "to await the initiation of a new challenge to the statute by injured third parties would be *impermissibly* to foster repetitive and time-consuming litigation under the guise of caution and prudence."[269] The Court cited no authority for what made this result "impermissibl[e],"[270] and so, as the Seventh and Ninth Circuits reasoned,[271] this suggests that the Court is willing to consider on a discretionary basis prudential standing issues that have been waived by the parties, such as by considering whether the doctrine's purposes would be furthered by doing so.[272] In a second case, the Court unanimously affirmed a lower court's opinion that had raised the zone-of-interests test sua sponte, thus suggesting that the Court endorsed the lower court's practice.[273] In a third case, *Elk Grove Unified School District v. Newdow*,[274] the Court raised an issue of prudential standing, even though the issue had neither been raised in the circuit court

266. *See id.* at 2687–88.

267. *Cf.* Cibolo Waste, Inc. v. City of San Antonio, 718 F.3d 469, 474 n.4 (5th Cir. 2013) ("[Article III standing] goes to the court's jurisdictional *power* to hear the case, while the prudential limitation goes to the court's administrative *discretion* to hear the case." (emphasis in original) (quoting Lewis v. Knutson, 699 F.2d 230, 236 (5th Cir. 1983))).

268. 429 U.S. 190 (1976).

269. *Id.* at 193–94 (emphasis added).

270. *See id.* at 194.

271. *See supra* notes 149–154 and accompanying text.

272. While *Craig* provides an indication of the Court's understanding of prudential standing's waiver procedure, the Court's discussion of that topic is dicta, because the Court went on to hold that the plaintiff satisfied prudential standing in any event. *See Craig*, 429 U.S. at 194–97.

273. *See* Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 125, 136 (1995).

274. 542 U.S. 1 (2004).

below[275] nor argued in the relevant party's briefs to the Court,[276] and ultimately dismissed the suit for lack of prudential standing.[277] In sum, in addition to the flexible nature of prudential standing as exemplified by *Windsor*, these three cases suggest that the Court supports federal courts having the discretion to raise sua sponte prudential standing issues.

### *2. Federal Courts' Ability to Raise Other Non-Jurisdictional, Judge-Made Doctrines Designed to Protect Interests Beyond the Litigants' Interests Supports Federal Courts Having the Same Ability for Prudential Standing*

Federal courts may raise in their discretion an "intermediate class" of doctrines, even though the doctrines are not jurisdictional.[278] First, the Supreme Court has held that federal courts may raise, in the "interests of comity and federalism," the requirement that a federal habeas corpus petitioner exhaust state remedies before petitioning in federal court.[279] Second, the Court has held that federal courts may raise *Pullman*[280] abstention—*i.e.*, the doctrine that requires federal courts to abstain in favor of a state court decision when a state law at issue is uncertain and when a state court's clarification might make the federal court's constitutional ruling unnecessary[281]—because the doctrine promotes a "harmonious relation between state and federal authority"[282] and is "equitable in nature."[283] Third, the Court has held that federal courts may raise ripeness doctrine—*i.e.*, the doctrine of avoiding "premature adjudication"[284]—even when only prudential ripeness concerns are at

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275. *See* Newdow v. U.S. Congress, 292 F.3d 597, 601–05 (9th Cir.), *aff'd*, 313 F.3d 500, 502–05 (9th Cir. 2002), *and amended by* 328 F.3d 466, 484–85 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

276. *See* Petitioners' Brief on the Merits at 7–8, 10–21, *Elk Grove Unified Sch. Dist.*, 542 U.S. 1 (No. 02-1624); Petitioners' Reply Brief at 1–7, *Elk Grove Unified Sch. Dist.*, 542 U.S. 1 (No. 02-1624).

277. *See Elk Grove Unified Sch. Dist.*, 542 U.S. at 11–18.

278. MainStreet Org. of Realtors v. Calumet City, Ill., 505 F.3d 742, 747 (7th Cir. 2007) (Posner, J.).

279. *See* Granberry v. Greer, 481 U.S. 129, 130–34 (1987).

280. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

281. *See id.* at 499–502.

282. *Id.* at 501.

283. *See* Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976); *accord* Colautti v. Franklin, 439 U.S. 379, 392 n.9 (1979) (recognizing that federal courts may raise *Pullman* abstention sua sponte).

284. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967); *see also id.* at 149 ("[The two elements of ripeness] requir[e] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.").

issue.[285]

These three doctrines all originated as judge-made doctrines.[286] At a doctrinal level, this suggests that judge-made prudential standing should likewise join this intermediate class of doctrines that falls short of being jurisdictional, but that courts may raise in their discretion. Moreover, the Supreme Court's treatment of prudential ripeness doctrine is particularly telling. Ripeness doctrine and standing doctrine overlap at times, such that an opinion could fairly describe dismissing the plaintiff's claim either for being unripe or for lacking standing.[287] And ripeness, like standing, contains both an Article III constitutional dimension and a judge-made prudential dimension.[288] The way that the Court treats prudential ripeness is thus a compelling indicator of how it will treat prudential standing.[289]

At a theoretical level, federal courts having the discretion to raise prudential standing makes sense. In our adversarial legal system, litigants—not courts—traditionally carry the burden of investigating and presenting their evidence and legal theories at the risk of forfeiture because, among other reasons, the litigants' own interests are at stake and they thus have the greatest incentive to develop their case.[290] The force of this rationale for the adversarial system becomes diluted, however, when a court's decision affects other important interests beyond the litigants' own interests.[291] The doctrines in the intermediate

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285. *E.g.*, Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003); *see also* CHEMERINSKY, *supra* note 39, at 121 & n.8 (describing uncertainty in the Supreme Court's case law as to what elements of ripeness are prudential, rather than constitutional, but suggesting that the element of hardship on the party is constitutional, while the element of fitness of the issues for a judicial decision is prudential).

286. CHEMERINSKY, *supra* note 39, at 121, 811, 950.

287. *See, e.g.*, Colwell v. Dep't of Health & Human Res., 558 F.3d 1112, 1123 (9th Cir. 2009) ("Standing and ripeness under Article III are closely related. . . . The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." (internal quotation marks omitted)); *see also* CHEMERINSKY, *supra* note 39, at 119–21.

288. *E.g.*, Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993).

289. *Compare id.* (stating that ripeness encompasses "Article III limitations on judicial power and . . . prudential reasons for refusing to exercise jurisdiction"), *with* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004) (stating that standing encompasses "Article III standing . . . and prudential . . . limits on the exercise of federal jurisdiction." (internal quotation marks and citations omitted)).

290. *See, e.g.*, WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 80–85 (3d ed. 2002).

291. *Cf.* ROBERT H. FRANK & BEN S. BERNANKE, PRINCIPLES OF ECONOMICS 298, 305–09 (4th ed. 2009) (discussing the principle of economics that when transaction costs exist and when externalities—*i.e.*, "activities that generate costs or benefits that accrue to people not directly

class of doctrines address such situations where the adversarial process may at times be insufficient to protect the important interests that the doctrines serve.[292] For example, the Seventh Circuit reasoned that because the litigants do not necessarily represent the court's independent interest in maintaining a harmonious federalism system through the use of *Pullman* abstention, federal courts may raise *Pullman* abstention sua sponte.[293]

Likewise, a defendant's waiver of a prudential standing defense affects important interests far beyond the defendant's own interests. First, when a defendant waives the third-party prudential standing defense, courts should be able to raise the issue to protect the interests of the missing party that is entitled to legal relief.[294] This is a compelling situation for courts to raise the issue because the plaintiff's interests would be directly opposed to the interests of the missing party who is entitled to legal relief, yet the missing party would be unrepresented. Second, when a defendant waives the zone-of-interests defense, courts should be able to raise the issue to ensure that Congress's interests are not flouted because, in such circumstances and absent judicial intervention, a plaintiff who Congress did not intend to benefit by enacting a statute would be enabled to sue under the statute.[295] Third, when a defendant waives the prohibition on generalized grievances defense, courts should be able to raise the issue to promote judicial economy by avoiding rulings on questions of "broad social import where no individual rights would be vindicated" and to enhance their decision-making process by only entertaining suits from "those litigants best suited to assert a particular claim."[296] Moreover, in such circumstances, courts should be able to raise the prohibition on generalized grievances to promote the robustness of the political process, because the lawsuits that the doctrine prohibits are "committed to the surveillance of

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involved in those activities"—occur, government intervention may enhance efficiency and welfare); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–19 (1960) (emphasizing that in such circumstances government intervention *may*—but need not necessarily—enhance efficiency and welfare).

292. *See* MainStreet Org. of Realtors v. Calumet City, Ill., 505 F.3d 742, 748 (7th Cir. 2007) (Posner, J.).

293. *See id.*

294. *See id.*

295. *Cf.* Cmty. First Bank v. Nat'l Credit Union Admin., 41 F.3d 1050, 1053 (6th Cir. 1995) (reasoning that a litigant's forfeiture should not be able to alter the congressional intent embodied in the zone-of-interests test).

296. Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99–100 (1979).

Congress, and ultimately to the political process."[297]

In sum, the interests that prudential standing serves are much broader than an individual litigant's interests, and a litigant's waiver thus should not be able to undermine the doctrine's purposes. This supports that judge-made prudential standing should join the intermediate class of other judge-made doctrines where courts may raise the issue in their discretion.

## CONCLUSION

The Supreme Court should, in the appropriate case, definitively resolve the current circuit split concerning whether prudential standing is jurisdictional. The Court should hold that prudential standing is not jurisdictional because only the Constitution and Congress hold the power to set the jurisdiction of federal courts, because the Court's recent line of cases on jurisdiction reinforces that court-created doctrines cannot be jurisdictional, and because prudential standing doctrines concern litigants' lack of rights on the merits, not the adjudicatory authority of federal courts. However, the Court should also hold that federal courts have the discretion to raise prudential standing sua sponte after a litigant has waived the issue. This practice is most consistent with the flexible nature of prudential standing doctrine itself, and is supported by federal courts' ability to raise in their discretion three other non-jurisdictional doctrines—the requirement that habeas corpus petitioners exhaust state remedies, *Pullman* abstention, and prudential ripeness—that, like prudential standing, originated as judge-made doctrines designed to protect interests beyond the litigants' individual interests.

297. United States v. Richardson, 418 U.S. 166, 179 (1974).