## *Standing — Civil Procedure —* Lexmark International, Inc. v. Static Control Components, Inc.

Few areas of doctrine in the past fifty years have experienced greater transformation, implicated a wider range of cases, and engendered more confusion than standing.[1] In its 1970 decision *Association of Data Processing Service Organizations, Inc. v. Camp*,[2] the Supreme Court moved away from the "legal interest" test[3] and established that standing was an inquiry separate from the merits of the claim.[4] In the decades that followed, the Court's standing doctrine experienced significant change[5] and sustained scholarly criticism,[6] but also appeared to have stabilized as a two-sided inquiry of constitutional and prudential standing.[7] Constitutional standing requirements derive from Article III's limitation of the judicial power to resolve cases and controversies,[8] while prudential standing has involved self-imposed judicial considerations beyond that constitutional minimum.[9]

Last Term, in *Lexmark International, Inc. v. Static Control Components, Inc.*,[10] the Supreme Court penned the latest chapter on standing — upending the doctrine yet again. A few details are (relatively) clear in isolation: First, the "zone of interests" test and the bar on "gen-

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[1] The Supreme Court has defined the question of standing as "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Allen v. Wright, 468 U.S. 737, 750–51 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (internal quotation mark omitted).

[2] 397 U.S. 150 (1970).

[3] *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 226–27, 227 n.37 (1988) (summarizing the "legal interest" test). Under the "legal interest" test, a plaintiff lacked standing "unless the right invaded [was] 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." *Data Processing*, 397 U.S. at 153 (quoting Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 137–38 (1939)) (internal quotation marks omitted).

[4] *Data Processing*, 397 U.S. at 153 ("The 'legal interest' test goes to the merits. The question of standing is different.").

[5] *Compare, e.g.*, *id.* at 151–58 (liberalizing standing), *with, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (restricting standing).

[6] *See, e.g.*, Fletcher, *supra* note 3; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317 (2004); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

[7] *See, e.g.*, Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 91 (2009) ("[D]octrines of constitutional and prudential standing appear to be here to stay . . . .").

[8] *See* U.S. CONST. art. III, § 2; *Lujan*, 504 U.S. at 560–61. The three well-established requirements of constitutional standing are (1) that the plaintiff has suffered or imminently will suffer an injury in fact, (2) that the injury is fairly traceable to the conduct of the defendant, and (3) that a favorable judicial outcome is likely to redress the plaintiff's injury. *Lujan*, 504 U.S. at 560–61.

[9] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004). The three, formerly well-established, limitations of prudential standing are (1) the general prohibition on third-party standing, (2) the rule barring adjudication of generalized grievances, and (3) the requirement that a plaintiff fall within the zone of interests of the law invoked. *Id.*

[10] 134 S. Ct. 1377 (2014).

eralized grievances" are no longer part of prudential standing. Second, the *Lexmark* inquiry — combining the zone of interests and proximate causation — does not implicate courts' subject matter jurisdiction but instead goes to the merits of a plaintiff's statutory claim for relief. What is perhaps less apparent is that these doctrinal reworkings are part of larger trends in the Court's cases that limit federal courts' ability to avoid deciding cases falling within their jurisdiction: First, as a general matter, the Court appears increasingly uncomfortable with the discretion afforded by prudential justiciability doctrines. Second, it has exerted considerable effort in recent years to limit and bring greater discipline to jurisdictional rulings. *Lexmark* embodies these two broader trends, signaling the end of prudential standing and turning the easily abused zone of interests test into a merits question.

The *Lexmark* decision arose out of "sprawling litigation" between laser printer manufacturer Lexmark International, Inc. and component supplier Static Control Components, Inc.[11] Lexmark not only manufactures and sells laser printers, it also sells toner cartridges — the only toner cartridges Lexmark printers are designed to accept.[12] Other businesses refurbish used Lexmark toner cartridges and sell them in competition with Lexmark.[13] In an effort to dry up the remanufacturing market, Lexmark introduced a "Prebate" program through which customers receive a discount on new toner cartridges in exchange for agreeing to return used cartridges directly to Lexmark.[14] The terms of the Prebate program were communicated to consumers through notices printed on the toner-cartridge boxes — so-called "shrinkwrap licensing" — and enforced through the use of an embedded microchip that would disable an empty cartridge until it was replaced by Lexmark.[15]

Static Control neither manufactures nor remanufactures toner cartridges. Instead, it is the leading supplier of components "necessary to remanufacture Lexmark cartridges"[16] — including toner, replacement parts, and a microchip that mimics Lexmark's.[17] In 2002, Lexmark sued Static Control, alleging that Static Control's microchips violated the Copyright Act of 1976 and the Digital Millennium Copyright Act. Static Control counterclaimed, alleging, among other things, violations of the Lanham Act's[18] prohibition on false advertising.[19] Static Control's

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[11] *Id.* at 1385 n.2.
[12] *Id.* at 1383.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387, 396 (6th Cir. 2012).
[17] *Lexmark*, 134 S. Ct. at 1384.
[18] 15 U.S.C. §§ 1051–1128 (2012). As did the *Lexmark* Court, this Comment uses "Lanham Act" to refer to the relevant section of 15 U.S.C.
[19] *Lexmark*, 134 S. Ct. at 1384; *see* 15 U.S.C. § 1125(a).

Lanham Act claim alleged two types of objectionable conduct by Lexmark: First, it asserted that Lexmark misled consumers to believe they were legally bound by the Prebate terms.[20] Second, it claimed that Lexmark sent letters to most of the toner cartridge manufacturers, falsely advising them that it was illegal to sell refurbished Prebate cartridges and to use Static Control's products to refurbish those cartridges.[21] This conduct, Static Control contended, misrepresented "the nature, characteristics, and qualities" of both Lexmark's and Static Control's products.[22] It also argued that these misrepresentations had "proximately caused and [we]re likely to cause injury" to Static Control by "diverting sales from [Static Control] to Lexmark" and had "substantially injured [its] business reputation" by leading consumers and others to believe that Static Control was "engaged in illegal conduct."[23]

The district court granted Lexmark's motion to dismiss the Lanham Act claim,[24] holding that Static Control lacked "prudential standing"[25] under a multifactor balancing.[26] The court emphasized that Lexmark and Static Control were not direct competitors, and that there were more direct plaintiffs in the form of the remanufacturers — the primary targets of Lexmark's alleged false advertising.[27] The Sixth Circuit reversed the Lanham Act dismissal.[28] It identified three competing approaches for determining whether a plaintiff has standing to sue under the Lanham Act, ultimately adopting the Second Circuit's "reasonable interest" approach,[29] under which a plaintiff has standing "if the claimant can demonstrate '(1) a reasonable interest to be protected against the alleged false advertising and (2) a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising.'"[30] The court concluded that Static Control had standing because it "alleged a cognizable interest in its business reputation and sales to remanufacturers and sufficiently alleged that th[ose] interests were harmed by Lexmark's statements."[31]

The Supreme Court affirmed, but on very different grounds. Writing for the unanimous Court, Justice Scalia began his analysis by

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[20] *Lexmark*, 134 S. Ct. at 1384.

[21] *Id.*

[22] *Id.* (quoting Joint Appendix at 43–44, *Lexmark*, 134 S. Ct. 1377 (No. 12-873)) (internal quotation marks omitted).

[23] Joint Appendix, *supra* note 22, at 44.

[24] Static Control Components, Inc. v. Lexmark Int'l, Inc., Nos. 02-571, 04-84, 2006 WL 7347975, at *7, *9 (E.D. Ky. Sept. 28, 2006).

[25] *Id.* at *3.

[26] *See id.* at *2–3 (citing Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983)).

[27] *Id.* at *5.

[28] Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387, 395 (6th Cir. 2012).

[29] *See id.* at 410.

[30] *Id.* (quoting Famous Horse, Inc. v. 5th Ave. Photo Inc., 624 F.3d 106, 113 (2d Cir. 2010)).

[31] *Id.* at 411.

"clarifying the nature of the question at issue" in the case.[32] While the parties had briefed the case as involving a question of "prudential standing," the Court made it clear that neither party's arguments were properly so labeled.[33] Moreover, declining to adjudicate Static Control's claim on "prudential" grounds, the Court explained, would be in "tension"[34] with a federal court's "virtually unflagging" obligation to "hear and decide cases within its jurisdiction."[35] The Court acknowledged that its decisions had "adverted to a 'prudential' branch of standing,"[36] and admitted that the zone of interests had been classified as "prudential" in the past,[37] but held that such labeling is "inapt."[38] According to the Court, both proximate causation, as put forward by Lexmark, and the zone of interests, as put forward by Static Control, are questions of statutory interpretation: "whether Static Control has a cause of action under the statute."[39]

The Court proceeded to address the question of whether the cause of action in § 1125(a) of the Lanham Act extends to plaintiffs like Static Control. While the provision's broad language could be read to suggest that an action is available "to anyone who can satisfy the minimum requirements of Article III," the Court declined to give it such a broad reading "in light of two relevant background principles already mentioned," namely, the "zone of interests" and "proximate causality."[40] Under the former, the Court explained that it presumes that a statutory cause of action extends only to plaintiffs whose interests "fall within the zone of interests protected by the law invoked."[41] The Court reaffirmed that the zone of interests applies to all statutory causes of action, not just to those conferred by the Administrative Procedure Act.[42] The breadth of the zone of interests, however, "varies according to the provisions of law at issue."[43] In the present case, the Court said,

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[32] *Lexmark*, 134 S. Ct. at 1386. The Court assumed without deciding that "the communications alleged by Static Control qualify as commercial advertising or promotion" under the Lanham Act. *Id.* at 1385 n.1.

[33] *Id.* at 1386–87.

[34] *Id.* at 1386.

[35] *Id.* (quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)) (internal quotation marks omitted).

[36] *Id.*

[37] *Id.* at 1387.

[38] *Id.* n.3.

[39] *Id.* at 1387. The Court noted that it had "on occasion," *id.* n.4, referred to this inquiry as "statutory standing," *id.* (internal quotation marks omitted), and treated it as "effectively jurisdictional," *id.* But while that label "correctly places the focus on the statute," the Court explained that it too was "misleading," *id.*, as "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction," *id.* (quoting Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 642–43 (2002)).

[40] *Id.* at 1388.

[41] *Id.* (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)) (internal quotation marks omitted).

[42] *Id.*

[43] *Id.* at 1389 (quoting Bennett v. Spear, 520 U.S. 154, 163 (1997)).

identifying the interests protected "requires no guesswork," since the Lanham Act includes a "detailed statement" of purposes.[44] To fall within the zone of interests of § 1125(a), "a plaintiff must allege an injury to a commercial interest in reputation or sales."[45]

For the proximate cause requirement, the Court explained that it "generally presume[s] that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute."[46] The Court held that a plaintiff suing under § 1125(a) "ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising" — and that such an injury is sufficiently direct "when deception of consumers causes them to withhold trade from the plaintiff."[47] The Court further clarified that proximate causation is not a requirement of Article III standing, but like the zone of interests test, is "an element of the cause of action" and nonjurisdictional.[48] It also noted that, "like any other element of a cause of action," proximate causation must be "adequately alleged at the pleading stage" for the case to proceed.[49] As long as the plaintiff's allegations are sufficient, the Court concluded, "the plaintiff is entitled to an opportunity to prove them."[50]

The Court considered alternative tests proposed by Lexmark and amici but declined to adopt any of them, holding that "a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue."[51] Applying those tests, the Court held that Static Control came "within the class of plaintiffs whom Congress authorized to sue under § 1125(a)."[52] First, Static Control's alleged injuries of lost sales and damage to its business reputation were "precisely the sorts of commercial interests the Act protects."[53] Second, Static Control "sufficiently alleged" that its injuries were proximately caused by Lexmark's misrepresentations.[54] While the case did not present a "classic"[55] false-advertising claim, Static Control had alleged that Lexmark "directly target[ed] Static

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[44] *Id.*
[45] *Id.* at 1390.
[46] *Id.*
[47] *Id.* at 1391.
[48] *Id.* n.6.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 1391; *see also id.* at 1391–93.
[52] *Id.* at 1393.
[53] *Id.*
[54] *Id.*
[55] *Id.* (quoting Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 799 n.24 (5th Cir. 2011)) (internal quotation mark omitted).

Control"[56] when it "falsely advertised that Static Control infringed Lexmark's patents."[57] Even though Lexmark and Static Control were not direct competitors, the Court held that competition is not required for proximate cause "when a party claims reputation injury from disparagement."[58] In addition, Static Control had adequately alleged proximate causation by pleading that it "designed, manufactured, and sold" microchips that were "necessary for," and "had no other use" than, refurbishing Lexmark cartridges.[59] As a result, any reduction in remanufacturers' business necessarily injured Static Control in equal measure — a "relatively unique circumstance[]."[60]

It is impossible to read Justice Scalia's opinion for the unanimous Court in *Lexmark* — and in particular, the footnotes[61] — without perceiving that the opinion is far more than a decision about who has standing to sue for false advertising under the Lanham Act. But as is frequently true of the Court's major cases in this area, exactly *what* that "more" entails is less evident. The Court's explicit doctrinal moves are relatively straightforward — despite abrogating nearly everything the parties, circuit courts, and the Court's own precedent had to say on the matter. What is not immediately apparent is that the Court's decision fits neatly into existing trends within its jurisprudence: discomfort with prudential justiciability doctrines and an effort to bring greater discipline to jurisdictional rulings. As part of a larger trend toward limiting courts' discretion to avoid deciding cases within their jurisdiction, *Lexmark* cripples prudential standing, while moving the zone of interests to the merits stage, where judges have less control.

The Court's first doctrinal move came in its choice to reclassify the bar on generalized grievances as an Article III requirement and the zone of interests as a question of "statutory interpretation."[62] Granted, this move was not entirely unprecedented: Since Justice Scalia's opinion in *Lujan v. Defenders of Wildlife*,[63] the term "generalized grievance" has been treated as an antonym of the constitutional standing requirement of a particularized injury in fact,[64] a practice the Court

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[56] *Id.* (alteration in original) (quoting Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387, 411 n.10 (6th Cir. 2012)) (internal quotation marks omitted).

[57] *Id.* (quoting *Static Control*, 697 F.3d at 411 n.10) (internal quotation marks omitted).

[58] *Id.* at 1394.

[59] *Id.*

[60] *Id.*

[61] *Cf.* United States v. Denedo, 556 U.S. 904, 921 (2009) (Roberts, C.J., concurring in part and dissenting in part) ("[F]ootnotes are part of an opinion, too, even if not the most likely place to look for a key jurisdictional ruling.").

[62] *Lexmark*, 134 S. Ct. at 1387; *see id.* & n.3.

[63] 504 U.S. 555 (1992); *see id.* at 573–75.

[64] *See, e.g.*, Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344–46 (2006).

noted in *Lexmark*.[65] And the Court has vacillated between treating the zone of interests as prudential — a judge-made, policy-driven limit — and treating the limitation as something more substantive, dictated by statute[66] or tied to Congress's actual intent.[67] In any event, the Court had included both doctrines within the prudential framework in the last decade,[68] and lower courts[69] as well as commentators[70] had viewed the categories of standing doctrine as relatively stable.

The second doctrinal move was the Court's clarification that its inquiry — the zone of interests and proximate causation — goes to the *merits* of any federal statutory cause of action. The inquiry requires courts to determine, using "traditional principles of statutory interpretation,"[71] whether a plaintiff has "a cause of action under the statute."[72] Both prongs of the inquiry are "element[s] of the cause of action under the statute,"[73] and "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction."[74] And, "like any other element of a cause of action," both must be "adequately alleged at the pleading stage in order for the case to proceed."[75] Beyond resolving a lower court split over the jurisdictional nature of the zone of interests,[76] this language is a marked change from Justice Scalia's earlier attempts to carefully distinguish the *Lexmark* inquiry — formerly termed "statutory standing"[77] — from the merits.[78] While the Court

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65 *See Lexmark*, 134 S. Ct. at 1387 n.3.

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

67 *See, e.g.*, Air Courier Conference of Am. v. Am. Postal Workers Union, 498 U.S. 517, 524–28 (1991). The history of the Court's inconsistent treatment of the "zone of interests" cannot be recounted in full here. For an overview, see generally Siegel, *supra* note 6, at 319–41.

68 *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012) (zone of interests); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (zone of interests, generalized grievances, and third-party standing).

69 *See, e.g.*, Montone v. City of Jersey City, 709 F.3d 181, 198–99 (3d Cir. 2013) (describing the "prudential standing" inquiry and citing *Newdow*, 542 U.S. at 12); Wilderness Soc'y v. Kane Cnty., 632 F.3d 1162, 1168 (10th Cir. 2011) (identifying the "two strands" of the Supreme Court's standing jurisprudence as "Article III standing" and "prudential standing").

70 *See, e.g.*, Pathak, *supra* note 7, at 91; Micah J. Revell, Comment, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221, 225 (2013) ("[T]he Court's recent jurisprudence legitimizes the prudential reading [of the zone of interests] as the correct one.").

71 *Lexmark*, 134 S. Ct. at 1388.

72 *Id.* at 1387.

73 *Id.* at 1391 n.6.

74 *Id.* at 1387 n.4 (quoting Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 642–43 (2002)) (internal quotation mark omitted); *see also id.* at 1391 n.6 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998)).

75 *Id.* at 1391 n.6 (citing Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009)); *see also* FED. R. CIV. P. 12(b)(6) (governing dismissal for a "failure to state a claim upon which relief can be granted").

76 *See, e.g.*, Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 184–85 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (observing that six circuits had held that prudential standing is a nonjurisdictional question).

77 *Lexmark*, 134 S. Ct. at 1387 n.4 (internal quotation marks omitted).

78 *See, e.g.*, *Steel Co.*, 523 U.S. at 97 n.2 (defining "statutory standing" as "whether *this* plaintiff has a cause of action under the statute" and "the merits" as "whether *any* plaintiff has a cause of ac-

still referred to "standing" a few times in its analysis,[79] its more direct discussion of the inquiry is indistinguishable from how it typically talks about the merits of the underlying claim.[80] As background principles against which Congress is "presumed" to legislate,[81] these elements are now part of any federal statutory cause of action.[82]

*Lexmark* has abruptly upended prudential standing doctrine, but its moves are actually part of two broader trends in the Court's jurisprudence — both of which involve concern about courts' ability to refuse to adjudicate cases within their jurisdiction. First is the Court's growing discomfort with the discretion embedded in prudential limits. Prudential standing, particularly the zone of interests, can be used by courts as a tool of nearly unfettered policy discretion.[83] Justice Scalia has long disliked prudential standing,[84] and, despite fleeting moments of apparent solicitude,[85] has now united the Court and rendered judgment: Prudential limits are in "tension"[86] with federal courts' "virtually unflagging" obligation to "hear and decide cases within [their] jurisdiction."[87] A court can no more "limit a cause of action that Congress has created" because "'prudence' dictates" than it can "apply its

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tion under the statute," but admitting that the two often overlap and "are sometimes identical"); *id.* at 92 ("[T]he scope of the . . . right of action . . . goes to the merits and not to statutory standing."); *id.* at 93 (stating that "whether respondent's complaint states a 'cause of action'" is the merits question).

[79] *Lexmark*, 134 S. Ct. at 1392, 1394.

[80] *Compare id.* at 1387–88, 1387 n.4, *and id.* at 1391 n.6, *with* Bond v. United States, 131 S. Ct. 2355, 2362 (2011) (criticizing treatment of a lack of "standing" or a "cause of action" as "interchangeable," while clarifying that "the question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case," *id.* (quoting *Steel Co.*, 523 U.S. at 92)), *and* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (explaining that "the question whether the allegations the plaintiff makes entitle him to relief" is "a merits question"), *and* Arbaugh v. Y & H Corp., 546 U.S. 500, 509–16 (2006) (deciding that the statutory requirement was "simply an element of a plaintiff's claim for relief," *id.* at 509, and "concerns the merits of [the] case," *id.* at 510).

[81] *Lexmark*, 134 S. Ct. at 1388.

[82] *See id.*

[83] *See* Siegel, *supra* note 6, at 319 (noting that the "judicial policy" approach to the zone of interests test "puts courts in a realm where they have no interpretive guideposts" and "effectively requires them to make pure policy choices").

[84] *See* Scalia, *supra* note 6, at 885–86 (noting that he finds the "bifurcation" between constitutional and prudential standing "unsatisfying," believing that "the Court must always hear the case of a litigant who asserts the violation of a legal right," *id.* at 885).

[85] *See* Bennett v. Spear, 520 U.S. 154, 162–63 (1997) (Scalia, J.) (spending nearly two pages situating the zone of interests within the Court's prudential standing jurisprudence). But there is good reason to believe Justice Scalia's distaste for prudential standing never changed substantially. *See* Bradford C. Mank, *Judge Posner's "Practical" Theory of Standing: Closer to Justice Breyer's Approach to Standing than to Justice Scalia's*, 50 HOUS. L. REV. 71, 107–08 (2012); *cf.* United States v. Windsor, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting) ("Relegating a jurisdictional requirement to 'prudential' status is a wondrous device, enabling courts to ignore the requirement whenever they believe it 'prudent' — which is to say, a good idea.").

[86] *Lexmark*, 134 S. Ct. at 1386.

[87] *Id.* (quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)) (internal quotation marks omitted).

independent policy judgment to recognize a cause of action that Congress has denied."[88] And while *Lexmark* is the Court's most sweeping articulation of these concerns, it is far from the first[89] — nor are its concerns limited to standing. The Court's emphasis on courts' "unflagging" obligation was a *reemphasis* of the sentiment in *Sprint Communications, Inc. v. Jacobs*,[90] an abstention case. And in *Susan B. Anthony List v. Driehaus*,[91] a unanimous Court repeated its concern in the context of ripeness.[92] Without addressing the normative desirability of this attack on a family of rich and (arguably) essential doctrines,[93] *Lexmark*'s reshuffling is clearly part of a broader trend.

The second, more well-known and analyzed,[94] trend is the Court's concerted effort to draw a clear(er) line between jurisdiction on the one hand and claim-processing rules and the merits on the other. "Jurisdiction . . . is a word of many, too many, meanings," the Court has observed.[95] But the term properly applies only to rules that limit a court's constitutional or statutory *power* to reach the merits of a particular claim.[96] In *Arbaugh v. Y & H Corp.*,[97] the Court held that in the absence of a clear statement by Congress, courts should not treat a statutory requirement as jurisdictional.[98] Nonjurisdictional rules — both "claim-processing rules" and "elements of a cause of action"[99] — address the rights and duties of parties, rather than the power of the

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[88] *Id.* at 1388.

[89] The principle is an old one, *see* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (stating that federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"), but the Court's emphasis of this point — and focus on prudential doctrines — is a noticeable trend of this past and recent Terms. *Cf.* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) (narrowing the political question doctrine and emphasizing that the judiciary "has a responsibility to decide cases properly before it, even those it 'would gladly avoid'" (quoting *Cohens*, 19 U.S. (6 Wheat.) at 404)).

[90] 134 S. Ct. 584; *see also Lexmark*, 134 S. Ct. at 1386 (describing its "recent reaffirmation" of the principle and citing *Sprint Communications*, 134 S. Ct. at 591).

[91] 134 S. Ct. 2334 (2014).

[92] *Id.* at 2347.

[93] *See, e.g.*, Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 179 (3d Cir. 2001) (describing "prudential standing" as "a set of judge-made rules forming an integral part of 'judicial self-government'" (quoting Gen. Instrument Corp. of Del. v. Nu-Tek Elecs. & Mfg., Inc., 197 F.3d 83, 87 (3d Cir. 1999)) (internal quotation marks omitted)).

[94] *See, e.g.*, Howard M. Wasserman, Colloquy Essay, *The Demise of "Drive-By Jurisdictional Rulings*,*"* 105 NW. U. L. REV. 947 (2011).

[95] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)) (internal quotation marks omitted).

[96] *Id.* at 89.

[97] 546 U.S. 500 (2006).

[98] *Id.* at 515–16. This holding helps explain why the *Lexmark* inquiry, which is *implied*, *see Lexmark*, 134 S. Ct. at 1388, 1389 n.5, 1390–91, cannot be jurisdictional.

[99] *See* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243–44 (2010) (stating that courts "have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional").

court.[100] Claim-processing rules address rights and duties of the parties *within* the litigation, while elements of the cause of action address rights and duties of the parties in the real world.[101]

*Lexmark* embodies both of these trends, signaling the end of prudential standing as a category of standing doctrine and turning the oft-abused zone of interests into a merits question. Whatever else it portends, *Lexmark* calls the future viability of prudential standing into question.[102] While the Court's opinion left third-party standing — and, presumably, prudential standing's "not exhaustively defined" other pieces[103] — for "another day,"[104] its philosophical underpinnings are incompatible with prudential standing as a whole.[105] The logic of *Lexmark* leaves little room for courts to refuse to adjudicate a case for lack of standing based on *prudential* considerations. At a more granular level, treating the *Lexmark* inquiry as nonjurisdictional elements of the statutory cause of action also leaves courts with less discretion: Because they are not jurisdictional, both claim-processing and merits rules can be waived or forfeited by parties, and courts have no obligation to raise them sua sponte.[106] But the practical difference between the two categories of nonjurisdictional rules is also significant — for litigants, and for courts' ability to avoid reaching the merits. Procedural issues, unlike merits, are a threshold matter — decided concurrently with, or even prior to, issues of jurisdiction.[107] And like jurisdictional rules, for procedural rules "[t]he judge, not the jury, serves as fact-finder on any underlying disputed issues."[108] By requiring only that plaintiffs adequately plead the *Lexmark* inquiry,[109] more litigants will be given "a chance to prove [their] case"[110] — including cases and controversies courts would prefer to avoid.

[100] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" (quoting Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring))).

[101] Wasserman, *supra* note 94, at 958.

[102] *See, e.g.*, Kentucky v. United States *ex rel.* Hagel, No. 12-6610, 2014 WL 3558044, at *5 n.3 (6th Cir. July 21, 2014) (interpreting *Lexmark* as "plac[ing] the continuing vitality of the prudential aspects of standing . . . in doubt").

[103] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004).

[104] *Lexmark*, 134 S. Ct. at 1387 n.3.

[105] Tellingly, the Court suggests that third-party standing limitations can also be understood as a statutory question. *See id.*

[106] *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

[107] *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 431 (2007) (holding a case could be dismissed on procedural grounds *before* determining subject-matter jurisdiction because "[j]urisdiction is vital only if the court proposes to issue a judgment on the merits," *id.* (quoting Intec USA, LLC v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006)) (internal quotation marks omitted)).

[108] Wasserman, *supra* note 94, at 960.

[109] *See Lexmark*, 134 S. Ct. at 1391 n.6.

[110] *Id.* at 1395.