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Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction

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PRUDENTIAL STANDING, THE ZONE OF INTERESTS, AND THE NEW JURISPRUDENCE OF JURISDICTION

ABSTRACT

Threshold limitations on the availability of judicial review are ubiquitous in the modern federal court system. While many are fact-specific and malleable, the most foundational one, jurisdiction, is not. The D.C. Circuit recently held that prudential standing, specifically the zone of interests test, is a jurisdictional limitation on the court's power to decide a case. This holding directly contradicts several other circuits, which have held that prudential standing is not jurisdictional and may be waived when the parties fail to raise it. Twenty years ago, this decision likely would not have garnered much attention because jurisdictional dismissals were common for a wide swath of reasons. However, the Supreme Court has recently honed its concept of jurisdiction and has cautioned courts to use the label sparingly.

The Supreme Court has referred to the zone of interests test repeatedly as a prudential consideration—one that is judge-made. However, scholars and courts alike have questioned this categorization and applied the test in a conflicting manner. The categorization of the zone of interests test as a constitutional, statutory, or prudential limitation is fundamental to determining its function within the newly refined law of jurisdiction. Nevertheless, courts have largely ignored this determination in recent treatments.

This Comment addresses that paucity, arguing that the Supreme Court has built and sustained the zone of interests test on prudential standing grounds. Prudential standing, properly understood in the context of the larger prudential body of law, cannot function in a jurisdictional manner under the Court's recent cases. Accordingly, the zone of interests test, as currently defined, should not be wielded in a jurisdictional manner.

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INTRODUCTION

*“Unlike the Article III standing inquiry . . . prudential standing is not a jurisdictional limitation on our review.”*¹

*“[T]he theory plainly fails to demonstrate prudential standing. . . . We therefore dismiss all petitions for lack of jurisdiction.”*²

Litigants and courts alike face threshold limitations on the availability of judicial review. Litigants, among other requirements, must possess standing to bring their claims. Standing always requires plaintiffs satisfy the constitutional requirements of Article III—injury in fact, causation, and redressability.³ In addition to this constitutional minimum, plaintiffs must often satisfy a second set of standing requirements, referred to as prudential standing. Prudential standing is judge-made law and generally encompasses several separate guidelines.⁴

Courts, on the other hand, have the responsibility to ensure that they only intervene in cases when they have jurisdiction to do so. Jurisdiction can be defined as the court’s power to hear and decide a case.⁵ Because courts must refuse to hear a case when that power is lacking, they have an independent responsibility to ensure their jurisdiction exists.⁶ Moreover, if jurisdiction is found wanting at any point in litigation, the court must dismiss the case immediately, sometimes even vacating a final judgment.⁷ Accordingly, a court’s decision to interpret any doctrine or rule as a jurisdictional limitation has sweeping consequences—it can yield untold hours of litigation moot and

¹ *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008) (internal quotation marks omitted).

² *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 179–80 (D.C. Cir. 2012), *reh’g denied*, 704 F.3d 1005 (D.C. Cir. 2013), *cert. denied*, 133 S. Ct. 2880 (2013), and *cert. denied*, 133 S. Ct. 2880 (2013), and *cert. denied*, 133 S. Ct. 2881 (2013).

³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁴ *Allen v. Wright*, 468 U.S. 737, 751 (1984). Generally, the three prudential standing doctrines are (1) the prohibition against litigating generalized grievances, (2) the prohibition against litigating the rights of a third party, and (3) the requirement that the plaintiff’s interest falls within the zone of interests that the statute was designed to protect. *Id.* While all three will be addressed, this Comment focuses on the zone of interests test.

⁵ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998).

⁶ *See Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012).

⁷ *See* FED. R. CIV. P. 12(h)(3); *see also Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

deny parties with uncontested Article III standing the opportunity to seek or gain relief.⁸

Recently, food and automotive interest groups experienced this sting firsthand in *Grocery Manufacturers Association v. EPA*.⁹ Several groups across industry lines challenged the EPA's partial waivers of requirements for the introduction of E15 gasoline into the energy market.¹⁰ While two of the D.C. Circuit judges found that one group satisfied the requirements of Article III standing,¹¹ the split panel held that the same group failed to satisfy the zone of interests test of prudential standing.¹² Accordingly, the majority dismissed for lack of jurisdiction.¹³

Judge Kavanaugh dissented, writing, “[P]rudential standing is not jurisdictional, meaning that it can be forfeited and need not be considered by the court if the defendant or respondent does not assert it.”¹⁴ For Judge Kavanaugh, the Supreme Court's pronounced effort to refine the application of the “jurisdictional label” in recent years foreclosed its use in dismissing a case for a lack of prudential standing.¹⁵ He highlighted the split that the decision solidified between the D.C. Circuit and its sister circuits.¹⁶ Moreover, he

⁸ See *Henderson*, 131 S. Ct. at 1202 (“Branding a rule as going to a court’s subject-matter jurisdiction alters the normal operation of our adversarial system.”); see also *Gonzalez*, 132 S. Ct. at 648.

⁹ 693 F.3d 169 (D.C. Cir. 2012), *reh’g denied*, 704 F.3d 1005 (D.C. Cir. 2013), *cert. denied*, 133 S. Ct. 2880 (2013), and *cert. denied*, 133 S. Ct. 2880 (2013), and *cert. denied*, 133 S. Ct. 2881 (2013).

¹⁰ *Id.* at 172.

¹¹ *Id.* at 179–80, 182. Only one group needed to satisfy the standing requirements. *Id.* at 175.

¹² See *id.* at 182 (Kavanaugh, J., dissenting).

¹³ *Id.* at 180 (majority opinion).

¹⁴ *Id.* at 182 (Kavanaugh, J., dissenting). The parties appealed directly from the agency decision but did not raise prudential standing in the briefs or at oral argument. See *id.* at 171, 185. The intervenor raised the challenge. *Id.* at 185 n.5. Judge Kavanaugh disagreed with the majority, which held that the court was required to raise prudential standing *sua sponte*. See *id.* at 185. In any event, Judge Kavanaugh would have found that the parties had prudential standing. *Id.* at 186.

¹⁵ See *id.* at 182–83. Notably, Judge Kavanaugh described the zone of interests test as a question of whether Administrative Procedure Act (APA) § 702 provided a cause of action to the aggrieved parties. See *id.* at 183 & n.3. That cause of action does not speak to a court’s power to hear the case but rather the parties’ right of review. *Id.* at 183 n.3. For support, Judge Kavanaugh appealed to the circuit majority, which has adopted this view. See *id.* at 184–85. That argument hinges upon the Supreme Court’s holding that a cause of action goes to the merits of a claim and not the jurisdiction of the court. See *infra* notes 187–93 and accompanying text. However, this Comment approaches the zone of interests test a step before Judge Kavanaugh’s dissent, essentially arguing that the Supreme Court’s articulation of the zone of interests test precludes even reading it as a statutory cause of action.

¹⁶ See *Grocery Mfrs. Ass’n*, 693 F.3d at 184–85. The Fifth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits have all held that prudential standing is not jurisdictional and is subject to waiver. *Id.* The Second, Sixth, and D.C. Circuits have held to the contrary. See *Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000); *Cnty. First Bank v. Nat’l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994); *Animal Legal Def.*

stressed, this determination was far from an ethereal or hypothetical one—the EPA likely would have lost on the merits had the court reached them.¹⁷

On the surface, whether the zone of interests test is jurisdictional should be an easy question. The Court has repeatedly described the test as a prudential consideration.¹⁸ As this Comment will discuss, the foundation of prudential considerations rests not in external limitations imposed upon the Court, such as those imposed by Article III of the Constitution, but in the Court’s caution to exercise its own legitimate authority.¹⁹ However, the Court has also provided seemingly conflicting foundations for the zone of interests test and called into question its proper home among the prudential doctrines.²⁰ Because of this confusion, scholars have called for the Court to relocate the test to a more appropriate position within its standing jurisprudence.²¹

This Comment will argue that the Court has planted and cultivated the zone of interests test in the soil of prudential considerations. While several cases may cast doubt on this determination, the Court’s recent jurisprudence legitimizes the prudential reading as the correct one. This understanding is

Fund, Inc. v. Espy, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994); Thompson v. Cnty. of Franklin, 15 F.3d 245, 248 (2d Cir. 1994).

¹⁷ Grocery Mfrs. Ass’n v. EPA, 704 F.3d 1005, 1005, 1007 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (denying petition for rehearing en banc) (“The panel’s standing holding is outcome-determinative because EPA will lose if we reach the merits. The E15 waiver plainly violates the statutory text.”). While not failsafe, Judge Kavanaugh’s conclusion is bolstered by the fact that Judge Tatel, who concurred in the panel judgment, indicated that he personally agreed that prudential standing should not be jurisdictional. *Grocery Mfrs. Ass’n*, 693 F.3d at 180 (Tatel, J., concurring). He would have reached the merits if the D.C. Circuit precedent did not clearly state that a lack of prudential standing was jurisdictional. *See id.*

¹⁸ *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 162 (1997). It should be noted from the outset that these terms—“prudential standing” and “zone of interests”—are not interchangeable. The confusion in *Grocery Manufacturers* stems, in part, from conflation of the terms. The actual holding of the case was not that the zone of interests test is jurisdictional, but that prudential standing is jurisdictional. *See Grocery Mfrs. Ass’n*, 693 F.3d at 179–80 (majority opinion). While that conflation is not uncommon, it is immensely harmful to the discussion. The zone of interests may be seen as prudential standing, but the reverse is not true—prudential standing encompasses more than the zone of interests test. This conflation is the equivalent of labeling all whiskey “bourbon” or all fruit “oranges.” The practical importance can be seen in the Supreme Court’s holding that other doctrines of prudential standing are not jurisdictional. *See infra* Part III, nn.300–01 and accompanying text. In this sense, the panel’s decision is flatly wrong. Accordingly, this Comment will use the labels with more precision.

¹⁹ *See infra* Part III.A.

²⁰ *See infra* Part I.B.

²¹ *See, e.g.*, Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 102 (2009) (“[T]he actual application of the zone of interests test, in contrast to the way it is often described, supports the view that it should be understood as nothing more than an interpretation of the APA.” (footnote omitted)). *But see* Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 728 (2009) (arguing that constitutional standing provisions should be absorbed into the prudential analysis).

pivotal in determining how the zone of interests test functions in light of the Court's recent articulation of jurisdiction. In parsing the zone of interests test to determine whether it is jurisdictional, the circuit courts have failed to give proper credence to the Supreme Court's clearly articulated view that the test is prudential. However desirable and important it may be, prudential standing, properly understood in the context of the larger prudential body of law, cannot function in a jurisdictional manner under the Court's recent cases. Accordingly, the zone of interests test cannot, and should not, be used by courts to abdicate jurisdiction over a case or controversy.

To that end, Part I of this Comment examines the development of the zone of interests test, tracing the Court's justification for it at each iteration. It will give particular attention to whether the test is constitutional, statutory, or prudential. Part II examines the Court's recent movement to refine jurisdiction, focusing on the potential sources for jurisdictional rules. It will explain how the Court analyzes those sources to determine whether they are jurisdictional, deducing an essential framework for application.

Part III applies the new framework of jurisdiction to the salient points of prudential standing, concluding that the two doctrines function in a complementary but distinct fashion. It then presents compelling examples of this distinction and addresses why the zone of interests test functions more efficiently when viewed as a prudential standing doctrine. Ultimately, this Comment concludes that the zone of interests test, as currently defined, is a prudential standing doctrine and cannot function in a jurisdictional manner.

I. THE ZONE OF INTERESTS TEST AS A PRUDENTIAL DOCTRINE

The zone of interests test can be succinctly stated: "The interest [the plaintiff] asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated."²² However, that simple phrase belies the complexity and deep unrest implicated by the doctrine. The zone of interests test has been called many things in its forty-three years of existence, both by the Court and its commentators.²³

²² *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

²³ *See, e.g., Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987) ("The 'zone of interests' formula in *Data Processing* has not proved self-explanatory . . .").

Despite the criticism, the Court has long classified the zone of interests test as a prudential doctrine²⁴—a prudential doctrine being one that is judge-made.²⁵ Some commentators, however, reject this prudential gloss and instead argue that the test is ultimately a statutory imposition required by the APA.²⁶ The Court’s language at times could be read to support such an interpretation.²⁷ Thus, understanding the source of the zone of interests test stands as the first stop in determining whether it should be read to limit the jurisdiction of the courts.

This section catalogs a few of the more important and divergent cases, focusing on the Court’s treatment of the zone of interests test with respect to its prudential classification and distinct role in the standing evaluation.²⁸ Particular attention will be given to the Court’s justification for creating and utilizing the zone of interests test. This section will begin by examining the seminal case for the test, *Association of Data Processing Service Organizations v. Camp*.²⁹ Then it will move to subsequent cases that sent conflicting messages about the test’s prudential status. Finally, it will examine the most recent cases concerning the zone of interests test, which lead to the conclusion that the test is a category of prudential standing.

A. *The Inception of the Zone of Interests Test*

The zone of interests test first appeared in *Association of Data Processing Service Organizations v. Camp*.³⁰ In *Data Processing*, the plaintiffs, sellers of data processing services, challenged a ruling by the Comptroller of the Currency that allowed banks to sell the same services.³¹ The plaintiffs alleged this ruling was in violation of the Bank Service Corporation Act of 1962, § 4,

²⁴ See *infra* Part I.

²⁵ 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, FEDERAL PRACTICE AND PROCEDURE § 8413 (2006) (“Prudential considerations are limitations on the courts’ power that the judiciary itself has devised . . .”). Wright and Koch describe the application of prudential considerations as “discretionary” and grounded in a desire to limit judicial intervention to disputes where a decision would be meaningful. See *id.* (“Simply because the Constitution gives courts power does not mean that it is either wise or necessary for them to exercise that power.”).

²⁶ See Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 341 (2004); see also Pathak, *supra* note 21 at 102.

²⁷ See *infra* Part I.B.

²⁸ For an in-depth treatment of the less prominent cases not addressed herein, as well as the lower court reactions, see Siegel, *supra* note 26, at 319–41. See generally Sanford A. Church, Note, *A Defense of the “Zone of Interests” Standing Test*, 1983 DUKE L.J. 447 (discussing the early zone of interests cases).

²⁹ 397 U.S. 150 (1970).

³⁰ *Id.* at 153.

³¹ *Id.* at 151.

which stated, “No bank service corporation may engage in any activity other than the performance of bank services for banks.”³² The trial court dismissed the case, finding the plaintiffs lacked standing.³³ The court of appeals affirmed.³⁴ The Supreme Court reversed, holding that the plaintiffs had standing and the case should be heard on the merits.³⁵ The Court’s opinion in *Data Processing* highlights two considerations that are salient to this Comment: (1) the development of the Court’s bifurcated standing analysis and (2) the role of prudential considerations in that standing analysis.

First, the Court delineated a new, bifurcated framework for determining standing in APA cases. The Court abandoned its prior framework, the legal interest test,³⁶ and instead required the plaintiff to suffer harm cognizable under both Article III of the Constitution and the review portions of the APA.³⁷ The first prong of the new standing framework emphasized the constitutional requirement that a plaintiff sustain an “injury in fact.”³⁸ The plaintiffs satisfied this requirement by showing they would suffer financial harm through direct competition from the banks.³⁹ The second prong of the standing analysis examined “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”⁴⁰ The Court made clear that this second prong was not mandated by the Constitution by stating that it stood

³² *Id.* at 155 (quoting 12 U.S.C. § 1864 (1964)).

³³ *Id.* at 151.

³⁴ *Id.*

³⁵ *Id.* at 158.

³⁶ *Id.* at 153. The legal interest test can be described as withholding standing “‘unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.’” *Id.* (quoting *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137–38 (1939)). The Court held that the legal interest test went to the merits of a case rather than a litigant’s standing. *Id.* at 153. Interestingly, the Court proceeded to find the plaintiff’s interest within the zone of interest through the statutory/congressional intent framework. *Id.* It then stated: “We do not put the issue in those words, for they implicate the merits. We do think, however, that § 4 arguably brings a competitor within the zone of interests protected by it.” *Id.* at 156.

³⁷ *Id.* at 153.

³⁸ *Id.* at 152. This is the foundation of the modern Article III standing analysis, which requires injury in fact, causation, and redressability. *See* Siegel, *supra* note 26, at 320.

³⁹ *Data Processing*, 397 U.S. at 152.

⁴⁰ *Id.* at 153. Ensuing confusion over this bifurcation is hardly surprising given the fact that the Court seemed confused itself when explaining standing. It observed earlier in the same opinion, “Generalizations about standing to sue are largely worthless One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to ‘cases’ and ‘controversies.’” *Id.* at 151. Yet, it folded concerns “‘apart from the ‘case’ or ‘controversy’ test’” directly into the standing evaluation. *See id.* at 153. Given the conflation, it seems even this generalization was “‘largely worthless.’”

“apart from the ‘case’ or ‘controversy’ test.”⁴¹ Applying the second prong, the Court interpreted the language of the APA as “grant[ing] standing to a person ‘aggrieved by agency action within the meaning of a relevant statute.’”⁴² In the Court’s opinion, the relevant statute, the Bank Services Corporation Act of 1962, brought the plaintiffs’ interest within its zone of interests.⁴³ Accordingly, the plaintiffs satisfied both prongs of the standing analysis.

Second, the *Data Processing* Court discussed the foundation for the non-constitutional second prong of the standing inquiry—prudential considerations. Acknowledging the broad reviewability provisions of the APA, the Court intimated a desire to somehow limit the growing class of those permitted to challenge agency action.⁴⁴ To that end, it wrote, “Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court for its own governance, have involved a ‘rule of self-restraint.’”⁴⁵ The Court had previously used that exact language to describe its prohibition on litigants bringing claims based on the rights of third parties.⁴⁶ By applying the same language to the zone of interests test, the Court grouped it alongside that prohibition.⁴⁷ The Court did not use the term “prudential” to describe either doctrine at that point.⁴⁸ However, it clearly voiced its ability to decline certain questions based on the wisdom of doing so, rather than out of constitutional necessity.⁴⁹

Justice Brennan concurred in the result but strongly dissented from the majority’s creation of a two-tiered standing inquiry.⁵⁰ For Justice Brennan, the

⁴¹ *Id.*

⁴² *Id.* at 153–54 (quoting 5 U.S.C. § 702 (Supp. IV 1964)).

⁴³ *Id.* at 156.

⁴⁴ *See id.* at 154.

⁴⁵ *Id.* (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)).

⁴⁶ *Barrows*, 346 U.S. at 255. It is worth noting that the *Barrows* language clearly distinguished jurisdictional issues from those of “judicial self-restraint.” *Id.* (“Apart from the *jurisdictional requirement*, this Court has developed a complementary rule of self-restraint for its own governance” (emphasis added)). The *Data Processing* opinion muddled this clarity.

⁴⁷ *See Data Processing*, 397 U.S. at 154 (quoting *Barrows*, 346 U.S. at 255).

⁴⁸ *See id.* With regard to standing, the term “prudential” has a less than clear history. Judge Fletcher attributed its ascent to common usage to Alexander Bickel’s “passive virtues.” *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 252 (1988) (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111 (2d ed. 1986)). Originally, Bickel used the term to describe the Supreme Court’s discretion in crafting its docket. *Id.* It is now far more broadly applied to all courts’ discretion. *Id.* In any event, the idea of judicial “self-restraint” dates back for some time. *See, e.g., Barrows*, 346 U.S. at 255. But, the Court did not affix the “prudential” label to any of these doctrines of self-restraint until the mid-1970s. *See* *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *United States v. Richardson*, 418 U.S. 166, 181 (1974) (Powell, J., concurring).

⁴⁹ *See Data Processing*, 397 U.S. at 154.

⁵⁰ *See id.* at 167–68 (Brennan, J., concurring in the result and dissenting).

only standing requirement consistent with the Court's jurisprudence was that of the constitutional injury in fact.⁵¹ By imposing the zone of interests test, the majority "perpetuat[ed] the discredited requirement" that the plaintiff show a legally protected interest to establish standing.⁵² Moreover, Justice Brennan argued that the majority "encourage[d] more [instances of confusing merits with standing] by engrafting its wholly unnecessary and inappropriate second step upon the constitutional requirement for standing."⁵³ He acknowledged the need for the statutory inquiry but proposed that it be performed, independent of the standing inquiry, as an "aspect of reviewability."⁵⁴ Justice Brennan preferred to keep the merits and standing inquiry separate and viewed their merger as likely to "encourage[] badly reasoned decisions."⁵⁵

The zone of interests test appeared in twelve additional cases in the 1970s.⁵⁶ However, with few exceptions, each subsequent case added little to the original test for actions brought under the APA.⁵⁷ The Court did, however, make a notable expansion of the test to actions not brought under the APA when it required that a plaintiff's injury fall within the zone of interests of the Commerce Clause.⁵⁸ Additionally, Justice Brennan continued to protest the use of the test for the reasons set forth in his *Data Processing* dissent.⁵⁹

⁵¹ *Id.* at 168 (citing *Flast v. Cohen*, 392 U.S. 83 (1968)).

⁵² *Id.* at 168.

⁵³ *Id.* at 169.

⁵⁴ *Id.* (emphasis removed).

⁵⁵ *See id.* at 170.

⁵⁶ *See Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Bos. Stock Exch. v. State Tax Comm'n.*, 429 U.S. 318, 321 n.3 (1977); *Singleton v. Wulff*, 428 U.S. 106, 111 (1976); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976); *United States v. Richardson*, 418 U.S. 166, 176 n.9 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 469 (1974); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 641 (1971) (Harlan, J., dissenting); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970); *Barlow v. Collins*, 397 U.S. 159, 159 (1970).

⁵⁷ *See Siegel, supra* note 26, at 320–24 (discussing subsequent cases and their failure to clarify the test).

⁵⁸ *See, e.g., Bos. Stock Exch.*, 429 U.S. at 320–21 n.3 (applying the zone of interests to the Commerce Clause). The application of the zone of interests test to the Commerce Clause was just the first of many subsequent applications to cases not involving the APA. This facet of the zone of interests test has sparked its own body of literature and, while intriguing, is too broad a discussion to include in this Comment.

⁵⁹ *See, e.g., Schlesinger*, 418 U.S. at 235–36, 238 (Brennan, J., dissenting) ("The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing." (internal quotation marks omitted) (citing *Barlow*, 397 U.S. at 176)).

B. *Confusion in Its Development*

While cases in the initial decade of the zone of interests test might not have shed much light on its application, they were mostly uniform. Moving into the 1980s, however, the Court authored opinions that seemed to present divergent perspectives on the source of the test. The Court ratified the doctrine as prudential early in the decade.⁶⁰ However, in attempting to clarify bubbling circuit confusion, it later embraced a view that relegated the zone of interests test to a rule of statutory interpretation that relied on congressional intent.⁶¹

Although the Court laid the groundwork for treating the zone of interests test as prudential in *Data Processing*, it did not explicitly refer to the test as such in the 1970s.⁶² The Court, however, officially adopted the “prudential” label in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, a case concerning taxpayer standing.⁶³ The Court ultimately decided the case on grounds other than the zone of interests test.⁶⁴ However, the Court’s inclusion of the test among the prudential standing doctrines, as well as its subsequent discussion of prudential standing, sheds more light (for purposes of this Comment) on understanding the zone of interests test than any previous case.

First, the *Valley Forge* Court explained that “[t]he term ‘standing’ subsumes a blend of constitutional requirements and prudential considerations.”⁶⁵ The Court proceeded to list three rules which it deemed prudential: (1) a plaintiff must assert his own rights and not those of a third party,⁶⁶ (2) the Court declines to hear “abstract questions of wide public

⁶⁰ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982).

⁶¹ See *Air Courier Conference of Am. v. Postal Workers Union*, 498 U.S. 517, 524 (1991); *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987).

⁶² While not adopted by the Court, Justice Powell had previously written that the zone of interests should “undoubtedly” be treated as a prudential limitation. See *United States v. Richardson*, 418 U.S. 166, 196 n.18 (1974) (Powell, J., concurring).

⁶³ 454 U.S. at 475.

⁶⁴ Instead, the Court found the plaintiff lacked standing under Article III, obviating the need to address any prudential standing deficiency. See *id.* at 485–86 (“[The plaintiffs] fail to identify any personal injury suffered by them . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . .”).

⁶⁵ *Id.* at 471. Notably, this approach differed from the Court’s previous generalization that standing should be analyzed in the Article III framework alone. See *supra* note 40. This language signaled the Court’s full embrace of the bifurcated standing analysis.

⁶⁶ *Valley Forge*, 454 U.S. at 474 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

significance which amount to generalized grievances,”⁶⁷ and (3) a “plaintiff’s complaint [must] fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”⁶⁸

Second, the *Valley Forge* Court taught that, although prudential standing considerations are closely related to Article III requirements, they are distinct concepts and should not be confused.⁶⁹ The Court explicitly noted that “[the Article III] requirement states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called ‘prudential’ considerations.”⁷⁰ Without explaining the full nature of what “prudential considerations” were or how they functioned, this treatment clearly distinguished them from the Article III factors, which limit judicial power. Accordingly, the *Valley Forge* Court clarified that the zone of interests test is a prudential standing doctrine and that prudential standing, unlike constitutional standing, does not impose limits on judicial power.

Compared to the decade in which the test was conceived, the 1980s saw few zone of interests cases.⁷¹ Given the few cases in which the Supreme Court utilized, let alone explained, the zone of interests test, lower courts struggled to apply it.⁷² However, most courts eventually interpreted the test to require an inquiry into whether Congress, through the relevant statute, had sought to benefit the plaintiff.⁷³

The Court set out to correct this misapplication in *Clarke v. Securities Industry Association* and, in so doing, provided two important considerations.⁷⁴ First, the *Clarke* Court clarified that the bar for satisfaction of the zone of interests test was lower than what the circuits were requiring.⁷⁵ Specifically,

⁶⁷ See *id.* at 474–75 (quoting *Warth*, 422 U.S. at 499–500 (1975)) (internal quotation marks omitted).

⁶⁸ See *id.* at 475 (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)) (internal quotation marks omitted).

⁶⁹ See *id.* (“Merely to articulate these principles is to demonstrate their close relationship But neither the counsels of prudence nor the policies implicit in the ‘case or controversy’ requirement should be mistaken for the rigorous Art. III requirements themselves.”).

⁷⁰ *Id.*

⁷¹ “Zone of interests cases” should be taken to mean the test was not merely mentioned offhand, but applied by the Court in some way. See *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 396–400 (1987); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 231 n.4 (1986); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345–46 (1984). *Allen v. Wright* mentioned the test, but merely in a way echoing the prudential classification from *Valley Forge*. See *Allen v. Wright*, 468 U.S. 737, 751 (1984).

⁷² See Siegel, *supra* note 26, at 322–24.

⁷³ See *id.* at 324.

⁷⁴ 479 U.S. 388.

⁷⁵ See *id.* at 399–400.

the test was not “to be especially demanding” and “there need be no indication of congressional purpose to benefit the would-be plaintiff.”⁷⁶ Accordingly, the right of review was to be denied only “if the 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.”⁷⁷

Second, the *Clarke* Court seemed to view the zone of interests test not as a prudential doctrine, but rather as a lens of statutory interpretation. Acknowledging that the test “ha[d] not proved self-explanatory,” the Court took the opportunity to provide an exegesis of *Data Processing*.⁷⁸ At the core of its discussion, the Court did not mention that the zone of interests test fell among the prudential standing doctrines or even that it was a doctrine of self-governance or self-restraint. Rather, the Court’s only explanation painted the test as a judicially created gloss on the meaning of APA § 702, which grants the “aggrieved person” a right of review.⁷⁹ The Court found this gloss necessary because it did not perceive Congress intended to allow suit by “every person suffering injury in fact.”⁸⁰

Although the Court recognized that it had “occasionally listed the ‘zone of interest’ inquiry among general prudential considerations bearing on standing,”⁸¹ this was more of an afterthought and did not occur in the exegesis of the doctrine. With *Clarke*, the Court indicated that the zone of interests test was merely a doctrine of statutory interpretation.⁸² While the distinction between doctrines of statutory interpretation and prudential considerations could seem arbitrary, the trickle down impact of a shift like this is difficult to overstate. Essentially, the Court moved from viewing the zone of interests test as a limitation created by judicial self-imposition to one imposed upon the Court by the text of the APA.⁸³ Without the appeal to or exposition of prudential concerns, the *Clarke* decision introduced significant ambiguity to the foundation and function of the zone of interests test.

⁷⁶ *Id.*

⁷⁷ *Id.* at 399.

⁷⁸ *See id.* at 394–98.

⁷⁹ *See id.* at 395.

⁸⁰ *See id.*

⁸¹ *Id.* at 400 n.16 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)).

⁸² *See Siegel, supra* note 26, at 327.

⁸³ This distinction between external statutory imposition and prudential self-imposition will be particularly relevant in discussions *infra* Part III.

Four years later, the Court again decided a case on the zone of interests test in *Air Courier Conference of America v. American Postal Workers Union*.⁸⁴ In *Air Courier*, the American Postal Workers Union challenged a Postal Service ruling that allowed private carriers to participate in “international remaining.”⁸⁵ The union alleged that the participation of the private companies in the international mail market would harm its workers’ employment interests.⁸⁶ The decision is important for two reasons: (1) for the first time, the Court found that plaintiffs lacked standing under the zone of interests test⁸⁷ and (2) again the Court did not mention prudential considerations in its analysis.

First, after analyzing the statutory scheme, the Court declined to extend standing to the plaintiffs.⁸⁸ The first prong of the Court’s standing analysis, the constitutional injury in fact, was not appealed.⁸⁹ Thus, the Supreme Court assumed that the Union had constitutional standing and then sought to determine whether Congress intended to protect the Union’s interest under the relevant statute.⁹⁰ After analyzing the language and history of the statute, the Court stated that it would not make the “substantial extension” of *Clarke* and *Data Processing* that would be necessary to find the Union within the statute’s zone of interests.⁹¹

The Court dismissed the case on the sole ground that the plaintiffs lacked standing.⁹² Moreover, this lack of standing was not based on Article III deficiencies, but merely a failure to satisfy the zone of interests test.⁹³ Ultimately, whether the Court made the correct statutory application makes little difference. The practical outworking is what matters—the decision gave

⁸⁴ 498 U.S. 517 (1991).

⁸⁵ *See id.* at 519–20.

⁸⁶ *See id.* at 521.

⁸⁷ *Id.* at 530. Only once prior to this case had the Court arguably declined to find a plaintiff’s interest within the zone of interests. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). But even in *Block*, the Court did not explicitly apply the zone of interests test. Rather, it held that “[t]he structure of this Act implies that Congress intended to preclude [the plaintiff’s] challenges.” *Id.* at 352.

⁸⁸ *Air Courier*, 498 U.S. at 530.

⁸⁹ *See id.* at 524. The Postal Service, along with the ACCA, was the petitioner in this case. *See id.* at 521. It filed a motion for summary judgment against the Union, which was granted at the trial level. *See id.* The appellate court reversed, determining the Union satisfied the zone of interests test. *Id.*

⁹⁰ *See id.* at 524–25 (“We must inquire, then, as to Congress’ intent in enacting the [relevant statutes] in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes.”).

⁹¹ *See id.* at 530.

⁹² *See id.* at 530–31.

⁹³ *See id.*

teeth to the Court's requirement that a plaintiff must satisfy both prongs of its standing evaluation.⁹⁴

Second, throughout the Court's entire exposition of the zone of interests test and the relevant statutory material, it did not mention the test as a prudential doctrine, either explicitly or implicitly.⁹⁵ Taken in light of *Clarke*, the decision's lack of prudential considerations signaled a full embrace of the zone of interests test as a tool of statutory interpretation, rather than a judicially created doctrine of prudence. *Air Courier*, thus, was the high-water mark for viewing the zone of interests test independently from its prudential origins.⁹⁶

C. *Recent Cases: Consistently Applying the Zone of Interests Test as a Prudential Requirement*

Although the *Clarke* and *Air Courier* decisions seemed to direct the zone of interests test away from its prudential roots, the Court reclaimed the test's heritage beginning with *Bennett v. Spear*,⁹⁷ a unanimous opinion.⁹⁸ Cases following *Bennett*, up to the present, have shown that the Court continues to articulate the zone of interests test as a prudential standing requirement.

The *Bennett* Court raised three important considerations. Primarily, it addressed whether the Endangered Species Act's citizen suit provision⁹⁹ abrogated the zone of interests test, allowing any citizen, more or less, to bring suit under it.¹⁰⁰ In the end, the Court found the language of the statute—"any person may commence a civil suit"¹⁰¹—to be purposefully broad and inclusive, relaxing the zone of interests entirely.¹⁰² It reasoned, "Congress legislates against the background of our prudential standing doctrine, which applies

⁹⁴ Even at this point, however, the Court did not refer to the requirement as jurisdictional. *See id.*

⁹⁵ *See id.* at 529–31.

⁹⁶ Even so, the Court never described the zone of interests test as an *imposition* from the APA. Rather, it felt the gloss on the statute necessary to effectuate what it perceived was congressional intent to limit the growing class of litigants. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395 (1987).

⁹⁷ 520 U.S. 154 (1997).

⁹⁸ *Id.* at 156.

⁹⁹ 16 U.S.C. § 1540(g) (1994).

¹⁰⁰ *See Bennett*, 520 U.S. at 161.

¹⁰¹ 16 U.S.C. § 1540(g)(1).

¹⁰² *See Bennett*, 520 U.S. at 164–66.

unless it is expressly negated.”¹⁰³ Thus, Congress intended the citizen suit provision to establish an express negation.¹⁰⁴

Second, and more salient to this discussion, the Court returned to the prudential bedrock of the zone of interests test. Prior to reaching the conclusion on the negation of the test, Justice Scalia, writing for the unanimous Court, dedicated nearly two pages to recapping and summarizing its place within the Court’s jurisprudence.¹⁰⁵ Again dividing standing into constitutional and prudential considerations, the Court reaffirmed that the zone of interests test is “judicially self-imposed,” rather than an “immutable requirement[] of Article III.”¹⁰⁶ Moreover, the Court affirmed that it “specifically listed [the zone of interests] among other prudential standing requirements of general application,” showing its view that the zone of interests test stands among the two other categories of prudential standing—the prohibition against third-party standing and the refusal to hear generalized grievances.¹⁰⁷

Third, *Bennett* presented the Court with perhaps its only explicit opportunity to confront whether prudential standing, specifically the zone of interests test, should be read as a jurisdictional limitation on the courts. The case came before the Court after the district court dismissed it for a lack of jurisdiction, determining the plaintiffs lacked standing under the zone of interests test.¹⁰⁸ The court of appeals affirmed.¹⁰⁹ This posture presented a unique opportunity for the Court to clarify whether the test was jurisdictional. However, the Court did not address the question because it reversed the lower courts, finding that the plaintiff did have standing under the zone of interests test.¹¹⁰

After *Bennett* the Court has shown no intention to back away from the classification of the zone of interests test as prudential. Nor has the Court shied away from the bifurcated standing analysis. In fact, the Court has seemed to

¹⁰³ *Id.* at 163. The possible implications of this paragraph will be discussed subsequently. *See infra* Part III.C.

¹⁰⁴ *See Bennett*, 520 U.S. at 163–64.

¹⁰⁵ *See id.* at 162–63.

¹⁰⁶ *See id.* at 162.

¹⁰⁷ *See id.* at 162–63. This quoted language was in specific reference to the zone of interests test’s applicability across all statutory and constitutional provisions, as opposed to just the APA. *See id.*

¹⁰⁸ *Id.* at 160–61.

¹⁰⁹ *Id.* at 161.

¹¹⁰ *See id.* at 166. While the avoidance may have been either intentional or arbitrary, perhaps the fact that jurisdiction was not quite in focus yet had something to do with the aversion. The Court did not take up the jurisdictional fight until the following year. *See infra* note 143 and accompanying text.

take both for granted.¹¹¹ For instance, in *Elk Grove Unified School District v. Newdow*,¹¹² the Court explained the two-fold standing inquiry—constitutional and prudential—and then listed the zone of interests test in the prudential category.¹¹³ The Court reaffirmed prudential standing as “judicially self-imposed limits on the exercise of federal jurisdiction.”¹¹⁴ Moreover, it described prudential concerns as “closely related to Art. III concerns but essentially matters of judicial self-governance.”¹¹⁵

Most recently, the Court decided *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*.¹¹⁶ In *Patchak*, the Secretary of the Interior sought to acquire property for a band of Pottawatomis Indians under 25 U.S.C. § 465.¹¹⁷ The band intended to use the land for gaming purposes.¹¹⁸ Patchak, a resident who lived “in close proximity” to the property, challenged the action, asserting the acquisition was not authorized by § 465.¹¹⁹ The band and Secretary countered that Patchak lacked prudential standing.¹²⁰

The Court found that Patchak did in fact satisfy the zone of interests test.¹²¹ Three facets of the analysis shed light on the Court’s current view of the test. First, the Court took for granted that the test is a form of “prudential standing.” It implicitly endorsed the use of the term by the defendants and utilized the term to describe the test.¹²² Second, it affirmed the view that standing, at least in APA cases, always requires both Article III injury-in-fact and satisfaction of

¹¹¹ See, e.g., *FEC v. Akins*, 524 U.S. 11, 20 (1998) (“[P]rudential standing is satisfied when the injury asserted by a plaintiff arguably falls within the zone of interests” (internal quotation marks omitted)).

¹¹² 542 U.S. 1 (2004).

¹¹³ See *id.* at 11–12.

¹¹⁴ See *id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (internal quotation marks omitted).

¹¹⁵ *Id.* at 12 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). The Court ultimately dismissed the case under its long-standing practice of refusing to hear matters hinging upon family law disputes. See *id.* at 17–18. However, the majority took the opportunity to fold this practice into the prudential standing body of law, a decision that drew strong criticism from Chief Justice Rehnquist and Justices O’Connor and Thomas. See *id.* at 18–19 (Rehnquist, C.J., concurring in the judgment).

¹¹⁶ 132 S. Ct. 2199 (2012).

¹¹⁷ See *id.* at 2203.

¹¹⁸ *Id.*

¹¹⁹ See *id.* at 2203. Patchak alleged no personal stake in the property to be acquired, but rather destruction of his lifestyle through “increased traffic, increased crime, decreased property values, an irreversible change in the rural character of the area, and other aesthetic, socioeconomic, and environmental problems.” See *id.* at 2203–04 (internal quotation marks omitted).

¹²⁰ *Id.* at 2210.

¹²¹ See *id.* at 2210–11.

¹²² See *id.* at 2210.

the zone of interests test.¹²³ Third, citing *Clarke*, it affirmed that the threshold for the test is low.¹²⁴

In light of these recent cases, three principles are evident. First, the zone of interests test is a prudential doctrine—one self-imposed by the Court for its own governance. It is clearly not a constitutional imposition. Although the *Clarke* and *Air Courier* decisions indicated that the zone of interests test sprung from statutory imposition, the Court never explicitly rejected the test as a prudential limitation. From *Bennett* to the present, the Court has implicitly rejected the statutory imposition reading by consistently describing the zone of interests test as prudential. Second, the Court requires that the plaintiff fall within the zone of interests of the relevant statute to secure a right of review when challenging under the APA. Mere satisfaction of the Article III standing component is not enough. Third, the Court is emphatic that the test be satisfied when prudential standing is raised, but it has never referred to the test as jurisdictional. Although the Court had an explicit opportunity to address whether the zone of interests test is jurisdictional, the Court declined to take it by finding the plaintiff within the zone of interests and reversing the jurisdictional dismissal. Ambiguity remains then as to whether the Court considers the test jurisdictional.

II. JURISDICTION'S NEW SCOPE

This Comment has shown why the zone of interests test is categorized as a prudential doctrine.¹²⁵ However, that categorization mattered little for purposes of determining the doctrine's jurisdictionality until recently. Twenty years ago, as the *Bennett* decision indicates,¹²⁶ the question of whether prudential standing was jurisdictional would not have been appropriate (or even material) because of the loose construction most courts gave to jurisdiction.¹²⁷ Over the last fifteen years, the Court has recognized the haphazard application of jurisdiction and the egregious consequences associated with that misapplication.¹²⁸ In remedy, the Court has sought to curtail what it deemed

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See supra* Part I.

¹²⁶ *See supra* note 110.

¹²⁷ *See, e.g.,* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (acknowledging that even the Supreme Court had misused the term).

¹²⁸ *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011); *Arbaugh*, 546 U.S. at 510.

“drive-by jurisdictional rulings.”¹²⁹ Beginning with *Steel Co. v. Citizens for a Better Environment* in 1998,¹³⁰ the Court has regularly spoken, albeit indirectly at times, to the definition of jurisdiction, gradually building a repository of what it is and what it is not.

Accordingly, the zone of interests test’s prudential status does not end the inquiry into its jurisdictional status. Rather it advances the discussion to the question of what sources the Court considers appropriate sources of jurisdiction. While constitutional provisions have long been viewed as such, this discussion will illustrate that less-than-constitutional rules can be jurisdictional as well. The purpose of this section, then, is to sort through the relevant portions of two recent groups of cases, assembling a coherent and contemporary framework of jurisdiction.

A. *The Harsh Consequences of Jurisdictional Deficiency*

The first group of cases outlines the stringent boundaries and harsh consequences of jurisdiction. These might be said to embody the general legal community’s understanding of jurisdiction and, thus, do not require as much explanation. Moreover, these cases assure that the popular understanding of jurisdiction is alive and well in recent applications.

In *United States v. Cotton*, an appeal out of the Fourth Circuit questioned the Fourth Circuit’s precedent that defective indictments were jurisdictional.¹³¹ The Supreme Court held that deficiencies in an indictment are not a jurisdictional limitation on a court.¹³² The Supreme Court took the opportunity

¹²⁹ See *Arbaugh*, 546 U.S. at 511 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998)). The Court applied this label to “unrefined dispositions” that failed to consider “whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim.” See *id.* at 511 (quoting *Da Silva v. Kinsho Int’l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000)) (internal quotation mark omitted). Moreover, the Court emphasized that this type of ruling does not hold precedential effect upon its jurisprudence. See *id.* (citing *Steel Co.*, 523 U.S. at 91); see also *Henderson*, 131 S. Ct. at 1202 (explaining the Court’s effort to “bring some discipline to the use of [jurisdiction]”); see generally Howard M. Wasserman, *The Demise of “Drive-by Jurisdictional Rulings”*, 105 NW. U. L. REV. COLLOQUY 184 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/3/LRColl2011n3Wasserman.pdf> (examining the recent focus of the Court on limiting the use of the term “jurisdictional”).

¹³⁰ 523 U.S. 83. Notably, the shift began during the same time frame that the Court moved to fully embrace the zone of interests test as a prudential doctrine. See *supra* note 110.

¹³¹ See 535 U.S. 625, 629 (2002). The Fourth Circuit had, to that point, relied upon *Ex parte Bain*, 121 U.S. 1 (1887), a case in which the Court utilized an “elastic concept[ion] of jurisdiction” to remedy constitutional wrongs it could not have otherwise reached due to the then existing limitations on its review of criminal convictions. See *Cotton*, 535 U.S. at 630. In *Cotton* the Court overruled *Ex parte Bain*. *Id.* at 631.

¹³² *Cotton*, 535 U.S. at 630.

to elucidate two interrelated principles. First, jurisdiction should be understood as “the courts’ statutory or constitutional *power* to adjudicate the case.”¹³³ Second, the fact that subject-matter jurisdiction concerns a court’s power to even hear a case means that subject-matter jurisdiction “can never be forfeited or waived.”¹³⁴

In 2012 the Court decided *Gonzalez v. Thaler*,¹³⁵ a case in which it clearly summarized its current understanding of jurisdiction.¹³⁶ Reiterating and drawing from *Cotton*, the Supreme Court emphasized that “courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented” when those issues go to subject-matter jurisdiction.¹³⁷ Moreover, these objections may be raised at any point throughout the litigation and, if valid, “lead a court midway through briefing to dismiss a complaint in its entirety.”¹³⁸ Such “drastic” consequences mean that jurisdictional infirmity can waste “[m]any months of work on the part of the attorneys and the court.”¹³⁹

Thus, the limitations and consequences that the jurisdictional label connotes are unambiguous. One can imagine how this power (or lack thereof) might easily become a blunt instrument in courts’ hands. A particularly difficult or potentially time-consuming case could be jettisoned with a simple determination by the judge that the court lacks jurisdiction. Alternatively, a judge might utilize a proposed lack of jurisdiction to further other personal or policy goals.¹⁴⁰ One scholar even suggests that jurisdiction can be construed at points as a “conclusory label for a judicial refusal to act.”¹⁴¹

¹³³ *Id.* at 630 (quoting *Steel Co.*, 523 U.S. at 89) (internal quotation marks omitted).

¹³⁴ *Id.* at 630.

¹³⁵ 132 S. Ct. 641 (2012).

¹³⁶ *See id.* at 648.

¹³⁷ *See id.*; *accord* *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *cf.* *Bowles v. Russell* 551 U.S. 205, 214 (2007) (explaining that the “Court has no authority to create equitable exceptions to jurisdictional requirements”).

¹³⁸ *Gonzalez*, 132 S. Ct. at 648.

¹³⁹ *Id.* (quoting *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011)) (internal quotation marks omitted).

¹⁴⁰ *See* Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 95–96 (1994) (“The language is a hook that judges use when they want to achieve certain ends, like construing a rule strictly and literally, or raising a legal issue *sua sponte*, or engaging in collateral review of another court’s judgment.”).

¹⁴¹ *Id.* at 96.

B. *Reining in a Severe Doctrine*

Perhaps for legitimacy concerns, but certainly to facilitate consistent jurisprudence,¹⁴² the Court has tempered its affirmation of jurisdiction's strong effects by steadily articulating the scope of its application. The cases that follow in this section develop both the scope of application and the reasons behind that limitation, with particular focus placed upon the source—Constitution or statute—of each jurisdictional limitation.

Steel Co. v. Citizens for a Better Environment,¹⁴³ best known for abolishing the practice of hypothetical jurisdiction,¹⁴⁴ provided fodder that became foundational for the Court's movement to refine the breadth of jurisdiction.¹⁴⁵ The plaintiff-respondent, Citizens for a Better Environment, brought a citizen suit under the Emergency Planning and Community Right-to-Know Act (EPCRA)¹⁴⁶ against the petitioner for past violations involving compliance with form-filing deadlines.¹⁴⁷ The defendant filed the necessary but delinquent forms prior to the suit.¹⁴⁸ Thus, the primary question before the Court was whether the relevant EPCRA provision, § 11046(a), permitted suit for purely historical violations.¹⁴⁹ While the Court ultimately dismissed the case for want of Article III standing,¹⁵⁰ it took the opportunity to address at least three pertinent concerns for the refining of jurisdiction.

First, the Court defined jurisdiction, explained its sources, and outlined the consequences of its absence. Jurisdiction should be understood as the courts' "power to adjudicate the case."¹⁵¹ That power can be granted, enlarged, or

¹⁴² See *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

¹⁴³ 523 U.S. 83 (1998).

¹⁴⁴ See *id.* at 94. Hypothetical jurisdiction can be described as the practice of "proceed[ing] immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.* at 93.

¹⁴⁵ Justice Scalia coined the term "drive-by jurisdictional rulings" in this opinion. *Id.* at 91.

¹⁴⁶ 42 U.S.C. § 11046(a)(1) (1994).

¹⁴⁷ See *Steel Co.*, 523 U.S. at 86–87.

¹⁴⁸ See *id.* at 87–88.

¹⁴⁹ See *id.* at 88.

¹⁵⁰ See *id.* at 109–10. The Court ultimately held that the plaintiff lacked constitutional standing to bring the suit because redress was not possible. See *id.*

¹⁵¹ *Id.* at 89. For commentary on the idea of jurisdiction as power, see Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1547–48 (2008) ("[Jurisdiction] can broadly be defined as the court's raw, baseline power and legitimate authority to hear and resolve the legal and factual issues in a class of cases."). But see Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1620 (2003) ("[J]urisdiction cannot truly be a matter of power but instead must be a matter of something like legitimate authority.").

limited by two sources—the Constitution or a statute.¹⁵² Drawing from long-standing precedent, Justice Scalia wrote, “Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”¹⁵³ Accordingly, the question of a court’s jurisdiction must be resolved prior to making any determination on the merits, hypothetical or otherwise.¹⁵⁴ To proceed otherwise would be to render an advisory opinion.¹⁵⁵ The Court leveraged this definition and function to reform jurisdiction in cases following *Steel Co.*¹⁵⁶

Second, Justice Scalia explained that a clear statutory cause of action was not required for the court to have jurisdiction.¹⁵⁷ He wrote, “It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction”¹⁵⁸ However, the possibility that the averments fail to state a cause of action upon which relief could be granted does not defeat jurisdiction.¹⁵⁹ In *Bell v. Hood* the Court established that competing statutory constructions, one of which would entitle the plaintiff to recover, are sufficient to entertain the case.¹⁶⁰ Therefore, in order to dismiss the claim for lack of jurisdiction, “the federal claim . . . [must be] ‘so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.’”¹⁶¹

Third, he explained the practical implication that, if differing statutory constructions could provide or preclude a cause of action, courts would be forced to enter a hair-splitting interpretative mode to even determine jurisdiction.¹⁶² To “call the existence of a cause of action ‘jurisdictional,’ . . . would turn every statutory question in an EPCRA citizen suit into a question of

¹⁵² See *Steel Co.*, 523 U.S. at 89.

¹⁵³ See *id.* at 94 (1998) (quoting *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868)) (internal quotation marks omitted).

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* at 101.

¹⁵⁶ See, e.g., *United States v. Cotton*, 535 U.S. 625, 630 (2002).

¹⁵⁷ See *Steel Co.*, 523 U.S. at 89. While the majority found only the (constitutional) standing issue jurisdictional, Justice Stevens insisted in his concurrence that the issue of whether the relevant statute permitted the cause of action was equally jurisdictional. See *id.* at 114–15 (Stevens, J., concurring in the judgment). Justice Scalia found this an important enough issue to devote over twelve pages to refuting it. See *id.* at 89–102 (majority opinion).

¹⁵⁸ *Id.* at 89.

¹⁵⁹ *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

¹⁶⁰ See *id.* (quoting *Bell*, 327 U.S. at 685).

¹⁶¹ *Id.* (quoting *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 666 (1974)).

¹⁶² See *id.* at 92–93.

jurisdiction.”¹⁶³ Amidst the onslaught of rhetoric, the conclusion from *Steel Co.* is plain: the arguable lack of a statutory cause of action is not fatal to jurisdiction and need not be considered prior to establishing jurisdiction.

Six years later, the Court in *Kontrick v. Ryan* shed more light on the jurisdictional question when it considered whether time constraints within the Bankruptcy Code were jurisdictional.¹⁶⁴ Two observations are noteworthy. First, the Court held that the Bankruptcy Rules were not jurisdictional.¹⁶⁵ It explained that “claim-processing rules [like the Bankruptcy Rules] . . . do not delineate what cases bankruptcy courts are competent to adjudicate.”¹⁶⁶ Like the Federal Rules of Civil Procedure,¹⁶⁷ the Bankruptcy Rules do not “extend or limit the jurisdiction of the courts.”¹⁶⁸ The Court explained that the rules are simply a court-adopted means of properly administering the jurisdiction that Congress has already given courts.¹⁶⁹ In short, the Court created the Bankruptcy Rules, and they are not jurisdictional.

Furthermore, *Kontrick* marked the first explicit modern admonition by the Court for judges and litigants to limit the use of the term “jurisdiction.” The Court acknowledged the confusion surrounding the “less than meticulous” use of the term, both within its case law and that of the lower courts.¹⁷⁰ Taking the opportunity to recount a few of its missteps in this regard,¹⁷¹ the Court admonished that “[c]larity would be facilitated if courts and litigants used the label ‘jurisdictional’ . . . only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicative authority.”¹⁷²

¹⁶³ See *id.* at 92.

¹⁶⁴ See 540 U.S. 443, 455 (2004).

¹⁶⁵ See *id.* at 454.

¹⁶⁶ *Id.*

¹⁶⁷ In describing the Federal Rules of Civil Procedure, the Court wrote, “[I]t is axiomatic that such rules ‘do not create or withdraw federal jurisdiction.’” *Id.* at 453 (alteration in original) (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)).

¹⁶⁸ See *id.* at 453–54 (quoting FED. R. BANKR. P. 9030) (internal quotation mark omitted).

¹⁶⁹ See *id.* at 454. The Bankruptcy Rules are by no means a traditional prudential doctrine. However, they share a thread with prudential standing in that they are used to guide the Court in administering the jurisdiction the Court already possesses. See *supra* note 25.

¹⁷⁰ See *Kontrick*, 540 U.S. at 454.

¹⁷¹ See *id.* (citing *United States v. Robinson*, 361 U.S. 220, 228–29 (1960) (describing FED. R. CIV. P. 6(b) and FED. R. CRIM. P. 45(b), both concerning time enlargement, as jurisdictional)).

¹⁷² *Id.* at 455.

The prominent Title VII case *Arbaugh v. Y & H Corp.*¹⁷³ implicitly built upon the foundations laid by *Steel Co.* and *Kontrick*. Justice Ginsburg, writing for an undivided Court, described the case as “concern[ing] 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.”¹⁷⁴ *Arbaugh* brought suit against her former employer, Y & H Corp., for sexual harassment.¹⁷⁵ The trial court returned a verdict for *Arbaugh* in the amount of \$40,000.¹⁷⁶ Y & H then raised, for the first time, that it could not be sued under Title VII of the Civil Rights Act of 1964¹⁷⁷ because it failed to satisfy the fifteen-employee threshold for an employer as defined under § 2000e(b).¹⁷⁸ The trial court dismissed the case, determining that the statutory threshold for fifteen employees was jurisdictional.¹⁷⁹ The court of appeals affirmed.¹⁸⁰ The Supreme Court reversed.¹⁸¹

Overall, the opinion gave two clarifications. First, the Court indicated that it would not consider every statute Congress enacted as speaking to jurisdiction. Rather, Congress must clearly state its intention for a statute to limit jurisdiction in order for the Court to treat it as such. Second, the Court emphasized the distinction between jurisdiction and the merits of the case, highlighting the practical consequences.¹⁸²

After recapping the strong effect of labeling a statute as jurisdictional, the Court exercised caution by declining to extend the label to the fifteen-employee threshold.¹⁸³ The Court explained that Congress has the power to designate any statute as jurisdictional.¹⁸⁴ Thus, congressional failure to designate the relevant Title VII statutes as such indicated that Congress did not

¹⁷³ 546 U.S. 500 (2006).

¹⁷⁴ *Id.* at 503.

¹⁷⁵ *Id.* at 503–04.

¹⁷⁶ *Id.* at 504.

¹⁷⁷ 42 U.S.C. § 2000e-2 (2000).

¹⁷⁸ *See Arbaugh*, 546 U.S. at 504, 509.

¹⁷⁹ *Id.* at 504.

¹⁸⁰ *Id.* at 501.

¹⁸¹ *Id.* at 516.

¹⁸² For a discussion of this distinction, see Wasserman, *supra* note 151, at 1548 (“Merits, by contrast, are defined by who can sue whom, what real-world conduct can provide basis for a suit, and the legal consequences of a defendant’s failure to conform that conduct to its legal duties.”). *But see, e.g., Lee, supra* note 151, at 1613 (“I will argue that the conventional wisdom about jurisdiction is misleading, and, on occasion, dangerous. It is misleading because it is based on a false premise—that the *true concept* of jurisdiction is distinct from the *true concept* of the merits.”).

¹⁸³ *See Arbaugh*, 546 U.S. at 515.

¹⁸⁴ *See id.* at 514–15 (citing 28 U.S.C. § 1332’s “monetary floor”).

intend them to be jurisdictional.¹⁸⁵ Therefore, the Court held that unless Congress clearly ranks a statutory limitation as jurisdictional, courts should not treat it as such.¹⁸⁶ Accordingly, although statutes have the ability to create or withhold jurisdiction, they are not by default jurisdictional.

Instead, the Court explained that the statutory provision should be seen as an element of the claim for relief, a merits consideration.¹⁸⁷ The effect of this realization or “bright-line rule,” at least for consideration here, is to shift the governing Federal Rule of Civil Procedure (FRCP) away from a 12(b)(1)¹⁸⁸ or 12(h)(3)¹⁸⁹ motion to dismiss for lack of subject-matter jurisdiction.¹⁹⁰ The notable inference is that any statute not “rank[ed]” by Congress as jurisdictional speaks to the claim for relief¹⁹¹ and is, thus, subject to the motion to dismiss requirements of FRCP 12(b)(6) as “fail[ing] to state a claim upon which relief can be granted.”¹⁹² Consequently, failure to question the cause of action under FRCP 12(b)(6) or 12(h)(3)¹⁹³ constitutes a waiver of the defense and cannot be remedied by a challenge to the jurisdiction of the court under FRCP 12(b)(1). While the Court later fleshed out the doctrinal backbone for this distinction, the mere fact that failure to state a claim is distinct from the concept of jurisdiction is remarkably important.

While *Arbaugh* presented a unified front from the Court, *Bowles v. Russell*¹⁹⁴ proved that not all of the dust of jurisdictional reform had settled. Only a year after *Arbaugh*, the Court considered whether statutory deadlines for the timely filing of an appeal¹⁹⁵ were jurisdictional.¹⁹⁶ Seemingly at odds with recent cases, the five–four majority held that the statutory timelines were

¹⁸⁵ *See id.* at 515–16.

¹⁸⁶ *Id.* at 516.

¹⁸⁷ *See id.* (“Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff’s claim for relief, not a jurisdictional issue.”).

¹⁸⁸ FED. R. CIV. P. 12(b)(1) (indicating that a 12(b)(1) motion must be raised in responsive pleadings).

¹⁸⁹ FED. R. CIV. P. 12(h)(3) (indicating that a 12(h)(3) motion may be raised at any point in the litigation).

¹⁹⁰ *See Arbaugh*, 546 U.S. at 506–07.

¹⁹¹ *See id.* at 516.

¹⁹² FED. R. CIV. P. 12(b)(6).

¹⁹³ FED. R. CIV. P. 12(h)(2) provides that a failure to state a claim upon which relief may be granted may be raised in the pleadings, a motion for judgment on the pleadings, or at trial.

¹⁹⁴ 551 U.S. 205 (2007).

¹⁹⁵ The specific statute at issue was 28 U.S.C. § 2107(c), which allows a district court the discretion to reopen the time to file an appeal for a period of fourteen days. *Id.* at 207. The district court properly granted the motion to reopen but provided the petitioner an erroneously elongated filing date. *See id.* The petitioner complied with the erroneous date and, accordingly, filed after time had run out. *See id.*

¹⁹⁶ *See id.* at 206.

jurisdictional.¹⁹⁷ Three aspects of *Bowles* are helpful in reconciling the case and understanding its role in the development of jurisdiction: (1) the Court's rationale for the jurisdictional label, (2) the Court's efforts to distinguish *Arbaugh* and *Kontrick*, and (3) the dissent's response to those arguments.

First, in holding that the appeal filing deadlines were jurisdictional, the majority relied on two pillars: (1) the Court's longstanding precedent of treating statutory time limits for taking an appeal as jurisdictional, and (2) Congress's intention that the statute be ranked as jurisdictional.¹⁹⁸ The Court explained that "even prior to the creation of the circuit courts of appeals, [it] regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction."¹⁹⁹ It then cited a history of cases that explicitly treated those filing deadlines as jurisdictional.²⁰⁰ Moreover, the Court read Congress's explicit limitation of time for filing as an indication that it viewed the deadlines as jurisdictional.²⁰¹

Second, the majority attempted to distinguish the type of rules addressed in *Kontrick* and *Arbaugh*, which it had held were nonjurisdictional.²⁰² *Kontrick*, the Court reasoned, dealt with the Bankruptcy Rules, which were court-developed guidelines to facilitate orderly business.²⁰³ Fundamentally, these were not statutory impositions, thus not appropriately jurisdictional. *Arbaugh* received a single sentence: "[T]he statutory limitation was an employee-numerosity requirement, not a time limit."²⁰⁴ In an effort to retain the doctrinal backbone of the Court's jurisprudence, Justice Thomas wrote that "'subject-matter' jurisdiction obviously extends to 'classes of cases . . . falling within a court's adjudicatory authority,' but it is no less 'jurisdictional' when Congress prohibits federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment."²⁰⁵

¹⁹⁷ See *id.* at 206–07. Regardless of the petitioner's compliance with the district court's issued deadline, the Supreme Court held that the appeal was barred because it was jurisdictionally out of time. See *id.*

¹⁹⁸ See *id.* at 209–11.

¹⁹⁹ *Id.* at 210.

²⁰⁰ See *id.*

²⁰¹ See *id.* at 213.

²⁰² See *id.* at 210–13.

²⁰³ See *id.* at 210–11.

²⁰⁴ *Id.* at 211.

²⁰⁵ *Id.* at 213 (alteration in original) (citation omitted) (internal quotation marks omitted).

Unsurprisingly, Justice Souter's dissent took issue with the majority's effort to distinguish the statute at issue as jurisdictional.²⁰⁶ Particularly, Justice Souter was not persuaded that the rule's statutory status amounted to congressional demarcation of jurisdiction.²⁰⁷ Disagreeing with the majority's reconciliation efforts, Justice Souter wrote, "A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside the class of limitations on subject-matter jurisdiction unless Congress says otherwise."²⁰⁸

Despite the confusion caused in *Bowles, Reed Elsevier, Inc. v. Muchnick*²⁰⁹ more or less cleared the air. The *Reed Elsevier* decision coalesced the twelve years of intervening cases between itself and *Steel Co.* into a succinct framework on jurisdiction²¹⁰ and reconciled *Bowles* in a way that was at least indicative of the Court's intended direction, if not intellectually satisfying.²¹¹ The case concerned an issue similar to *Arbaugh*—whether a litigant's failure to satisfy a statutory provision would deprive a federal court of subject-matter jurisdiction to hear the case.²¹² The Copyright Act, § 411, states, "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made."²¹³ However, several plaintiffs in a class action settlement for copyright infringement had not registered their copyright.²¹⁴ Nevertheless, the district

²⁰⁶ *Id.* at 216–17 (Souter, J., dissenting). Besides the doctrine at stake, the effect of the decision was unduly harsh, especially considering the fact that *Bowles* likely relied on an erroneous timeline provided by the district court. *See id.* at 206–07 (majority opinion).

²⁰⁷ *See id.* at 217 (Souter, J., dissenting).

²⁰⁸ *See id.* at 218 (responding to the majority's citation to *Kontrick* and reconciliation of the definition of jurisdiction with the holding).

²⁰⁹ 130 S. Ct. 1237 (2010).

²¹⁰ *See id.* at 1243–45.

²¹¹ *See id.* at 1247–48. Justice Ginsburg provided further clarity in her concurrence. *See id.* at 1250–51 (Ginsburg, J., concurring in part and concurring in the judgment). Notably, Justice Ginsburg authored the unanimous opinion in *Arbaugh*, establishing the bright-line test that highlighted Congress's role in granting jurisdiction. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Concurring in *Reed Elsevier*, she acknowledged the tension between *Arbaugh* and *Bowles*, going so far as to state that "*Bowles* moved in a different direction" than the carefully executed steps toward refinement leading up to and through *Arbaugh*. *See Reed Elsevier*, 130 S. Ct. at 1250 (Ginsburg, J., concurring in part and concurring in the judgment). She did, however, propose a simple way to reconcile the two cases: *Bowles*'s reliance on a history of jurisdictional treatment rested on the same line of cases that Congress had left undisturbed. *See id.* at 1251. The result is a sort of implicit endorsement (by congressional inaction) that the statute was jurisdictional.

²¹² *See Reed Elsevier*, 130 S. Ct. at 1241 (majority opinion). While in *Arbaugh* the question was whether the defendant could be sued, the issue in *Reed Elsevier* was whether the plaintiff met the prerequisites to bring suit. *See id.* at 1245.

²¹³ *Id.* (quoting § 411(a)).

²¹⁴ *Id.* at 1242.

court approved their settlement.²¹⁵ The defendants did not raise a jurisdictional challenge at any point during the district court proceedings.²¹⁶ On appeal, the court vacated the settlement, holding that the district court did not have jurisdiction because of the § 411 deficiency.²¹⁷ The Supreme Court reversed.²¹⁸

The Court found that a copyright holder's failure to satisfy the registration requirement of § 411 did not deprive the district court of jurisdiction.²¹⁹ Justice Thomas, writing for the majority, conscripted the *Arbaugh* bright-line test to determine whether the statute was jurisdictional.²²⁰ However, what the Court originally deemed a bright-line test, Justice Thomas appeared to take in three separate steps. Expositing *Arbaugh*, he explained that the statute at issue there did "not 'clearly stat[e]' that the employee numerosity threshold on Title VII's scope 'count[s] as jurisdictional.'"²²¹ Nor did the statute, in its text or structure, "demonstrate that Congress 'rank[ed]' that requirement as jurisdictional."²²² Rather than stop at that all-or-nothing determination, he then looked to context to determine if Congress had implicitly endorsed a long line of the Court's cases that held the statute to be jurisdictional.²²³ However, that question as well was answered in the negative.²²⁴ Consequently, the statute could not be said to speak to the jurisdiction of the courts and, inferentially, spoke to the merits of the case.²²⁵ Applying that framework to § 414 of the Copyright Act, the Court found that none of those jurisdictional qualifications existed, making it nonjurisdictional.²²⁶

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *See id.* at 1243.

²¹⁸ *Id.* at 1249.

²¹⁹ *Id.* at 1241.

²²⁰ *See id.* at 1244–45 ("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." (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 515, 515–16 (2006)) (internal quotation marks omitted)).

²²¹ *Id.* at 1244 (alterations in original) (quoting *Arbaugh*, 546 U.S. at 515–16). Justice Thomas immediately thereafter stated, "And nothing in our prior Title VII cases compelled the conclusion that even though the numerosity requirement lacks a clear jurisdictional label, it nonetheless imposed a jurisdictional limit." *Id.* This allusion to the precedential evaluation leaves room for *Bowles* yet makes for an awkward and broad substep in the evaluation.

²²² *Id.* (alteration in original) (citing *Arbaugh*, 546 U.S. at 513–16).

²²³ *See id.*

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See id.* at 1248.

Three months later, with jurisdiction settling into its own, the Court again addressed the distinction between merits and jurisdiction in *Morrison v. National Australia Bank Ltd.*²²⁷ The plaintiffs, Australians who had purchased shares in National Australia Bank, brought suit against it for violations under § 10(b) of the Securities and Exchange Act.²²⁸ However, the alleged securities fraud took place outside the United States.²²⁹ The trial court dismissed the case for lack of jurisdiction under FRCP 12(b)(1) because it considered § 10(b) inapplicable to crimes committed outside the United States.²³⁰ The circuit court affirmed on similar grounds.²³¹ The Supreme Court reversed, holding the territorial reach of the statute to be a question for the merits.²³²

Again, the Court considered the issue to be a question of whether the plaintiff's allegations entitled him to relief, thus resolvable on a 12(b)(6) motion.²³³ One phrase in particular stood out: "The District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to National's conduct."²³⁴ Thus, the question of whether the cause of action was available to the plaintiffs should have been resolved on the merits, rather than before reaching them, because it did not impinge upon the "tribunal's power to hear a case."²³⁵

Finally, the Supreme Court appears to have landed on what it considers jurisdictional in *Henderson ex rel. Henderson v. Shinseki*.²³⁶ In *Henderson*, the plaintiff missed the statutory 120-day filing deadline²³⁷ to appeal a decision of the Board of Veterans' Appeals to the Veterans Court.²³⁸ The Veterans Court relied on *Bowles* in holding that the statutory timeline for filing an appeal was jurisdictional and dismissed the case for a lack of jurisdiction.²³⁹ The Federal

²²⁷ 130 S. Ct. 2869 (2010).

²²⁸ *Id.* at 2876.

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *Id.*

²³² *See id.* at 2877 (explaining that "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question"—it is not a question of whether the court has the power to hear the case).

²³³ *See id.*

²³⁴ *Id.* (footnote omitted).

²³⁵ *See id.* (internal quotation marks omitted).

²³⁶ 131 S. Ct. 1197 (2011).

²³⁷ 38 U.S.C. § 7266(a) (2006).

²³⁸ *Henderson*, 131 S. Ct. at 1201. Veterans Court is an Article I tribunal that hears appeals from the Board of Veterans' Appeals. *See* 38 U.S.C. §§ 7251, 7252(a) (2006). Its decisions are appealable to the United States Court of Appeals for the Federal Circuit. *See* § 7292(c).

²³⁹ *See Henderson*, 131 S. Ct. at 1202.

Circuit affirmed.²⁴⁰ A unanimous Supreme Court reversed, holding that, although the filing deadline rule was “important,” it was not jurisdictional.²⁴¹

The opinion invoked the *Arbaugh/Reed Elsevier* analysis, looking for any “clear” indication that Congress ranked the rule as jurisdictional.²⁴² However, because the context of the statute and the Court’s longstanding treatment of the rule are sufficiently informative, “Congress, of course, need not use magic words in order to speak clearly on this point.”²⁴³ But, the Court found no clear words and no congressional intent evident in the structure of the statute to implicate jurisdiction.²⁴⁴ The rule, therefore, was not jurisdictional.

As demonstrated in *Henderson*, the Court has now arrived at a seemingly stable point in its articulation of jurisdiction. It has delineated what jurisdiction is, how to determine whether something functions as such, and what happens when it is lacking. Jurisdiction is a court’s legitimate authority to hear a case, grounded in constitutionally or statutorily granted power.²⁴⁵ This definition stands in contrast to the rights or responsibilities of the parties—causes of action and the merits of a claim.²⁴⁶ Courts, as a threshold issue, must address whether they have the power to adjudicate the case, meaning jurisdiction must be authenticated regardless of whether the parties raise it.²⁴⁷ It is not subject to exception or waiver.²⁴⁸

Determining the jurisdictional quality of a provision depends on its origin. Jurisdictional limitations can spring from two foundations—Article III of the Constitution or statutory provisions promulgated by Congress. Article III limitations are always jurisdictional. However, if the limitation is not of the Article III ilk, the Court employs a three-step test to determine if Congress “ranked” the statutory provision as jurisdictional. First, does the text of the statute speak plainly about jurisdiction? Second, if not, does the context of the statute indicate that Congress intended the statute to be jurisdictional? Third, even if the context does not, does a long line of cases from the Court treating the provision as jurisdictional show congressional acceptance of such a

²⁴⁰ *Id.*

²⁴¹ *See id.* at 1200, 1206.

²⁴² *See id.* at 1203.

²⁴³ *See id.*

²⁴⁴ *See id.* at 1205–06.

²⁴⁵ *See Reed Elsevier, Inc. v. Muchnik*, 130 S. Ct. 1237, 1243 (2010).

²⁴⁶ *See id.*

²⁴⁷ *See Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012).

²⁴⁸ *See United States v. Cotton*, 535 U.S. 625, 630 (2002).

practice? If these are all answered in the negative, the statutory provision may be important, but not jurisdictional. Instead, these nonjurisdictional statutory limitations should be seen as going to the merits of the case.

III. PRUDENTIAL STANDING AND THE ZONE OF INTERESTS TEST: DISTINCT FROM JURISDICTION

While Article III standing is unquestionably jurisdictional because it is imposed by the Constitution,²⁴⁹ the Court has yet to explicitly address whether the second prong of the standing analysis—prudential standing—bears the same imprimatur.²⁵⁰ Even without the Court’s explicit pronouncement, some scholars and judges have assumed that prudential standing is nonjurisdictional.²⁵¹ However, several circuits remain unconvinced and continue to apply the zone of interests test in a jurisdictional manner.²⁵²

The confusion is not entirely unwarranted. Several functions or features of the prudential standing analysis can leave even the attentive reader with the impression that courts wield prudential standing in a jurisdictional manner. For example, the discussion of prudential standing often falls in the section of an opinion that broadly addresses jurisdiction.²⁵³ If that were not confusing enough, the evaluation of prudential standing usually is intertwined with or immediately follows the discussion of Article III standing, which is jurisdictional.²⁵⁴ Moreover, courts, including the Supreme Court, have dismissed cases for a lack of prudential standing in a manner that oddly resembles a jurisdictional defect.²⁵⁵

²⁴⁹ See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102–04 (1998).

²⁵⁰ See *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 184 (D.C. Cir. 2012) (“[A]lthough the Supreme Court has not yet directly addressed whether prudential standing is jurisdictional, the Court has suggested that it is not.”), *reh’g denied*, 704 F.3d 1005 (D.C. Cir. 2013), *cert. denied*, 133 S. Ct. 2880 (2013), and *cert. denied*, 133 S. Ct. 2880 (2013), and *cert. denied*, 133 S. Ct. 2881 (2013).

²⁵¹ See *infra* note 278; cf. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (discussing prudential standing as “subject to elimination by the Court or by Congress”).

²⁵² See *Grocery Manufacturers*, 693 F.3d at 185; *Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000); *Cnty. First Bank v. Nat’l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994); *Animal Legal Def. Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994); *Thompson v. Cnty. of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994).

²⁵³ See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

²⁵⁴ See, e.g., *id.* at 472–76.

²⁵⁵ See, e.g., *Air Courier Conference of Am. v. Postal Workers Union*, 498 U.S. 517, 530 (1991). Amidst this confusion, some scholars have called for the dissolution of the constitutional standing requirement and an adoption of the prudential “abstention” category to encompass all standing considerations. See, e.g., Heather

Notwithstanding these conflicting signals, prudential standing, although related to Article III standing, is not jurisdictional in nature. This section will establish that conclusion by first comparing the respective sources of prudential standing and jurisdiction, determining that they are complimentary, but distinct. In illustration of this distinction, it will then provide practical examples of prudential standing and the broader prudential body of law that display the nonjurisdictionality of the doctrine. Finally, it confronts potential difficulties with reading the zone of interests test as nonjurisdictional, concluding that the test, for doctrinal and practical reasons, best aligns with a nonjurisdictional reading.

A. Because Prudential Standing Is a Judicial Self-Imposition, It Does Not Fit in the New Framework of Jurisdiction

First and foremost, the sources of jurisdiction and prudential standing are distinct. This section will highlight that doctrinal distinction by examining the opposing language scattered throughout the cases that address each limitation. It will then explain the effect of that distinction, as observable in *Bowles v. Russell*.

Jurisdiction is the power or legitimate authority of the court originating from one of two sources—Article III of the Constitution or a statutory provision promulgated by Congress.²⁵⁶ Prudential standing, on the other hand, is not based on constitutional or statutory grounds. From the outset, the Court distinguished prudential standing from the requirements of Article III.²⁵⁷ Most subsequent opinions that have broached prudential standing have done so with similar language, clearly distinguishing the constitutional limitations imposed by Article III from the prudential reservation of action.²⁵⁸ Moreover, with the

Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 464 (2008); cf. Sohn, *supra* note 21, at 728 (arguing that all constitutional standing doctrines be absorbed into the prudential category).

²⁵⁶ See *supra* Part II.

²⁵⁷ See *supra* notes 44–45 and accompanying text; see also *supra* notes 69–70 and accompanying text.

²⁵⁸ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[S]ome of [standing’s] elements express merely prudential considerations that are part of judicial self-government”); *Valley Forge*, 454 U.S. at 475 (“[Article III standing] states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called ‘prudential’ considerations.”); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“This inquiry [into standing] involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.”); see also *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) (“Though all are termed ‘standing,’ the differences between statutory, constitutional, and prudential standing are important. Constitutional and prudential standing are about, respectively, the constitutional power of a federal court to resolve a dispute and the wisdom of so doing.” (quoting *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 295 (3d Cir. 2007))).

exception of *Clarke* and *Air Courier*, the Court has not moored prudential standing of any sort to a statutory requirement.

Instead of constitutional or statutory justification, the Court has avowed that it engages prudential standing considerations for “its own governance” in a manner involving a “rule of self-restraint.”²⁵⁹ Neither constitutional nor statutory limitations can be properly described as judicial self-governance—they are by definition impositions upon the Court from outside its chambers. Thus, the Court’s effort to administer its docket in an orderly fashion may run concomitantly with constitutional and statutory limitations, but it rests in no other justification save that of prudence. While the debate on whether the Court has the ability to create or police its jurisdiction carries on in some circles,²⁶⁰ the Court has indicated that it trusts Congress with the delineation of its statutory jurisdiction and itself for parsing constitutional jurisdictional bounds.²⁶¹ Because prudential standing is neither constitutional nor statutory, it cannot be labeled jurisdictional.

An example from the Supreme Court’s reasoning in this regard is instructive. Although *Bowles* did not specifically address prudential standing, it did illustrate the distinction between Court-developed doctrine and limits imposed upon the Court from outside its chambers.²⁶² The *Bowles* Court held that the statutory timelines for filing appeals were jurisdictional.²⁶³ The Court, however, contrasted those jurisdictional, statutory timelines with the nonjurisdictional Bankruptcy Rules addressed in *Kontrick*.²⁶⁴ Both sets of rules placed procedural time limits on filing in the appropriate court. The difference, according to the Court, lay in the sources of the limitations. Notably, “[b]ecause [o]nly Congress may determine a lower federal court’s subject-matter jurisdiction, it was improper for courts to use the term ‘jurisdictional’ to describe emphatic time prescriptions in rules of court [like those at issue in *Kontrick*].”²⁶⁵ Thus, in *Bowles*, the Court explicitly labeled the Bankruptcy

²⁵⁹ *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)) (internal quotation marks omitted).

²⁶⁰ *See, e.g.,* Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. PITT. L. REV. 351, 371 (1993) (discussing Professor Redish’s thesis that the refusal to hear a case on abstention doctrine grounds abrogates congressional authority in determining jurisdiction).

²⁶¹ *See Bowles v. Russell*, 551 U.S. 205, 210–13 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006).

²⁶² *See Bowles*, 551 U.S. at 210–13.

²⁶³ *See id.* at 206–07.

²⁶⁴ *See id.* at 210–11.

²⁶⁵ *Id.* at 211 (second alteration in original) (citation omitted) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 452, 454 (2004)) (internal quotation marks omitted).

Rules as nonjurisdictional because they were created by the Court. That court creation stands in opposition to not only the immutable requirements of Article III, but also the clear intent of Congress to put forth a jurisdictional statute.

Moreover, in declining to ascribe jurisdictional import to the Bankruptcy Rules, the Supreme Court signaled that it could not limit the jurisdiction of the courts. This prohibition was galvanized with the words, “Within constitutional bounds, *Congress* decides what cases the federal courts have jurisdiction to consider.”²⁶⁶ Although the Court was specifically distinguishing the Bankruptcy Rules (Court made for orderly administration) from appellate filing deadlines promulgated by Congress, it ultimately taught that jurisdiction does not appropriately refer to the court’s self-imposition of limitation.

It should be noted that the source of the limitation for each of the prudential standing doctrines has not remained static. For instance, the prohibition against bringing generalized grievances has vacillated between a constitutional and prudential home.²⁶⁷ However, this inconsistency does not contradict the idea that prudential standing emanates from the Court itself. In fact, one scholar acknowledges that the Court shifts the doctrine to its prudential home when it desires more flexibility in application.²⁶⁸ If anything, this pattern emphasizes the nonjurisdictionality of prudential standing.

B. Practical Illustrations Demonstrate that Prudential Standing Is Not Jurisdictional

While the Court’s reasoning in *Bowles* and *Kontrick* illustrates the distinction between Court-made doctrines and statutory or constitutional impositions, it does not specifically extend the distinction to prudential standing. Although that extension is no stretch, practical examples of the underlying rationale at work in the Court’s treatment of prudential doctrines are helpful. This section will first examine examples of exceptions the Court has made to prudential standing requirements. Second, it will study the flexible order in which courts engage prudential standing as compared to the required order for jurisdiction. Third, it will draw from the Court’s recent treatment of other prudential doctrines besides prudential standing.

²⁶⁶ *Id.* at 212 (emphasis added); *see also supra* note 265 and accompanying text.

²⁶⁷ *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, 1204–14 (2008) (recapping the Court’s inconsistent view of the proper classification for the generalized grievances prohibition).

²⁶⁸ *See id.* at 1217.

1. Prudential Standing, Unlike Jurisdiction, Is Subject to Exceptions

In the presence of a jurisdictional defect, a court must dismiss the case without giving the parties an opportunity for waiver.²⁶⁹ Even the Supreme Court does not have the power to make exceptions to cure a lack of subject-matter jurisdiction, even for compelling equitable considerations.²⁷⁰ Prudential standing does not function with the same inflexibility and compulsion.

The Supreme Court has waived at least one of the three prudential standing requirements, the prohibition against third-party standing, in the presence of “competing considerations.”²⁷¹ The Court in *Warth v. Seldin* stated, “In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff’s claim to relief rests on the legal rights of third parties.”²⁷² The Court emphasized in *Craig v. Boren* that prudential standing serves specific ends.²⁷³ When those ends were not furthered by the application of the doctrine, the Court did not feel obliged to observe its bounds.²⁷⁴ Moreover, it stated that adhering inflexibly to the prudential requirements in that instance would “foster repetitive and time-consuming litigation under the guise of caution and prudence.”²⁷⁵

The language surrounding this prohibition is enough to deduce that the rule is a generality and not an immovable bulwark.²⁷⁶ The Court has affirmed its understanding of this possibility as recently as 2004.²⁷⁷ While this observation

²⁶⁹ See *United States v. Cotton*, 535 U.S. 625, 630 (2002).

²⁷⁰ See *Bowles*, 551 U.S. at 214 (explaining that the “Court has no authority to create equitable exceptions to jurisdictional requirements”).

²⁷¹ See, e.g., *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (“[T]here are situations where competing considerations outweigh any prudential rationale against third-party standing, and . . . this Court has relaxed the prudential-standing limitation when such concerns are present.”).

²⁷² *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975). Moreover, the idea that “usual reluctance to exert judicial power” exists in prudential standing circumstances presupposes that the power exists in those circumstances. See *id.* Reluctance necessitates discretion, which is wholly absent in the presence of jurisdictional limitations.

²⁷³ See 429 U.S. 190, 193 (1976).

²⁷⁴ See *id.* at 193 (“These prudential objectives, thought to be enhanced by restrictions on third-party standing, cannot be furthered here . . .”).

²⁷⁵ See *id.* at 193–94.

²⁷⁶ See, e.g., *Hodel v. Irving*, 481 U.S. 704, 711 (1987) (“[O]ne of these prudential principles is that the plaintiff generally must assert his own legal rights and interests. That general principle, however, is subject to exceptions.” (citation omitted)).

²⁷⁷ See *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004) (“We have not treated this rule [against third-party standing] as absolute . . .”). Building upon that construction, the Court’s recent articulations on the doctrine against third-party standing acknowledge that it is not jurisdictional. See *infra* note 299.

might not fully frame the other two prudential standing doctrines as subject to exception,²⁷⁸ it does unequivocally teach that the prudential standing umbrella as a whole is not jurisdictional.

2. Prudential Standing May Be Addressed in a Different Order than Jurisdiction

The Supreme Court has not minced words in establishing that courts may not consider merits questions prior to ensuring proper jurisdiction exists. For instance, the *Steel Co.* decision clearly established that a court is not free to bypass a jurisdictional question to address the merits of a case when it condemned the use of “hypothetical jurisdiction.”²⁷⁹ Courts, including the Supreme Court, have not treated prudential standing with the same zealous supervision.

While the *Steel Co.* discussion was set in the context of the Article III question, Justice Scalia did not cabin the prohibition against hypothetical jurisdiction to issues of constitutional jurisdiction.²⁸⁰ He described the assumption of “[h]ypothetical jurisdiction” as creating a “hypothetical judgment,” which is the same as issuing an advisory opinion, a practice long forbidden.²⁸¹ The Court’s subsequent opinions have broadly applied the description of a court’s power as jurisdiction to not only constitutional limits, but also those imposed by Congress.²⁸² Therefore, “[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.”²⁸³

Accordingly, if prudential standing were jurisdictional, a court could not bypass it to rule on the merits in any given case. It would be an essential ingredient of the recipe for legitimate authority. The Supreme Court, however, has not treated it as such. Even while distinguishing cases within *Steel Co.*, the Court relied on an implicit understanding that prudential standing was not

²⁷⁸ See 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 14 (2d ed. 2011) (“[T]he Court itself is free to disregard one of the prudential rules when it thinks it appropriate to do so. The jus tertii rule [or the prohibition on third-party standing], in particular, often has been disregarded by the Court in cases that seemed to it proper.”).

²⁷⁹ See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998); see also *supra* note 144.

²⁸⁰ See *Steel Co.*, 523 U.S. at 101 (“The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers . . .”).

²⁸¹ *Id.* (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792)).

²⁸² See *supra* Part II.B.

²⁸³ *Steel Co.*, 523 U.S. at 101–02.

jurisdictional.²⁸⁴ The courts of appeals, at least those that have addressed it recently, have decided the prudential-standing-as-jurisdictional question in a similar manner.²⁸⁵ Even the D.C. Circuit seems to have previously embraced this rationale and foregone the determination of prudential standing to decide a case on the easier merits question.²⁸⁶ This ordering of prudential standing compared to that of jurisdiction displays the difference between the two.

3. *Other Prudential Doctrines (Besides Standing) Are Not Jurisdictional*

Given the infrequency and terseness with which the Court has explained prudential standing, especially the zone of interests test, a broader discussion of prudential, or judge-made, doctrine is helpful. The Court's recent treatment of ripeness,²⁸⁷ another justiciability doctrine, illuminates the relationship between the prudential doctrines, jurisdiction, and waiver.²⁸⁸ Ripeness, like standing, encompasses both constitutional and prudential considerations. The Court has recognized that ripeness stems from both "Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."²⁸⁹ In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the majority took the opportunity to clarify the distinction between those sources and how that distinction affects jurisdiction and waiver.²⁹⁰ The Court approached the ripeness question in these two separate steps—constitutional and prudential.

²⁸⁴ See 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.15 (3d ed. 2008) ("[T]he standing question that was put aside involved statutory standing under the 'zone of interests' test, a matter that is not jurisdictional—there is no illogic in the rule that a merits question can be given priority over a statutory standing question, but not over a constitutional standing question.").

²⁸⁵ See *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008); *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006).

²⁸⁶ See *Fraternal Order of Police v. United States*, 173 F.3d 898, 905 (D.C. Cir. 1999) (citing *Steel Co.*, 523 U.S. 83 (1998)) ("It is, however, permissible to reject a claim on the merits without having explicitly resolved the prudential standing issue. For one reason, as the Court has explained, overlap between the merits and prudential standing is sometimes so great as to make any distinction artificial.").

²⁸⁷ Ripeness determines whether a controversy is at the appropriate stage of development for judicial review. See WRIGHT, MILLER & COOPER, *supra* note 284, § 3532.1 ("The central perception is that courts should not render decisions absent a genuine need to resolve a real dispute.").

²⁸⁸ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010); see also *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env'tl. Prot.*, 130 S. Ct. 2592, 2610 (2010).

²⁸⁹ See, e.g., *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). This language mirrors the language of the prudential standing cases, which describe the dual sources of standing as Article III and prudential concerns. See *supra* Part III.A, specifically note 265 and accompanying text.

²⁹⁰ See 130 S. Ct. 1758, 1767 n.2 (2010).

The constitutional analysis was relatively straightforward. The Court took for granted that the constitutional components of ripeness were jurisdictional.²⁹¹ However, the petitioner satisfied the constitutional component, giving the Court jurisdiction.²⁹²

The analysis became more fascinating, however, when the Court raised two mirror issues relevant to the prudential standing discussion. First, the majority rejected the argument that a failure to satisfy prudential ripeness should preclude judicial review.²⁹³ Writing for the majority, Justice Alito stated, “[W]e reject that argument as waived, and we see no reason to disregard the waiver.”²⁹⁴ Second, the majority declined to raise the prudential objection on its own motion in the specific case.²⁹⁵ However, it specifically left open the possibility that a federal court could raise a motion concerning prudential ripeness *sua sponte* in a similar case.²⁹⁶ This absence of obligation reinforces the argument that the Court does not view the prudential doctrines as jurisdictional.

The Court decided *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*²⁹⁷ just two months after *Stolt-Nielsen S.A.* Again, the Court reiterated that parties could waive ripeness arguments not implicating constitutional concerns by a failure to raise them.²⁹⁸ It took the analysis one step further, however, in explicitly stating that ripeness (at least of the prudential strain) is not jurisdictional.²⁹⁹ Moreover, the Court addressed prudential ripeness in the same few sentences as the doctrine against third-party standing—a prudential standing doctrine.³⁰⁰ With little fanfare, the Court lumped the two doctrines together, writing, “Neither objection [of ripeness or third-party standing] appeared in the briefs in opposition to the petition for writ of certiorari, and since *neither is jurisdictional*, we deem both waived.”³⁰¹ This

²⁹¹ *See id.*

²⁹² *See id.*

²⁹³ *See id.*

²⁹⁴ *See id.* (citation omitted) (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002)).

²⁹⁵ *See id.*

²⁹⁶ *See id.* (“We express no view as to whether, in a similar case, a federal court may consider a question of prudential ripeness on its own motion.”) (citing *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003) (“[E]ven in a case raising only prudential concerns, the question of ripeness may be considered on a court’s own motion.”)).

²⁹⁷ 130 S. Ct. 2592 (2010).

²⁹⁸ *See id.* at 2610.

²⁹⁹ *See id.*

³⁰⁰ *See id.*

³⁰¹ *Id.* (emphasis added) (footnote omitted).

nonchalance toward the nonjurisdictionality of the prohibition against third-party standing indicates that the Court assumes that prudential concerns, including those of standing, are nonjurisdictional.

These two cases display the practical outworking of the distinct sources of limitation between jurisdictional and prudential doctrine.³⁰² More broadly, the preceding illustrations teach that the Court does not view the prudential doctrines, standing or otherwise, as limitations on its power to hear a case. With a sense of symmetry, the Court analyzes external impositions from the Constitution and Congress³⁰³ much more mechanically than it does self-imposed limitations.

C. *Overcoming Potential Hurdles for Accepting the Zone of Interests Test as Nonjurisdictional*

Given the conclusions that the zone of interests test is a prudential doctrine³⁰⁴ and that prudential doctrines are nonjurisdictional,³⁰⁵ it follows that the zone of interests test cannot be a jurisdictional limitation. While doctrinal support for this conclusion is compelling, some may see the preservation of judicial discretion instead of a mandatory blanket test as inefficient.³⁰⁶ This section will briefly explore one avenue through which the Court could advance that agenda. In response, it provides both doctrinal and practical reasons why that approach is inappropriate.

One loophole that the Court might look to exploit is the third step of the *Arbaugh/Reed Elsevier* test. That third step allows statutory rules that the Court has applied as jurisdictional, even without explicit or contextual congressional admonition to do so, to be jurisdictional if the Court determines that Congress has implicitly endorsed that application by leaving those cases unturned.³⁰⁷ This argument could be supported by the *Bennett* Court's

³⁰² See *supra* Part III.A.

³⁰³ Congressional mandates could be said to receive slightly lower deference than constitutional ones, but only to the extent that Congress must explicitly state that the statute is jurisdictional according to the *Arbaugh/Reed Elsevier* analysis. See *supra* notes 221–25 and accompanying text.

³⁰⁴ See *supra* Part I.

³⁰⁵ See *supra* Part III.A–B.

³⁰⁶ Cf. Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 529 (2012) (arguing that rules, rather than standards, are a more efficient means to outline jurisdictional boundaries).

³⁰⁷ See *supra* notes 221–22 and accompanying text.

statement that “Congress legislates against the background of our prudential standing doctrine.”³⁰⁸

However, the cards are stacked against that application in at least three ways. First, *Bennett* dealt specifically with a *statute* that the Court had treated as jurisdictional.³⁰⁹ Thus, the Court would have to clearly recast the zone of interests test as a statutory imposition to apply this exception.³¹⁰ Second, even if the Court recast the zone of interests test, the resulting statutory imposition would merely require that courts search for a cause of action.³¹¹ However, the *Kontrick* and *Arbaugh* decisions counsel that the cause of action goes to the merits of a case and therefore cannot be jurisdictional.³¹² Finally, the *Bennett* exception requires the Court to have treated the statute as jurisdictional in a long line of its cases.³¹³ The Court’s treatment of the zone of interests test might have appeared mandatory at points, but it has never treated the test as jurisdictional.³¹⁴

Beyond concerns of doctrinal fidelity, the practical efficiency gain of labeling the zone of interests test jurisdictional would be, at best, overstated. In fact, retaining the discretionary nature of the zone of interests test is seemingly more efficient. Were the zone of interests test jurisdictional, courts would be required to raise it *sua sponte* if the parties did not, obligating courts to engage in statutory interpretation to determine jurisdiction in every APA case. Besides putting the cart before the horse, this practice at times would run dangerously close to sending courts into what Justice Scalia cautioned against in *Steel Co.*—requisite and extensive statutory parsing to determine jurisdiction.³¹⁵

³⁰⁸ *Bennett v. Spear*, 520 U.S. 154, 163 (1997); *see supra* note 103 and accompanying text.

³⁰⁹ *See Bennett*, 520 U.S. at 164.

³¹⁰ *See supra* Part I (arguing that the zone of interests is not a statutory imposition).

³¹¹ *See supra* note 15.

³¹² *See supra* note 15; *see also supra* notes 169, 187 and accompanying text.

³¹³ *See Bennett*, 520 U.S. at 163.

³¹⁴ *See supra* Part I. The Court had explicitly and repeatedly labeled the timelines at issue in *Bennett* as jurisdictional. *See supra* Part I.

³¹⁵ *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 85, 92–93 (1998); *see also supra* notes 162–63 and accompanying text.

Instead, treating the zone of interests test as prudential alleviates this compulsion, saving precious judicial resources when the issue does not appear relevant. Litigants, then, bear the initial burden of raising the zone of interests test when the plaintiff may not be arguably within it.³¹⁶ However, the courts retain ultimate discretion to raise the test if the litigants fail to do so.³¹⁷ This framework leaves little room for the zone of interests test to be ignored when it matters, yet streamlines the analysis for both the courts and litigants. In the end, treating the zone of interests test as prudential, not jurisdictional, makes good sense on doctrinal and practical grounds.

CONCLUSION

This Comment has shown that prudential standing in general, and specifically the zone of interests test, is not a jurisdictional limitation on the Court. Jurisdictional limitations stem from either constitutional or statutory impositions. Prudential standing and the zone of interests test originate from neither, but instead are based on the judiciary's self-created and -imposed restraint. These matters of judicial self-governance should not be employed to narrow the availability of jurisdiction. Rather, judges should use them as a guide, but feel free to disregard their general wisdom in order to avoid the pernicious consequences that the Court cautioned against in its development of jurisdiction—waste of judicial resources, prejudice to litigants, and months of wasted work.³¹⁸

To this point, clarity on courts' appropriate use of prudential standing to dismiss cases has been encumbered by the absence of an adequately clear doctrine of jurisdiction. However, the Supreme Court's recent illumination of jurisdiction leaves no room for the lower courts to dismiss zone of interests cases on jurisdictional grounds, claiming they lack the power or ability to adjudicate them. Unfortunately, in June 2013, the Court declined the opportunity to clarify the zone of interests test, perpetuating the contentious circuit split, when it denied certiorari to *Grocery Manufacturers*. Lower courts need guidance and the Court should provide it, clarifying the zone of interests

³¹⁶ In *Grocery Manufacturers*, EPA did not raise the zone of interests test. See *supra* note 14. Had the issue been one worth briefing, the EPA, which is well versed in administrative law standing requirements, would have certainly raised it.

³¹⁷ Cf. *supra* note 296 and accompanying text (explaining courts' ability, but not compulsion, to raise prudential concerns *sua sponte*).

³¹⁸ See *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

test in the same manner as it has jurisdiction, at a minimum holding that the test is not jurisdictional.

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