

## AS PRUDENCE MIGHT DICTATE: THE PROPER LABEL FOR THIRD-PARTY STANDING\*

### I. INTRODUCTION

Article III of the U.S. Constitution limits federal court jurisdiction to “Cases” and “Controversies.”<sup>1</sup> From this requirement, the Supreme Court of the United States has defined several justiciability doctrines to ensure that federal courts do not exceed the scope of their limited role in the tripartite framework.<sup>2</sup> The Court has identified the doctrine of standing as “perhaps the most important of these doctrines.”<sup>3</sup>

Prior to Justice Scalia’s arrival on the Court, the Supreme Court distinguished between standing doctrine’s “core component derived directly from the Constitution” and the Court’s prudential, self-imposed rules.<sup>4</sup> While the Supreme Court interpreted Article III to require a plaintiff to show injury, causation, and redressability to establish a case or controversy,<sup>5</sup> it consistently denied such a constitutional label to the prohibition on third-party standing, rule against generalized grievances, and zone of interests requirement.<sup>6</sup>

In *Lexmark International, Inc. v. Static Control Components, Inc.*,<sup>7</sup> Justice Scalia’s unanimous opinion rejected the prudential label for the zone of interests test.<sup>8</sup> Prior precedents required a plaintiff to show that she fell within a statute’s intended “zone of interests” in order to have standing to challenge an administrative agency’s related regulation.<sup>9</sup> *Lexmark* rejected the “misleading” prudential label, concluding that whether a plaintiff comes within a statute’s zone of interests is not a standing concern at all.<sup>10</sup> Instead, the inquiry is one of straightforward statutory interpretation—“whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”<sup>11</sup>

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1. U.S. CONST. art. III, § 2, cl. 1.

2. See Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 677 (1990); see also *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546–47 (2016).

3. *Allen v. Wright*, 468 U.S. 737, 750 (1984), *abrogated by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

4. *E.g., id.* at 751.

5. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

6. *Allen*, 468 U.S. at 751.

7. 572 U.S. 118 (2014).

8. See *Lexmark*, 572 U.S. at 125–27.

9. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 67 n.25 (5th ed. 2017).

10. *Lexmark*, 572 U.S. at 125–27.

11. *Id.* at 127.

The *Lexmark* opinion—in what one scholar called “one of the most important footnotes in recent federal courts jurisprudence”<sup>12</sup>—went on to observe that the Supreme Court had similarly recharacterized other prudential standing doctrines as grounded in Article III, including the rule against generalized grievances.<sup>13</sup> Interestingly, however, the Supreme Court expressly left open the question of whether rules surrounding third-party standing should be understood as prudential, constitutional, or perhaps statutory.<sup>14</sup>

Toward the end of October Term 2019, a plurality of the Justices received and rejected an opportunity to meaningfully analyze that question.<sup>15</sup> In *June Medical Services v. Russo*,<sup>16</sup> the Supreme Court granted Louisiana’s cross-petition for certiorari, which argued that abortion providers who challenged the state’s abortion restriction lacked standing to assert a constitutional right of their patients.<sup>17</sup> Though the Court granted the cross-petition, neither Justice Breyer’s plurality opinion nor Chief Justice Roberts’s concurrence in the judgment meaningfully engaged with the issue of standing.<sup>18</sup> Instead, with a few conclusory sentences, Justice Breyer declared that the rule against third-party standing is “prudential,” that it “does not involve the Constitution’s ‘case-or-controversy requirement,’” and that it can therefore “be forfeited or waived.”<sup>19</sup> In a two-line footnote, the Chief Justice signaled his agreement with Justice Breyer’s conclusion.<sup>20</sup>

Justice Thomas was not so easily persuaded. In his solo dissent, he complained that the Court “has never provided a coherent explanation for why the rule against third-party standing is properly characterized as prudential.”<sup>21</sup> He argued that the rule is not a prudential concern but instead comes from Article III’s case-or-controversy requirement.<sup>22</sup>

The *June Medical* Court expressly held that the rule against third-party standing is prudential.<sup>23</sup> With Justice Barrett’s appointment, however, Justice Thomas may have the votes to reopen the question.<sup>24</sup> As in *June Medical*, the prudential label may matter in

12. Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 875–76 (2017).

13. *Lexmark*, 572 U.S. at 127 n.3.

14. *Id.*; see also Kylie Chiseul Kim, *The Case Against Prudential Standing: Examining the Courts’ Use of Prudential Standing Before and After Lexmark*, 85 TENN. L. REV. 303, 336–37 (2017).

15. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117–18 (2020) (plurality opinion).

16. 140 S. Ct. 2103 (2020).

17. *June Med.*, 140 S. Ct. at 2117 (plurality opinion).

18. See *id.* at 2117–18; *id.* at 2139 (Roberts, C.J., concurring in the judgment); cf. *id.* at 2142 (Thomas, J., dissenting) (“Despite the fact that we granted Louisiana’s petition specifically to address whether ‘abortion providers [can] be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients,’ a majority of the Court all but ignores the question.” (alteration in original) (citation omitted)).

19. *Id.* at 2117 (plurality opinion).

20. *Id.* at 2139 n.4 (Roberts, C.J., concurring in the judgment) (“For the reasons the plurality explains, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients.” (internal cross-reference omitted)).

21. *Id.* at 2143 (Thomas, J., dissenting).

22. *Id.* at 2144.

23. *Id.* at 2117 (plurality opinion).

24. Cf. Rebekah Durham, *Third-Party Standing in Challenges to State Abortion Laws*, UNIV. CIN. L. REV. (Oct. 1, 2020), [http://www.uclawreview.org/2020/10/01/third-party-standing-in-challenges-to-state-abortion-laws/#\\_edn4](http://www.uclawreview.org/2020/10/01/third-party-standing-in-challenges-to-state-abortion-laws/#_edn4)

future cases for questions of waiver.<sup>25</sup> Perhaps more importantly, prudential standing, unlike Article III standing, is open to manipulation by Congress.<sup>26</sup> Abortion providers have a long line of precedent to support their standing to assert the rights of their patients,<sup>27</sup> but *Lexmark* teaches that precedent may not be enough.<sup>28</sup>

This Comment argues that third-party standing is prudential, in contrast to the relabeled zone of interests and generalized grievance rules. Part II.A provides an overview of constitutional and prudential standing doctrines. Part II.B catalogues Justice Scalia’s successful effort to remove the prudential label from the rule against generalized grievances and the zone of interests requirement. Part II.C describes the prudential rule prohibiting a plaintiff from asserting the right of a third party, as well as the recognized exception to that rule. Part II.D summarizes Justice Thomas’s *June Medical* challenge to third-party standing as a prudential rule.

Section III responds to Justice Thomas’s *June Medical* dissent and argues that the limit on third-party standing is correctly understood as a prudential doctrine. Part III.A asserts that third-party standing is unlike other once-prudential doctrines because it cannot be repackaged as a component of Article III’s injury requirement, nor can it be viewed as a merits question. Part III.B suggests that this difference makes sense because the limitation on third-party standing serves a fundamentally different function than constitutional standing rules. Finally, Part III.C explains why the prudential label could matter in future cases.

## II. OVERVIEW

### A. *Standing Doctrine: Two Separate Strands*

The Supreme Court has long understood that the federal judiciary’s duty “to say what the law is”<sup>29</sup> includes the responsibility to determine *when* a federal court has the constitutional authority to perform that duty.<sup>30</sup> Of the doctrines created to set the outer

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[<http://perma.cc/F386-FBJZ>] (observing that dicta by Justices Thomas, Alito, and Gorsuch in *June Medical* “could lay the foundation for the [third-party standing] issue to be challenged in a future case”); Brandon L. Winchel, Note, *The Double Standard for Third-Party Standing: June Medical and the Continuation of Disparate Standing Doctrine*, 96 NOTRE DAME L. REV. 421, 426 (2020) (“Although the rule against third-party standing remains a prudential requirement, its categorization as such is far from firmly cemented.” (footnote omitted)).

25. See *June Med.*, 140 S. Ct. at 2118 (plurality opinion) (noting that Louisiana had conceded the issue of standing “as part of its effort to obtain a quick decision from the District Court on the merits of the plaintiffs’ undue-burden claims”).

26. See S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 101 (2014).

27. See Opposition to Conditional Cross-Petition for a Writ of Certiorari at 18, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1460) (collecting cases).

28. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (“Although we admittedly have placed [the zone of interests] test under the ‘prudential’ rubric in the past, it does not belong there . . .” (citation omitted)). See generally Bridget Winkler, *What About the Rule of Law? Deviation from the Principles of Stare Decisis in Abortion Jurisprudence, and an Analysis of June Medical Services L.L.C. v. Russo Oral Arguments*, 68 UCLA L. REV. DISCOURSE 14 (2020) (arguing the Supreme Court has deviated from stare decisis regarding third-party provider standing in order to favor anti-abortion interests).

29. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

30. See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

bounds of federal court jurisdiction, standing is the most complex.<sup>31</sup> Article III grants the “judicial Power” to federal courts,<sup>32</sup> but it defines the scope of that power only by limiting federal courts to adjudicating “Cases” and “Controversies.”<sup>33</sup> From this limited instruction, the Supreme Court has crafted a rule of standing with three distinct elements.<sup>34</sup>

In order to establish a case or controversy, and thus constitutional standing, a plaintiff must show (1) injury in fact, (2) a causal connection between his injury and the defendant’s conduct, and (3) redressability by federal court action.<sup>35</sup> Put simply, a plaintiff must demonstrate that he has been injured in some concrete way by a defendant’s unlawful conduct and that a federal court has the ability to correct that injury.<sup>36</sup> When constitutional standing cannot be established, a federal court lacks subject matter jurisdiction and must dismiss the case without deciding the merits.<sup>37</sup>

Since the Washington administration, the Supreme Court has interpreted the case-or-controversy requirement to furnish an absolute bar on advisory opinions.<sup>38</sup> Federal courts undoubtedly have the power and responsibility to “say what the law is”<sup>39</sup>—but only where that law is disputed by stakeholding parties with respect to a discrete set of facts.<sup>40</sup> Rigid standing requirements, along with related justiciability doctrines,<sup>41</sup> provide the guardrails to ensure that federal courts stay within their constitutional lane—even if they are tempted to swerve.<sup>42</sup>

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31. See Brown, *supra* note 26, at 96–97.

32. U.S. CONST. art. III, § 1.

33. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016); Lujan v. Defs. of Wildlife, 504 U.S. 555, 559 (1992).

34. See Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RESV. L. REV. 413, 420 (2013) [hereinafter Mank, *Jurisdictional*].

35. See Lujan, 504 U.S. at 560–61.

36. See Winchel, *supra* note 24, at 423–24.

37. Mank, *Jurisdictional*, *supra* note 34, at 419.

38. See United States v. Windsor, 570 U.S. 744, 781 (2013) (Scalia, J., dissenting) (citing 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–89 (H. Johnston ed. 1893)).

39. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

40. See Windsor, 570 U.S. at 780 (Scalia, J., dissenting); see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (“[The injury requirement] tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”). But see James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 175 (2018) (arguing that early federal court practice allowed for noncontentious jurisdiction in which a plaintiff was not required to articulate a personal injury nor to name an adverse defendant).

41. See generally C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862 (1985) (describing the justiciability decisions of the Burger Court and their impact on the ability of parties to access federal courts).

42. Cf. Windsor, 570 U.S. at 778–79 (Scalia, J., dissenting) (“The Court is eager—hungry—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges’ intrusion into their lives. They gave judges, in Article III, only the ‘judicial Power,’ a power to decide not abstract questions but real, concrete ‘Cases’ and ‘Controversies.’” (quoting U.S. CONST. art. III, § 2)).

In addition to guarding against advisory opinions, the standing requirements serve a separation of powers function.<sup>43</sup> The Constitution does not grant federal courts unfettered power to resolve questions of law.<sup>44</sup> Instead, the authority of federal courts “begins and ends with the need to adjudge the rights of an injured party . . . seeking redress.”<sup>45</sup> The standing requirements ensure that federal courts are cabined to the historical role occupied by courts.<sup>46</sup> Further, the requirements prevent federal courts from resolving matters better left to the political branches.<sup>47</sup>

But even where these three elements are satisfied, and despite a federal court’s “virtually unflagging obligation” to hear all cases to which its jurisdiction extends,<sup>48</sup> the Supreme Court has developed prudential rules to further curb its jurisdiction.<sup>49</sup> These exceptions are typically policy based and reflect a court’s judgment that, for some articulable reason, it ought not to hear a case.<sup>50</sup> Prudential standing doctrine has been largely undefined, but through the twentieth century it included, at minimum, (1) the rule against generalized grievances, (2) the zone of interests requirement, and (3) the prohibition against third-party standing.<sup>51</sup> The prudential label can be hugely important because jurisdictional requirements, unlike prudential concerns, can be neither waived by litigants nor overridden by Congress.<sup>52</sup>

The remainder of Part II.A discusses three traditionally recognized prudential standing doctrines, though the Supreme Court no longer recognizes the rule against generalized grievances<sup>53</sup> and the zone of interests test<sup>54</sup> as separate, prudential rules.

### 1. The Prudential Rule Against Generalized Grievances

The prudential rule against generalized grievances barred standing where a litigant’s asserted harm was “shared in substantially equal measure by all or a large class of citizens.”<sup>55</sup> The issue most commonly arose when public interest groups attempted to

43. See Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1869 (1996); F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 674–75 (2017). But see Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 460 (2008) (“[T]here is no single ‘idea’ of separation of powers, and the Court has used standing doctrine to pursue several different such ideas.”).

44. See *Windsor*, 570 U.S. at 780 (Scalia, J., dissenting).

45. *Id.* at 781 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

46. Hessick, *supra* note 43, at 674.

47. *Id.* at 674–75; see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (citing *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

48. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

49. *Brown*, *supra* note 26, at 96.

50. See Mank, *Jurisdictional*, *supra* note 34, at 421; Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?: Lexmark International, Inc. v. Static Control Components, Inc.*, 18 UNIV. PA. J. CONST. L. 213, 220 (2015) [hereinafter Mank, *Abolished*].

51. See Mank, *Jurisdictional*, *supra* note 34, at 421 (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

52. See *id.* at 430; cf. Smith, *supra* note 12, at 879–80 (noting that cases challenging housing segregation may have been unsuccessful had Congress been unable to abrogate prudential standing rules).

53. See *infra* Part II.A.1.

54. See *infra* Part II.A.2.

55. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

enforce group-based rights against the government.<sup>56</sup> The problem was not that the plaintiff had not suffered an injury but that the plaintiff's injury was no different than that suffered by a significant class of other potential plaintiffs.<sup>57</sup> Courts applying this rule reasoned that where a plaintiff alleges only "abstract questions of wide public significance," her demands would be better directed to the representative branches.<sup>58</sup>

For example, taxpayer suits typically prompted generalized grievance challenges.<sup>59</sup> In a taxpayer suit, a plaintiff claims to have suffered a concrete harm as a result of the government's unlawful mispending of taxes she paid.<sup>60</sup> The problem is that tax funds are fungible. The plaintiff suffers no more injury than every other taxpayer; the harm is not particularized.<sup>61</sup> And without a concrete harm, the taxpayer plaintiff is not seeking a resolution of a particularized dispute with the government but an order compelling the government to obey the law generally.<sup>62</sup>

The Court repeatedly and emphatically rejected theories of standing that would allow citizens to require "that the Government be administered according to law."<sup>63</sup> A federal court is designed and equipped to resolve concrete disputes between adverse parties; it is not a "forum in which to air . . . generalized grievances about the conduct of government."<sup>64</sup> Twentieth-century precedents did not suggest that a plaintiff asserting a widely suffered harm failed to allege a redressable injury, but instead that prudential principles—"[b]eyond the constitutional requirements"—counseled federal court restraint.<sup>65</sup>

## 2. The Prudential Zone of Interests Requirement

Plaintiffs challenging administrative action found themselves confronted with the prudential zone of interests requirement.<sup>66</sup> Prompted by the rise of the administrative state, the Burger Court devised a requirement that a plaintiff who sought to challenge a statute or regulation must demonstrate that her claim fell within the zone of interests protected by the law invoked.<sup>67</sup>

56. *Guilds*, *supra* note 43, at 1865.

57. See 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, 1204 (2008).

58. *E.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975)).

59. See, *e.g.*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 611–12 (2007); see also *Smith*, *supra* note 12, at 857.

60. *Stern*, *supra* note 57, at 1205.

61. See *Hein*, 551 U.S. at 593 (plurality opinion) ("In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm.").

62. *Cf. Flast v. Cohen*, 392 U.S. 83, 106 (1968) (distinguishing the justiciable case at issue from a situation where a taxpayer sought "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System").

63. *Valley Forge*, 454 U.S. at 482–83 (quoting *Baker v. Carr*, 369 U.S. 186, 208 (1962)).

64. *Id.* at 483 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

65. *Id.* at 474–75.

66. See *Smith*, *supra* note 12, at 856.

67. *Valley Forge*, 454 U.S. at 475 (citing *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)); see also *Mank, Abolished*, *supra* note 50, at 242–43.

The Administrative Procedure Act<sup>68</sup> offered judicial review to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”<sup>69</sup> The zone of interests test developed as a gloss on this provision but was later extended to other statutorily created causes of action.<sup>70</sup> In order to limit claims and further congressional intent, plaintiffs were required to show that the interests they sought to assert were “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>71</sup> Courts throughout the twentieth century repeatedly affirmed that the zone of interests principle was “undoubtedly” a component of prudential standing.<sup>72</sup>

### 3. The Prudential Rule Against Third-Party Standing

Courts invoke the rule against third-party standing to prevent a litigant from asserting a right of an absent third party.<sup>73</sup> In this context, the litigant typically has Article III standing—a direct injury caused by a defendant’s unlawful conduct and redressable by a federal court—but the substantive merits of the litigant’s argument turn on some right of a third party.<sup>74</sup>

In the abortion context, for instance, a physician challenging a state’s anti-abortion law can typically satisfy the three elements for Article III standing.<sup>75</sup> If a state outlawed abortion and threatened criminal penalties to those who would provide abortion services, an obstetrician-gynecologist seeking to perform an abortion could face criminal prosecution—a direct harm, caused by the state’s unconstitutional ban, redressable by a federal court.<sup>76</sup> But the merits of that physician’s claim would not stem from any constitutional right belonging to the physician.<sup>77</sup> The Supreme Court has already rejected arguments that a woman’s constitutional right to an abortion necessarily creates a physician’s reciprocal constitutional right to provide that abortion.<sup>78</sup> Instead, the physician in many abortion cases has argued that the state’s regulation is unconstitutional because of the substantial burden it would place on *his patient’s* right to an abortion.<sup>79</sup>

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68. 5 U.S.C. §§ 551–59, 701–06.

69. *Id.* § 702.

70. See Mank, *Abolished*, *supra* note 50, at 242–43.

71. See Brown, *supra* note 26, at 110, 112 (quoting *Camp*, 397 U.S. at 153).

72. *Id.* (quoting *United States v. Richardson*, 418 U.S. 166, 196 n.18 (1974) (Powell, J., concurring)).

73. See Smith, *supra* note 12, at 855.

74. See Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1337 n.87, 1359 (2000).

75. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 112–13 (1976).

76. See Note, *Standing To Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 431 (1974).

77. Cf. Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS. J. 277, 311 (2015) (observing that a court rejecting a claim on the ground that a litigant cannot assert another’s rights is necessarily holding that “the asserted right has a limited scope” and “that the litigant falls outside of that scope”).

78. E.g., *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion)).

79. See, e.g., *Singleton*, 428 U.S. at 113 (plurality opinion). *But see* Fallon, *supra* note 74, at 1360 (arguing that an abortion provider “need not rely directly on her patients’ rights, but can instead invoke a personal right not to be sanctioned except pursuant to a constitutionally valid rule of law”); Brief of Federal Courts Scholars as *Amici Curiae* in Support of Petitioners at 16–17, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460) (same).

This framing has caused courts to pause—is *this* plaintiff really the best litigant to assert *this* constitutional right?<sup>80</sup> Because of this concern, citing a prudential rule, federal courts typically (but not categorically<sup>81</sup>) refuse to allow a plaintiff to assert a right belonging to an absent third party.<sup>82</sup>

### B. *The Demise of Prudential Standing Doctrine*

For most of the twentieth century, the Supreme Court understood prudential standing as a “judicially self-imposed” limit on federal jurisdiction, separate from the “core component derived directly from the Constitution.”<sup>83</sup> These prudential concerns were “closely related to Art. III concerns”<sup>84</sup> but arose in cases “concededly within [the Court’s] jurisdiction under Article III.”<sup>85</sup>

Justice Scalia began to criticize the Court’s prudential standing doctrine in 1983 while serving as a judge on the United States Court of Appeals for the District of Columbia Circuit.<sup>86</sup> He argued that while constitutional standing is a necessary limitation to ensure the separation of powers,<sup>87</sup> prudential standing doctrine gives a federal court an inexplicable power to refuse to hear a case otherwise within its jurisdiction.<sup>88</sup> He described the bifurcation between prudential and constitutional standing rules as “unsatisfying,” arguing that the doctrine “[le]ft unexplained the Court’s source of authority for simply granting or denying standing as its prudence might dictate.”<sup>89</sup>

Justice Scalia’s criticisms continued after his elevation to the Supreme Court. He penned strong dissents, arguing that federal courts attached the “prudential” label to standing requirements in order to justify ignoring Article III’s limitations when anxious to reach the merits of a case.<sup>90</sup> Although he did not directly call for the abolition of prudential standing while on the Court, he successfully recategorized multiple issues as “constitutional” rather than “prudential.”<sup>91</sup> As explained in the following Parts, the Supreme Court, propelled by Justice Scalia, has rejected the prudential label for two of

80. *Cf. Singleton*, 428 U.S. at 113–14 (plurality opinion).

81. See *infra* Part I.C for a discussion of the exception to the prohibition on third-party standing.

82. See *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

83. *Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

84. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

85. *Id.* at 11.

86. Mank, *Abolished*, *supra* note 50, at 225 (citing Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881, 885 (1983)); see also Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 164 (1992).

87. See Scalia, *supra* note 86, at 881.

88. See *id.* at 885.

89. *Id.*

90. See, e.g., *United States v. Windsor*, 570 U.S. 744, 785 (2013) (Scalia, J., dissenting) (“Relegating a jurisdictional requirement to ‘prudential’ status is a wondrous device, enabling courts to ignore the requirement whenever they believe it ‘prudent’—which is to say, a good idea.”).

91. Mank, *Abolished*, *supra* note 50, at 226.

the three traditionally recognized prudential doctrines: the rule against generalized grievances and the zone of interests requirement.<sup>92</sup>

### 1. Generalized Grievances: From Prudential to Constitutional

First, the Supreme Court held that the rule against generalized grievances is not prudential. In *Lujan v. Defenders of Wildlife*,<sup>93</sup> the Court, in an opinion by Justice Scalia, held that environmentalists lacked standing to challenge an executive agency's failure to comply with a section of the Endangered Species Act<sup>94</sup> (ESA).<sup>95</sup> First, the *Lujan* Court applied traditional standing principles, observing that the plaintiffs could show neither an injury in fact nor redressability.<sup>96</sup> The Court then went on to reject plaintiffs' alternate theory—that the “citizen-suit” provision of the ESA created a private right to challenge a government entity's failure to follow the Act's prescribed procedure.<sup>97</sup> The Court held that Congress could not extend standing to a plaintiff who suffers only a generalized grievance without running afoul of Article III's case-or-controversy requirement.<sup>98</sup>

The Court reasoned that to allow a plaintiff to argue a private right from an “undifferentiated public interest” in government's compliance with law would be to allow Congress to transfer the Executive Branch's “most important constitutional duty”: the duty to “take Care that the Laws be faithfully executed.”<sup>99</sup> The Court explicitly tied this concern to Article III's case-or-controversy requirement: a generalized grievance lacks the particularity to create a case or controversy.<sup>100</sup> Indeed, were generalized grievance concerns not tied to a constitutional principle—were they merely prudential—Congress would have the power to legislate the concerns away.<sup>101</sup> In rejecting the ESA's citizen-suit provision, the *Lujan* Court necessarily determined—in an independent holding—that the rule against generalized grievances created a constitutional barrier that not even Congress could overcome.<sup>102</sup>

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92. See *id.* at 217; Winchel, *supra* note 24, at 425–26.

93. 504 U.S. 555 (1992).

94. 16 U.S.C. §§ 1531–44.

95. See *Lujan*, 504 U.S. at 578.

96. *Id.* at 564, 568.

97. See *id.* at 571–73 (“The so-called ‘citizen-suit’ provision of the ESA provides, in pertinent part, that ‘any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.’” (omission in original) (quoting 16 U.S.C. § 1540(g))).

98. See *id.* at 573–74.

99. *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

100. See *id.* at 573–74, 577–78; cf. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (explaining that *Lujan* rested on constitutional grounds); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344–45 (2006) (rejecting taxpayer standing for failure to allege an injury in fact).

101. See Brown, *supra* note 26, at 124; Chemerinsky, *supra* note 2, at 692.

102. Cf. Smith, *supra* note 12, at 876 (“Generalized grievances are barred for constitutional reasons, not ‘prudential’ ones.”); Sunstein, *supra* note 86, at 165 (“[T]he [*Lujan*] decision invalidates the large number of statutes in which Congress has attempted to use the ‘citizen-suit’ device as a mechanism for controlling unlawfully inadequate enforcement of the law.”).

## 2. Zone of Interests: From Standing to Merits

A unanimous Supreme Court, again led by Justice Scalia, similarly removed the prudential label from the zone of interests requirement.<sup>103</sup> In *Lexmark International, Inc. v. Static Control Components, Inc.*, a manufacturer of microchips that facilitated other companies' refurbishment of Lexmark cartridges attempted to sue Lexmark for false advertising under the Lanham Act.<sup>104</sup> The parties framed the issue as one of prudential standing, but the Court rejected that label as "misleading."<sup>105</sup>

The zone of interests requirement had been previously understood as a prudential question, asking whether a plaintiff's claim fell within the range of interests protected by the law invoked.<sup>106</sup> The *Lexmark* Court did not challenge the relevance of the question, but instead the accuracy of the label.<sup>107</sup> The Court explained that the inquiry does not require a separate standing analysis.<sup>108</sup> Instead, the concerns which led previous courts to articulate a prudential zone of interests standing requirement were adequately addressed by the straightforward tools of statutory interpretation used to identify the outer bounds of a legislatively created cause of action.<sup>109</sup>

Therefore, the *Lexmark* Court reasoned, the question required only the familiar, nonprudential analysis of whether a substantive statute creates a right to sue for a particular plaintiff.<sup>110</sup> The function of the zone of interests requirement was to "infer[] limits on who may obtain relief under the law when the statute is silent."<sup>111</sup> The *Lexmark* Court established that the traditional cause of action inquiry sufficiently performed that function.<sup>112</sup>

## 3. Third-Party Standing: The Last Domino To Fall?

The *Lexmark* Court, in a now-famous footnote, expressly observed that the limit on third-party standing remained as the sole traditionally recognized prudential rule.<sup>113</sup> The Court declined to analyze whether the rule against third-party standing should similarly be recharacterized as a jurisdictional rule, noting that the case did not present the issue.<sup>114</sup> Although Justice Scalia's footnote stated only that the question remained an open one, Justice Thomas has since argued that the inclusion of third-party standing in the *Lexmark* footnote signaled Justice Scalia's belief that the prudential label was similarly inapt for

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103. See *Lexmark*, 572 U.S. at 126–27.

104. 15 U.S.C. §§ 1051–1129; see *Lexmark*, 572 U.S. at 121–23.

105. *Lexmark*, 572 U.S. at 125.

106. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) (citing *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

107. See *Lexmark*, 572 U.S. at 126–27.

108. See *id.* at 126–28.

109. See *id.*; Smith, *supra* note 12, at 874.

110. See *Lexmark*, 572 U.S. at 126–27; see also Kim, *supra* note 14, at 336.

111. Brown, *supra* note 26, at 113.

112. See *id.* at 113–14.

113. See *Lexmark* 572 U.S. at 127 n.3.

114. *Id.*

the last of the remaining prudential doctrines.<sup>115</sup> Part II.C defines the rule against third-party standing and explains the rule's long-recognized exception.

### C. Prudential Standing's Last Stand: Third-Party Standing

The rule against third-party standing “bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.”<sup>116</sup> The Supreme Court consistently recognized the limitation as a rule of self-governance, subject to exceptions.<sup>117</sup> Congress could remove the rule by statute, or a court could find the rule inapt where “enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.”<sup>118</sup>

An exception to the limit on asserting a right of a third party has long been recognized in the abortion context.<sup>119</sup> In *Singleton v. Wulff*,<sup>120</sup> the Supreme Court held that it is generally “appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision.”<sup>121</sup>

The *Singleton* Court recognized that physicians plainly suffer an injury in fact sufficient to sustain an Article III case or controversy—the providers themselves are being directly regulated by the challenged statute.<sup>122</sup> The only question, then, was whether prudential concerns counseled that the doctors were not the best party to assert the constitutional right.<sup>123</sup> As a general matter, the Court observed that the absent third party—in *Singleton*, the female patient for whom the plaintiff doctors sought to perform an abortion—may not wish to assert her right, or, at the very least, would be a better proponent of that right.<sup>124</sup> These concerns drive the prudential rule, and therefore, the Court reasoned, the rule should only apply to those cases in which those concerns are present.<sup>125</sup>

The *Singleton* Court, seeking a rule that would confine the prohibition of third-party standing to those cases to which the underlying concerns apply, identified a two-part test.<sup>126</sup> Third-party standing is permissible only where, (1) the party asserting the right

115. Cf. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2144 (2020) (Thomas, J., dissenting) (“The [Lexmark] Court specifically questioned the prudential label for the rule against third-party standing.”). Commentators have likewise suggested that Justice Scalia’s decision to preserve the question for another day should not be viewed as an indication that the Justice believed the prudential label any better fitting for third-party standing than he did for the other traditionally recognized rules. See, e.g., Mank, *Abolished*, *supra* note 50, at 257; Joel S. Nolette, *Last Stand for Prudential Standing?: Lexmark and Its Implications*, 16 GEO. J. L. & PUB. POL’Y 227, 235 (2018).

116. *Warth v. Seldin*, 422 U.S. 490, 509 (1975).

117. *E.g.*, *id.*

118. *Id.* at 510 (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

119. *E.g.*, *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality opinion).

120. 428 U.S. 106 (1976).

121. *Singleton*, 428 U.S. at 118.

122. *Id.* at 112–13.

123. *Id.* at 112.

124. *Id.* at 113–14.

125. See *id.* at 114; see also Winchel, *supra* note 24, at 427.

126. See *Singleton*, 428 U.S. at 114–15.

has a close relationship with the holder of the right, and (2) the right holder faces some hindrance in asserting her own interests.<sup>127</sup>

The first consideration is the “relationship of the litigant to the person whose right he seeks to assert.”<sup>128</sup> The Court focused on the relationship between the litigant and the right holder as a means to further the goal of constitutional avoidance and as a proxy for alignment of interests.<sup>129</sup>

The *Singleton* Court reasoned that the relationship could further the goal of constitutional avoidance because the issue of a constitutional right’s scope is less likely to be reached unnecessarily where the enjoyment of that right is “inextricably bound up” with the litigant’s purported harm.<sup>130</sup> Federal courts seek to avoid constitutional rulings where a case could be disposed of on another ground.<sup>131</sup> Allowing a third party to assert someone else’s constitutional right creates a risk that more constitutional adjudication may occur than is necessary to resolve a claim.<sup>132</sup> That risk is lessened when the third party’s constitutional right is necessarily implicated by the nature of the litigant’s claim.<sup>133</sup> A woman’s constitutional right to an abortion may not create a reciprocal constitutional right in a physician to provide that abortion,<sup>134</sup> but a limitation on a physician’s ability to provide abortions will necessarily affect the enjoyment of a woman’s constitutional right.<sup>135</sup> Thus, the outcome of a suit challenging an anti-abortion law carries a lower risk of unnecessarily reaching constitutional questions because a woman’s right will necessarily be implicated.<sup>136</sup>

The *Singleton* Court also observed that the requirement of a close relationship increases the likelihood that the litigant will be well positioned to advance the interests of the right holder.<sup>137</sup> Later precedents have further ensured this unity of interests by signaling the potential disallowance of third-party standing where a conflict of interests might exist between the litigant and the right holder.<sup>138</sup>

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127. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

128. *Singleton*, 428 U.S. at 114; *see also* *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

129. *See Singleton*, 428 U.S. at 114–15.

130. *Id.*

131. *See* 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 23.10(a) (2020); *see also* *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring).

132. *Cf. Singleton*, 428 U.S. at 114–15.

133. *Cf. Note, supra* note 76, at 436–38.

134. *See* *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)).

135. *Cf. Brief of Federal Courts Scholars as Amici Curiae in Support of Petitioners* at 15–16, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460) (“The [anti-abortion] regulation applies to the physician and the patient at exactly the same time; if the physician is prevented from providing services, then the patient’s rights are diminished at that very moment, especially in light of the fact that there is no other feasible avenue for the patient to obtain those services.”).

136. *Cf. id.*

137. *See Singleton*, 428 U.S. at 115.

138. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (“In marked contrast to our case law on *jus tertii*, the interests of this parent and this child are not parallel and, indeed, are potentially in conflict.” (citation omitted)), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

The second prong of the *Singleton* test asks whether the right holder faces some impediment to asserting her own right.<sup>139</sup> One reason to deny third-party standing rests on the concern that the third party may not wish to press her right in the litigation.<sup>140</sup> If a woman wanted to litigate her right to an abortion, as the theory goes, she would bring the suit in her own name.<sup>141</sup> If the litigant can show some barrier inhibiting the right holder's ability to bring a claim, however, this justification loses force.<sup>142</sup>

In *Singleton*, the Court applied its articulated test and concluded—seemingly categorically—that abortion providers satisfy the two-part test to assert the constitutional rights of their patients.<sup>143</sup> The provider-patient relationship is close and the interests are aligned because a woman cannot safely secure an abortion without a physician and, therefore, the constitutional right is “necessarily at stake.”<sup>144</sup> Further, significant privacy concerns could chill a potential plaintiff from publicizing her intimate abortion decision via litigation.<sup>145</sup> The Court thus held that “it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision.”<sup>146</sup> This conclusion went unchallenged for decades until Justice Thomas began to suggest an interest in reopening the question.<sup>147</sup>

#### D. Third-Party Standing After *June Medical*

Despite *Singleton*'s express holding “generally” allowing physicians to assert the constitutional right of their abortion-seeking patients,<sup>148</sup> the Court granted the State of Louisiana's cross-petition for certiorari in *June Medical*.<sup>149</sup> Louisiana asked the Court to reconsider whether abortion providers should be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients and whether objections to prudential standing could be waived.<sup>150</sup> Notably, Louisiana did not ask the Court to reconsider whether third-party standing itself is a prudential or constitutional doctrine.

139. *Singleton*, 428 U.S. at 115–16.

140. *Cf. Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (noting that the rule rests on the assumption that the right holder has the “appropriate incentive to challenge (*or not challenge*) governmental action” (emphasis added)).

141. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2323 (2016) (Thomas, J., dissenting) (“After creating a constitutional right to abortion because it ‘involve[s] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,’ the Court has created special rules that cede its enforcement to others.” (alteration in original) (citation omitted)).

142. *See Singleton*, 428 U.S. at 116.

143. *Id.* at 117–18.

144. *Id.* at 117.

145. *Id.*

146. *Id.* at 118.

147. *See, e.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321–23 (2016) (Thomas, J., dissenting); *cf. Kowalski v. Tesmer*, 543 U.S. 125, 134–36 (2004) (Thomas, J., concurring).

148. *Singleton*, 428 U.S. at 118.

149. *See Rachel N. Morrison, The Supreme Court Takes Up Abortion: What You Need To Know About June Medical Services v. Gee*, 20 FEDERALIST SOC'Y REV. 144, 147 (2019); *cf. Winkler, supra* note 28, at 37.

150. Conditional Cross-Petition for Certiorari at i, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1323).

The plurality opinion did not meaningfully engage with the issues raised by the State of Louisiana's cross-petition.<sup>151</sup> Over a passionate dissent by Justice Thomas, the plurality held that a challenge to third-party standing is prudential and thus waivable.<sup>152</sup> Finding that Louisiana had waived its challenge, the Court declined to address the propriety of presuming third-party standing for abortion providers.<sup>153</sup>

In dissent, Justice Thomas argued that the plurality was incorrect to assume the applicability of the prudential label for the rule against third-party standing.<sup>154</sup> He challenged both the original justification given for the prudential classification and the continuing validity of that justification in the wake of the Roberts Court's more recent developments in standing doctrine.<sup>155</sup>

Justice Thomas first observed that many cases cite to *Barrows v. Jackson*<sup>156</sup> as support for third-party standing's prudential label but noted that *Barrows* provided no reasoning for the distinction between prudential and constitutional standing.<sup>157</sup> Worse, Justice Thomas explained, the only authority to which *Barrows* itself cited was Justice Brandeis's solo concurrence in *Ashwander v. Tennessee Valley Authority*<sup>158</sup> which never referenced third-party standing.<sup>159</sup> Therefore, Justice Thomas ostensibly concluded, the foundational case upon which modern third-party standing doctrine has been built failed to meaningfully analyze the issue before attaching the prudential label.<sup>160</sup>

And even if previous Courts had been willing to accept the prudential label despite its shaky foundation, Justice Thomas argued that any past justifications could not be squared with recent developments—specifically Justice Scalia's *Lexmark* footnote.<sup>161</sup> Justice Thomas contended that *Lexmark* suggests that the prudential label is inapt for *all* of the Court's standing doctrines, including the rule against third-party standing.<sup>162</sup> He then observed that *Spokeo, Inc. v. Robins*<sup>163</sup> “appeared to incorporate the rule against third-party standing into [the Court's] understanding of Article III's injury-in-fact requirement.”<sup>164</sup>

Turning to history, Justice Thomas argued that common law required not only real-world damages or practical injury to create a case or controversy but also a violation of a legally protected interest of the plaintiff.<sup>165</sup> He concluded that history demonstrated

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151. See *supra* notes 18–20 and accompanying text.

152. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020) (plurality opinion).

153. See *Winchel*, *supra* note 24, at 427; *Durham*, *supra* note 24.

154. See *June Med.*, 140 S. Ct. at 2143 (Thomas, J., dissenting).

155. See *id.* at 2146–48.

156. 346 U.S. 249 (1953).

157. *June Med.*, 140 S. Ct. at 2143 (Thomas, J., dissenting).

158. 297 U.S. 288 (1936).

159. *June Med.*, 140 S. Ct. at 2143 (Thomas, J., dissenting).

160. See *id.* at 2143–44.

161. See *id.* at 2144 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014)).

162. See *id.*

163. 136 S. Ct. 1540 (2016).

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

165. *Id.* at 2146.

that a plaintiff's injury, for purposes of Article III's injury-in-fact requirement, must consist of a violation of the plaintiff's own legally recognized right.<sup>166</sup>

Justice Thomas then rejected the plurality's assertion that prior precedents had settled the issue of abortion-provider standing.<sup>167</sup> He dismissed several cases<sup>168</sup> that permitted such standing because those Courts had "reflexively" assumed provider standing without questioning the propriety of the assumption.<sup>169</sup> And *Singleton*, the only case in which such an analysis was performed, did not command a majority of the Court.<sup>170</sup> Thus, he reasoned, the *June Medical* plurality could and should have considered the issue anew.<sup>171</sup>

Unbound by stare decisis, Justice Thomas concluded that the abortion providers did not have standing to bring the present claim.<sup>172</sup> He explained that plaintiff providers could not establish a personal legal injury because the substantive due process right to an abortion is a private right, belonging to the woman seeking the abortion.<sup>173</sup> Plaintiffs alleged potential damages, but no invasion of a legally protected interest belonging to them.<sup>174</sup> Therefore, Justice Thomas would have held that the plaintiff abortion providers lacked Article III standing and that the Court had no jurisdiction to hear the dispute.<sup>175</sup>

### III. DISCUSSION

Justice Thomas is incorrect. This Comment argues that the limitation on third-party standing is a prudential, judicially created rule. Unlike the generalized grievance and zone of interest rules, the limitation on third-party standing cannot be repackaged as either a component of the injury-in-fact requirement or the statutory scope of a cause of action.<sup>176</sup> And unlike Article III standing requirements, the limitation on third-party standing serves neither a separation of powers function nor as a protection against advisory opinions.<sup>177</sup> Therefore, objections to third-party standing can be waived by parties, and, more importantly, the limitation can be removed by Congress.<sup>178</sup>

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166. *See id.*

167. *Id.* at 2146.

168. Justice Breyer interrupted the government during oral argument to ask whether the Court should "go back and reexamine *Marbury versus Madison*" if the Court could ignore the many abortion decisions in which it had found provider standing. Winkler, *supra* note 28, at 30 (quoting Oral Argument at 3:02, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460), <http://www.oyez.org/cases/2019/18-1323> [<http://perma.cc/8XRT-VKK9>]).

169. *See June Med.*, 140 S. Ct. at 2146 (Thomas, J., dissenting).

170. *See id.* at 2147.

171. *See id.* at 2147–48.

172. *Id.* at 2148.

173. *See id.*

174. *Id.* at 2149.

175. *See id.*

176. *See infra* Part III.A.

177. *See infra* Part III.B.

178. *See infra* Part III.C.

A. *The Rule Against Third-Party Standing Does Not Fit Within an Existing Doctrine*

Despite his pre-elevation writings, Justice Scalia never called for the wholesale abandonment of prudential standing doctrine while on the Court.<sup>179</sup> The *Lexmark* decision undoubtedly questioned the legitimacy of piling prudential limitations atop Article III's "irreducible constitutional minimum of standing" rules,<sup>180</sup> but it did not hold that prudential rules are universally unconstitutional.<sup>181</sup>

More importantly, even where Justice Scalia succeeded in bucking the prudential label, he never rejected the premises undergirding the once-prudential limitations.<sup>182</sup> Instead, for both the rule against generalized grievances and the zone of interests requirement, the Court affirmed the legitimacy of the concerns that had caused earlier Courts to create the prudential rules in the first place.<sup>183</sup>

In the case of generalized grievances, the *Lujan* Court reasoned that the separation-of-powers concerns that prompted the rule not only counseled the limitation as a matter of prudence but also compelled it as a matter of constitutional design.<sup>184</sup> Courts creating and applying the rule against generalized grievances recognized that the judiciary was not the branch tasked to "take Care that the Laws be faithfully executed."<sup>185</sup> Thus, even where a plaintiff could show injury, causation, and redressability, pre-*Lujan* Courts refused to allow litigation where the crux of a plaintiff's claim rested on a right that the government follow its own laws.<sup>186</sup>

The *Lujan* Court not only recognized the legitimacy of such a limitation but also deemed the limitation so essential that it elevated the prohibition to a constitutional requirement.<sup>187</sup> A generalized theory of injury is so deficient that it cannot even be said to constitute a concrete, particularized injury.<sup>188</sup> Justice Scalia did not assert that pre-*Lujan* Courts were wrong in having identified a concern with generally suffered injuries; they were wrong only in failing to recognize that such a concern should make particularity a component of Article III's injury-in-fact analysis.<sup>189</sup>

In his *June Medical* dissent, Justice Thomas argued that the requirement that a litigant assert his own right should likewise be a component of Article III's injury-in-fact requirement.<sup>190</sup> Injury in fact requires an injury that is particularized to the plaintiff—the

179. See Mank, *Jurisdictional*, *supra* note 34, at 425.

180. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26 (2014) (observing that prudential limitations are "in some tension with [the Court's] recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging" (internal quotation marks omitted) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013))).

181. Cf. Mank, *Abolished*, *supra* note 50, at 261.

182. See *supra* Part II.B; see also Smith, *supra* note 12, at 850.

183. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–76 (1992); *Lexmark*, 572 U.S. at 127 n.3; see also Brown, *supra* note 26, at 109–10.

184. See *Lujan*, 504 U.S. at 576–77.

185. E.g., *Allen v. Wright*, 468 U.S. 737, 761 (1984) (quoting U.S. CONST. art. II, § 3).

186. E.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982).

187. See *Lujan*, 504 U.S. at 573–74.

188. See *id.* at 573–76; *Lexmark*, 572 U.S. at 127 n.3.

189. See *Lujan*, 504 U.S. at 573–76; *Lexmark*, 572 U.S. at 127 n.3.

190. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2148 (2020) (Thomas, J., dissenting).

injury must affect the plaintiff in a personal and individualized way.<sup>191</sup> From this, Justice Thomas reasoned that a harm inflicted on a woman's right to procure a safe abortion does not affect her provider in a personal and individualized way, and therefore, the harm is not particularized to the abortion provider seeking to rest his claim on the injured right.<sup>192</sup>

The problem with Justice Thomas's theory is that it conflates the injury necessary to grant a plaintiff standing with the argument on the merits that a defendant's conduct—which caused the standing injury—is unlawful. The abortion provider's alleged injury for standing purposes is the unlawful denial of the ability to perform abortions, an injury that is both particularized and concrete.<sup>193</sup> That the provider's argument on the merits turns on an injury not particularized to him does not defeat his standing.<sup>194</sup>

A plaintiff must plead facts establishing that a defendant's unlawful action has injured him in a concrete way and in a way that is unique and personal to him.<sup>195</sup> Nothing in this requirement suggests that the harm the plaintiff suffers must be the reason the defendant's conduct is unlawful. If a state attempted to enforce allegedly unlawful regulations, and the enforcement of those regulations resulted in a loss of the plaintiff's job, then the plaintiff has suffered a concrete, particularized harm. That harm, caused by the defendant and redressable by a federal court, is enough to get the plaintiff through standing doctrine's Article III door.<sup>196</sup> Any problem with the merits—the plaintiff's argument as to *why* the defendant's conduct was unlawful—has no bearing on the plaintiff's Article III standing.<sup>197</sup>

Of course, considerations of the merits of a plaintiff's claim may provide a compelling reason for a federal court to decline to exercise its jurisdiction.<sup>198</sup> If a plaintiff seeks to vindicate someone else's right, for instance, a court may reasonably be concerned for the reasons articulated in *Singleton*.<sup>199</sup> But the hesitancy in allowing an abortion provider to assert the constitutional right of his patient is not due to a concern that the abortion provider did not suffer a particularized, concrete injury.<sup>200</sup> It is because the claim that the regulation is unlawful would be better litigated by a woman who was denied access to an abortion—the holder of the right allegedly making the regulation unlawful.<sup>201</sup>

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191. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

192. See *June Med.*, 140 S. Ct. at 2148 (Thomas, J., dissenting).

193. See *Singleton v. Wulff*, 428 U.S. 106, 112–13 (1976) (“[T]here is no doubt now that the respondent-physicians suffer concrete injury from the operation of the challenged statute.”).

194. But see Sunstein, *supra* note 86, at 166–67 (arguing that Article III does not demand a constitutional standing analysis separate from the scope of a cause of action).

195. See *Spokeo*, 136 S. Ct. at 1548.

196. See Lea, *supra* note 77, at 306.

197. See *id.*

198. See *Brown*, *supra* note 26, at 101.

199. See *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976) (plurality opinion).

200. *Cf. id.* at 112–13.

201. See *id.* at 114.

Justice Thomas might be correct that third-party plaintiffs do not suffer an injury to their own legal interest—but that is not required for an Article III injury.<sup>202</sup> Third-party plaintiffs traditionally endure the sort of injury required to satisfy Article III.<sup>203</sup> They have suffered damages—an injury in fact.<sup>204</sup> Justice Thomas would hold that such an injury is insufficient to satisfy Article III, requiring instead a specific sort of injury, giving rise to a cause of action.<sup>205</sup> But much like pre-*Lexmark* Courts believed the zone of interests requirement to be separate from the cause of action analysis,<sup>206</sup> Justice Thomas conflates a plaintiff's standing with the merits of his claim. After *Lexmark*, a plaintiff unable to withstand a zone of interests analysis is no longer thrown out on jurisdiction, but instead on failure to state a claim.<sup>207</sup>

This post-*Lexmark* reality does not imply that third-party standing objections should, like the zone of interests requirement,<sup>208</sup> be subsumed into the statutory limits of a cause of action. The *Lexmark* Court concluded that a prudential analysis of a statute's zone of interests was an unnecessary redundancy, captured by the merits question of whether a cause of action had been pled.<sup>209</sup> Third-party standing concerns cannot be similarly remedied on the merits—just as an abortion provider unquestionably suffers direct harm, so too does he plead a cognizable cause of action.

The difference stems from the nature of the causes of action implicated by the two doctrines. The zone of interests test emerged to limit the scope of congressionally created causes of action.<sup>210</sup> *Lexmark* made clear that the Court's analysis of a cause of action's scope must turn only on the text of the statute.<sup>211</sup> But the Constitution itself creates the injunctive cause of action for those harmed by unconstitutional state action.<sup>212</sup> There is no statute to parse or congressional intent to divine. Where an abortion provider seeks only an injunction to prohibit a state's enforcement of unconstitutional regulations, he need not rely on a congressionally created cause of action. And a suggestion that a constitutional cause of action can only *ever* be pressed by the holder of the constitutional right could have significant consequences, most notably to the First Amendment's overbreadth doctrine.<sup>213</sup>

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202. *Cf. id.* at 112–13.

203. *See id.*; *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004).

204. *Cf. June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2149 (2020) (Thomas, J., dissenting).

205. *See id.* at 2148–49.

206. *See supra* Part II.A.2.

207. *See Kim, supra* note 14, at 349.

208. *See supra* Part II.B.2.

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

210. *See Brannon P. Denning & Sarah F. Bothma, Zone-of-Interests Standing in Constitutional Cases After Lexmark*, 21 LEWIS & CLARK L. REV. 97, 99–101 (2017).

211. *Id.* at 119 (“If the statute creates a cause of action for a particular class of potential plaintiffs, and if a plaintiff satisfies Article III standing, then a court cannot decline to hear that plaintiff’s case on prudential grounds.”).

212. *See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 760–61 (7th ed. 2015).

213. *See, e.g., United States v. Stevens*, 559 U.S. 460, 466, 473, 482 (2010) (allowing a defendant charged for selling videos depicting dogfighting to challenge the constitutionality of the statute under which he was indicted because the statute also criminalized other conduct protected by the First Amendment); *Mank, Abolished, supra* note 50, at 258–59. *But see Lea, supra* note 77, at 311.

B. *Third-Party Standing Rules Serve a Different Function than Article III Standing Rules*

It makes sense that the rules surrounding third-party standing cannot be neatly refitted as a component of an Article III requirement because the limitation on third-party standing addresses a fundamentally different concern. Constitutional standing doctrine prevents federal courts from issuing advisory opinions and ensures the separation of powers by limiting the role of the judiciary.<sup>214</sup> The rule against third-party standing is animated by a different concern and serves a different function.

Article III standing requirements developed as a check against the federal judiciary's power.<sup>215</sup> The separation of powers is central to the design of American democracy, and, as the branch with the constitutional duty to “say what the law is,” the judiciary has been assigned the unenviable task of setting and enforcing the limits of its own power.<sup>216</sup> Therefore, with so little guidance from the text of Article III, the Supreme Court turned to historical practice in order to define the “judicial Power,” reasoning that “Cases” or “Controversies” must mean whatever sorts of disputes English common law courts heard at the time of the founding.<sup>217</sup> As the *Lujan* Court explained, the “irreducible constitutional minimum of standing” developed as a means “to identify those disputes which are appropriately resolved through the judicial process.”<sup>218</sup>

The *Lujan* Court, building off earlier twentieth-century precedents, identified an injury as one requirement designed to cabin federal court power.<sup>219</sup> To effectively limit federal courts to traditional cases and controversies, injuries must be concrete and particularized, as well as actual or imminent.<sup>220</sup> If a plaintiff can make that showing—as well as showings of causation and redressability—then a court will be satisfied that he is alleging the sort of dispute traditionally heard by common law courts, and thus within the “judicial Power.”

The limitation on third-party standing does nothing to aid courts in ferreting out those injuries which are general or conjectural. In fact, courts have always required that a third-party plaintiff make the requisite showing of injury.<sup>221</sup> Instead, the limitation on third-party standing asks only if the claim in question would be *best* litigated by the injured plaintiff.<sup>222</sup>

Justice Scalia once framed the issue of standing as a federal court asking, “What’s it to you?”<sup>223</sup> The answer of an injured third-party plaintiff is generally clear—an abortion provider, for instance, has an obvious interest in being free from a regulation he believes is unconstitutional. The injury is particularized and imminent, and the dispute is

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214. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992).

215. See *supra* notes 44–48 and accompanying text.

216. See, e.g., *United States v. Windsor*, 570 U.S. 744, 762 (2013) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

217. See Scalia, *supra* note 86, at 882.

218. *Lujan*, 504 U.S. at 560.

219. See *id.*

220. See *id.*

221. E.g., *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

222. See *supra* notes 124–126 and accompanying text.

223. Scalia, *supra* note 86, at 882.

thus of the sort appropriately resolved through the judicial process. Allowing third-party standing would not pose a threat that federal courts would extend their reach beyond the narrowly circumscribed judicial power.

Another constitutional function of the injury element is to prevent federal courts from issuing advisory opinions.<sup>224</sup> The injury-in-fact definition requires that a plaintiff have a sufficient personal stake in the controversy and thus ensures that the issues will be thoroughly litigated.<sup>225</sup> Concededly, limiting allowable plaintiffs to the holder of an infringed right could further this goal—certainly a woman actually seeking an unconstitutionally prohibited abortion is the individual most likely to have a personal stake in the outcome of a challenge to the law. But a “sufficient” personal stake and the “strongest” personal stake are two different things.

Federal courts are adequately precluded from issuing advisory opinions where the litigants have sufficient skin in the game to ensure full presentation of adverse issues. The Court cannot justify the third-party standing limitation based on the desire to ensure actual conflict. Instead, the rule against third-party standing serves a wholly prudential, policy-based concern—whether a particular plaintiff is *best* positioned to assert the claim.<sup>226</sup>

### C. *It Matters Whether Third-Party Standing Rules Are Prudential or Constitutional*

The scope of this Comment is narrow, but the implications from the issue could be significant. This Comment takes no position on whether abortion providers should be granted standing to assert the constitutional right of their patients. Other scholarship has debated the soundness of the categorical presumption of standing, the closeness of the physician-patient relationship, the potential for conflicts of interest, and the reality of any hindrance on women seeking abortions in pursuing their own litigation.<sup>227</sup> Each of these issues deserves thorough attention by courts and scholars.

This Comment, however, addresses only the label assigned to the third-party standing question. Although technical, the issue has practical consequences.<sup>228</sup> For one, as occurred in *June Medical*, prudential standing objections, unlike Article III requirements, can be waived.<sup>229</sup> With the stage set by *June Medical*'s dissenting Justices,

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224. See *supra* notes 38–43 and accompanying text.

225. See Nolette, *supra* note 115, at 234.

226. See *supra* Part II.A.3; cf. Nolette, *supra* note 115, at 234 (observing that were the Court to remove the prudential rule and ask only whether the party has a personal interest then “the plaintiff would satisfy Article III’s requirements, and the Court would have to adjudicate the claim in question, whether or not that plaintiff is the most effective advocate of the rights at issue” (internal quotation marks omitted)).

227. E.g., Kaytlin L. Roholt, *Give Me Your Tired, Your Poor, Your Pregnant: The Jurisprudence of Abortion Exceptionalism in Garza v. Hargan*, 5 TEX. A&M L. REV. 505 (2018); Hannah Tuschman, *Challenging TRAP Laws: A Defense of Standing for Abortion Providers*, 34 BERKELEY J. GENDER L. & JUST. 235 (2019); Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion Suits Deserves a Closer Look*, 84 NOTRE DAME L. REV. 1369 (2009); Winchel, *supra* note 24.

228. See Tommy Tobin, *Deciding Not To Decide: Federal Courts’ Discretion To Decline Review and Miller v. City of Wickliffe*, 46 HOFSTRA L. REV. 709, 716 (2017).

229. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020) (plurality opinion); cf. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (explaining that where Article III limitations are at issue, “notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect”).

however, the issue of whether a challenge to third-party standing can be waived is unlikely to arise in future cases.<sup>230</sup> Having heard the dissenters' call to challenge abortion providers' standing, states defending the constitutionality of their abortion restrictions will reliably litigate the standing issue.<sup>231</sup> Further, groups seeking to challenge abortion regulations will likely join at least one patient seeking an abortion as a party. Of course, the issue of waiver may nonetheless appear in a different, less litigated context.<sup>232</sup>

More important in the context of abortion will likely be Congress's ability to override Court-created prudential standing rules.<sup>233</sup> If Congress perceived (and sought to rectify) a hindrance on a group's ability to enforce a right—say women seeking abortions or consumers trying to purchase firearms—Congress could pass legislation to overrule the Court's prudential rule and allow standing to any individual able to satisfy Article III standing's prerequisites. This could become necessary in the abortion context if the Court decides to maintain the prudential label for the limitation on third-party standing but rejects the applicability of the exception outlined in *Singleton*.<sup>234</sup> The Court might conclude that abortion providers and abortion seekers lack a sufficiently close relationship,<sup>235</sup> or might reject the claim that abortion seekers face meaningful obstacles in asserting their right to an abortion.<sup>236</sup> As long as the prudential label remains attached to the rule limiting third-party standing, Congress would maintain the ability to legislatively confer standing to challenge abortion restrictions onto providers who can otherwise establish Article III standing.

And, most fundamentally, prudential rules can be cast aside—to Justice Scalia's chagrin—whenever the Court decides that prudence so dictates.<sup>237</sup> It is the prudential label that allowed the *Singleton* plurality to recognize the exception to the bar on third-party standing where the rule did not implicate the concerns it sought to remedy.<sup>238</sup> Transforming the rule into a constitutional doctrine would not necessarily prohibit any exceptions,<sup>239</sup> but that would be a tough needle to thread in any principled way.

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230. See Durham, *supra* note 24.

231. See *id.*

232. Cf. 13A RICHARD D. FREER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3531.9.3 (3d ed. Supp. 2020) (“[T]hird-party standing has become firmly established with respect to a number of easily categorized relationships.”).

233. See Chemerinsky, *supra* note 2, at 692 (“The distinction between constitutional and prudential limits on federal judicial power is important because Congress, by statute, may override prudential, but not constitutional, limits. Because Congress may not expand federal judicial power beyond what is authorized in article III of the Constitution, a constitutional limit on federal judicial review may not be changed by federal law. But since prudential requirements are not derived from the Constitution, Congress may instruct the federal courts to disregard such a restriction.”); Smith, *supra* note 12, at 849, 851.

234. Cf. *June Med.*, 140 S. Ct. at 2167 (Alito, J., dissenting).

235. See *id.* at 2168 (“[A] woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure.”).

236. See *id.* (“The plurality opinion in *Singleton v. Wulff* found that women seeking abortions were hindered from bringing suit, but the reasoning in that opinion is hard to defend.” (citation omitted)).

237. See Floyd, *supra* note 41, at 891; see also *United States v. Windsor*, 570 U.S. 744, 785 (2013) (Scalia, J., dissenting).

238. Cf. Kim, *supra* note 14, at 346–47.

239. Cf. Chemerinsky, *supra* note 2, at 692–93 (noting that mootness is understood as an Article III requirement and yet is subject to several exceptions).

## IV. CONCLUSION

Generally, people are the best proponents of their own rights and interests. The Supreme Court recognizes this reality and thus typically limits a plaintiff to asserting his own rights. But the Court does this because it is good policy, not because the Constitution demands it. The limitation on third-party standing is a prudential doctrine, and the Supreme Court should not attempt to rebrand it as anything else.