ZONE-OF-INTERESTS STANDING IN CONSTITUTIONAL CASES AFTER *LEXMARK*

by
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In addition to satisfying Article III's standing requirements, the U.S. Supreme Court has long included, as one of its nonconstitutional "prudential" standing rules, a requirement that plaintiffs demonstrate that their claims are within the "zone of interests" protected by a statute or constitutional provision. In a recent case, Lexmark International, Inc. v. Static Control Components, Inc.*, the Court disavowed zone-of-interests standing in statutory cases. After* Lexmark*, courts need only determine whether a particular statute authorizes a plaintiff's cause of action. If it does, the Court held, courts are not free to prevent a plaintiff from bringing a claim out of prudential concerns. This Article asks whether zone-of-interests standing should be retained in constitutional cases, an issue not before the Court in* Lexmark*. We conclude that it should not be; the Court should pursue* Lexmark *to its logical conclusion and eliminate zone-of-interests standing entirely. After charting the course of the zone-of-interests test in statutory cases from its inception to the Court's disavowal of it in* Lexmark*, we examine the role it has played in constitutional cases in the Supreme Court and in the lower courts. We argue that (1) zone-of-interests standing rests on a constitutionally-dubious foundation; (2) existing doctrines better perform whatever useful functions the test was thought to serve; and (3) the practical difficulties that bedeviled the Court's application of the test in statutory cases remain and multiply in constitutional cases. We also consider, but reject, arguments that the test is useful for preventing courts from being flooded with certain constitutional claims or that it ought to be retained, but only for a few constitutional claims, like dormant Commerce Clause challenges.*

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I. INTRODUCTION

Article III's irreducible constitutional minimum requirements for standing have long been brigaded by "prudential" standing rules. Among the latter is the requirement that plaintiffs bringing a statutory or constitutional claim must be within the "zone of interests" protected either by a statute or a constitutional provision invoked by the plaintiff. Plaintiffs who cannot so prove, or whose interests are only marginally related to those protected by the provision can find themselves out of court despite having satisfied all of Article III's standing requirements. As the leading federal practice and procedure treatise admits, however, the standard for satisfying the zone-of-interests test "is not easily summarized, in part because there has been no attempt to articulate a justification or general theory."[1] At times, the zone-of-interests test has all but been interred by scholars, only to see it "repeatedly sit[] up in its grave and shuffle[] abroad," like "some ghoul in a late-night horror movie . . . ."[2]

[1] 13A CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.7, 593 (3d ed. 2008).

[2] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Justice Scalia's description, quoted above, was of the similarly-

In statutory cases, the Court recently delivered a partial death blow to zone-of-interests standing. Only two years after an 8–1 Court reaffirmed the doctrine, finding a plaintiff was within the zone of interests to challenge administrative action under the Administrative Procedure Act (APA),[3] the Court unanimously repudiated zone-of-interests standing in *Lexmark International, Inc. v. Static Control Components, Inc.*[4] *Lexmark* held that if Congress had created a cause of action for particular plaintiffs, courts are not at liberty to decline to entertain the suit because of prudential concerns.[5] Justice Scalia's opinion in *Lexmark* is especially puzzling because he once penned a dissent in which he declared the test, and prudential standing rules in general, to be essential to maintaining "the principle that 'the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.'"[6]

If zone-of-interests standing is to be eliminated for statutory claims, or at least has become a "straightforward question of statutory interpretation,"[7] then there is little reason to retain it as a limit—prudential or otherwise—in constitutional cases. Or so we argue here. The question whether or not to retain it, moreover, is not an academic one. Federal courts continue to apply the zone-of-interests test to constitutional claims post-*Lexmark*.[8]

Part II briefly traces the origin and evolution of the zone-of-interests tests as a prudential standing rule from its creation in *Association of Data Processing Service Organizations, Inc. v. Camp*.[9] Part III then examines the Court's limited application of the rule in constitutional cases, as well as its more robust life in the lower courts. Part III also asks if the reasons Justice Scalia gave for rejecting the rule as a species of prudential standing apply to constitutional cases or if there is an independent normative justification for retaining it for such cases. A brief conclusion follows.

maligned *Lemon* test for Establishment Clause violations. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[3] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012). Justice Sotomayor was the lone dissenter. *Id.* at 2212.

[4] 134 S. Ct. 1377 (2014).

[5] *See infra* notes 135–154 and accompanying text.

[6] Wyoming v. Oklahoma, 502 U.S. 437, 473 (1992) (Scalia, J., dissenting) (quoting Associated Gen. Contractors, Inc. v. Ca. State Council of Carpenters, 459 U.S. 519, 536 (1983)).

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

[8] *See, e.g.*, Maher Terminals, LLC v. Port Auth., 805 F.3d 98, 108–10 (3d Cir. 2015) (concluding that plaintiff was not within the zone of interests of the Tonnage Clause).

[9] 397 U.S. 150 (1970).

II. STATUTORY ZONE-OF-INTERESTS STANDING IN THE SUPREME COURT

Article III's "irreducible constitutional minimum of standing" requires plaintiffs to prove (1) an "actual or imminent", "concrete and particularized" injury-in-fact that is (2) "fairly . . . trace[able] to the . . . defendant" and (3) that is "likely" to be "redressed by a favorable judicial decision."[10] In addition, the Court has developed "prudential" standing requirements that are derived not from Article III's case-or-controversy limitations on judicial power, but rather are a "matter of 'judicial self-governance'"[11] and self-restraint. Prudential standing principles "are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'"[12] They include "[1] the general prohibition on a litigant's raising another person's legal rights, [2] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and [3] the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[13]

As explained by the Court,

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself

[10] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotations and citations omitted). For a summary of each of these elements, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.2–3, at 59–83 (6th ed. 2012).

[11] *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 123–24 (1976) (Powell, J., concurring in part and dissenting in part) (citations and footnote omitted). "[Prudential standing] is a matter of 'judicial self-governance.' The usual—and wise—stance of the federal courts when policing their own exercise of power in this manner is one of cautious reserve. This caution has given rise to the general rule that a party may not defend against or attack governmental action on the ground that it infringes the rights of some third party, and to the corollary that any exception must rest on specific factors outweighing the policies behind the rule itself." *Id.* at 124 (quoting Warth v. Seldin, 422 U.S. 490, 509 (1975)).

[12] Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 518 (1998) (O'Connor, J., dissenting) (quoting Bennett v. Spear, 520 U.S. 154, 162 (1997)).

[13] Allen v. Wright, 468 U.S. 737, 751 (1984). For commentary on the first two prudential standing categories, see, for example, Kimberly M. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221 (2008); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Henry Paul Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Craig A. Stern, *Another Sign from* Hein*: Does the Generalized Grievance Fail a Constitutional or Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169 (2008). The Court has recently reclassified the "generalized grievance" rule as one required by Article III. *See infra* notes 155–156 and accompanying text.

> the subject of the contested regulatory action, the test denies a right of review 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. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.[14]

This Part summarizes the evolution of the zone-of-interests test and its application by the Supreme Court in statutory cases. In Part III we discuss the zone-of-interests test in constitutional cases.

A. Origins of Zone-of-Interests Standing

The zone-of-interests test first made its appearance in *Association of Data Processing Service Organizations, Inc. v. Camp*,[15] which involved a challenge by a group of data processors to an Office of the Comptroller of the Currency (OCC) ruling that national banks could perform data processing services for others, allegedly in contravention of a statute restricting national banks to the provision of "bank services."[16] The Court reversed the lower courts, which had denied standing because Data Processing lacked an enforceable legal interest, writing that "[t]he 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, *the question 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.*"[17]

The Court held that Data Processing was within the zone of interests protected by the relevant federal bank acts and could sue based on the economic injury to Data Processing, the APA's grant of standing to "aggrieved" persons to review agency action,[18] reflecting "the trend . . . toward enlargement of the class of people who may protest administrative action,"[19] and the lack of evidence that judicial review of the

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[14] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987) (footnote omitted).

[15] 397 U.S. 150, 153–54 (1970).

[16] *Id.* at 151–52, 155.

[17] *Id.* at 153 (emphasis added). Prior to *Data Processing*, which inaugurated a change in the Court's standing doctrine, the Court had held that plaintiffs must demonstrate a legally-protected interest in order to maintain a cause of action. *See, e.g.*, Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 147 (1939) (denying standing to competitor seeking to challenge TVA's rate structure); 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.2, at 8 (3d ed. 1994). The Court later substituted the broader "adversely affected" test, which in turn was replaced by the injury-in-fact test. *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476–77 (1940); 3 DAVIS & PIERCE, *supra*, at § 16.2–3.

[18] 5 U.S.C. § 702 (2012).

[19] *Data Processing*, 397 U.S. at 154.

OCC's action was precluded.[20] In a companion case, *Barlow v. Collins*,[21] decided the same day, the Court held that cotton farmers had standing to challenge a rule permitting the assignment of federal farm subsidies to landlords in lieu of rent.[22] Citing congressional instructions to the Secretary of Agriculture to protect "the interests of the tenants,"[23] the Court concluded that "the tenant farmers [were] clearly within the zone of interests protected by the Act"[24] and could bring suit challenging the Secretary's actions under the APA.[25]

Other than referring to the newly-minted rule as a one of "self-restraint" in *Data Processing*,[26] and contrasting the requirements for standing with a decision on the merits of the suit,[27] Justice Douglas's opinion contained little hint as to the justification for or scope of the zone-of-interests test. Dissenting, Justice Brennan complained about the opacity of the test, calling its formulation "obscure" and predicting that the decision would "only compound present confusion" over standing rules.[28]

> What precisely must a plaintiff do to establish that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute"? How specific an "interest" must he advance? Will a broad, general claim, such as competitive interest, suffice, or must he identify a specific legally protected interest? When, too, is his interest "arguably" within the appropriate "zone"? Does a mere allegation that it falls there suffice? If more than an allegation is required, is the plaintiff required to argue the merits? And what is the distinction between a "protected" and a "regulated" interest? Is it possible that a plaintiff may challenge agency action under a statute that unquestionably regulates the interest at stake, but that expressly excludes the plaintiff's class from among the statutory beneficiaries?[29]

In Justice Brennan's opinion, when a plaintiff establishes injury-in-fact, "[w]e may reasonably expect that a person so harmed will, as best he

[20] *Id.* at 157.

[21] 397 U.S. 159 (1970).

[22] *Id.* at 167. The farmers argued that landlords coerced assignment of payments as a condition of leasing land to them, rendering them dependent on the landlord for essentials, which were provided at inflated prices and extortionate rates of interest. *Id.* at 163.

[23] *Id.* at 164–65.

[24] *Id.* at 164.

[25] *Id.* at 167.

[26] Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970).

[27] *Id.* at 153.

[28] *Id.* at 176–77 (Brennan, J., dissenting).

[29] *Id.* at 177.

can, frame the relevant questions with specificity, contest the issues with the necessary adverseness, and pursue the litigation vigorously."[30] In such a case, "his standing to litigate is then consistent with the Constitution, and no further inquiry is pertinent to its existence."[31] Requiring further inquiry into whether the plaintiff fell within some ill-defined zone-of-interests, Justice Brennan predicted, would revive "the erroneous notion that a plaintiff has no standing unless he can establish the existence of a legally protected interest."[32] Thus, judges will "use standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits."[33] As subsequent cases demonstrated, Justice Brennan's predictions of the difficulties attending the implementation of the test were prescient. Later courts struggled to provide answers to the questions he posed.

In *Arnold Tours, Inc. v. Camp*,[34] the Court reversed and remanded a case previously remanded after *Data Processing* and *Barlow* in which independent travel agents sued the OCC over an order permitting banks to provide travel services for customers.[35] Reversing the Court of Appeals for the second time, the Court noted that "[i]n *Data Processing* we did not rely on any legislative history showing that Congress desired to protect data processors alone from competition. Moreover, we noted a growing trend 'toward enlargement of the class of people who may protest administrative action.'"[36] Nothing in the provision of the Bank Service Corporation Act restricting banks to the provision of "bank services," it continued, "limited [that section] to protecting only competitors in the data-processing field. When national banks begin to provide travel services for their customers, they compete with travel agents no less than they compete with data processors when they provide data-processing services to their customers."[37] Therefore, the travel agents were within the zone of interests protected by the Act and could bring suit against competing banks.

The next year, again without answering any of Justice Brennan's questions, the zone-of-interests test surfaced in *Investment Co. Institute v. Camp*.[38] Here, petitioners challenged an OCC rule permitting banks to operate mutual funds allegedly in violation of the Glass-Steagall Act, which had required the separation of banks' investment and commercial

[30] *Id.* at 172–73.
[31] *Id.* at 173.
[32] *Id.* at 177.
[33] *Id.* at 178.
[34] 400 U.S. 45 (1970) (per curiam).
[35] *Id.* at 47.
[36] *Id.* at 46 (quoting *Data Processing*, 397 U.S. at 154).
[37] *Id.*
[38] 401 U.S. 617 (1971).

operations.[39] Concluding that the petitioners fell within the zone of interests protected by the Act, and could bring suit under the APA, the Court again analogized their position to that of the data processors in the earlier case.

In *Data Processing*, the Court concluded that the processors had suffered injury; further, it "concluded that Congress did not intend 'to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under [the National Bank Act].'"[40] Finally, it "concluded that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury. We noted that whether Congress had indeed prohibited such competition was a question for the merits."[41] Curiously, the Court cited its holding on the merits—"that Congress did legislate[] against the competition that the petitioners challenge"—as proof that "[t]here can be no real question . . . of the petitioners' standing in the light of the *Data Processing* case."[42]

Throughout the rest of the 1970s, the Court regularly referred to the zone-of-interests test as one of the "nonconstitutional" standing requirements,[43] but never relied on it to deny standing during the remainder of the decade.[44]

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[39] *Id.* at 618–19. *See generally Glass-Steagall Act—A History of Its Legislative Origins and Regulatory Construction*, 92 BANKING L.J. 38 (1975) (for a historical analysis of the act); *The Glass-Steagall Banking Act of 1933*, 47 HARV. L. REV. 325 (1933) (for a contemporary analysis).

[40] *Inv. Co. Inst.*, 401 U.S. at 620 (quoting *Data Processing*, 397 U.S. at 157).

[41] *Id.*

[42] *Id.* at 620–21.

[43] *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 123 & n.2 (1976) (Powell, J., concurring in part and dissenting in part) (citations and footnote omitted) (noting that the "Art. III standing inquiry often is only the first of two inquiries necessary to determine whether a federal court should entertain a claim"; that in addition to constitutional standing "[t]he inquiry also has been framed, in appropriate cases, as whether a person with Art. III standing is asserting an interest arguably within the zone of interests intended to be protected by the constitutional or statutory provision on which he relies . . . ."); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 39 n.19 (1976) ("The *Data Processing* decision established a . . . nonconstitutional standing requirement that the interest of the plaintiff, regardless of its nature in the absolute, at least be arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises." (quoting *Data Processing*, 397 U.S. at 153)); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226–27 & n.16 (1974) (refusing to entertain a lawsuit alleging that members of Congress who held commissions in the military reserve were ineligible to hold office under the Constitution's Incompatibility Clause that prohibited dual legislative and executive branch office holding due to lack of standing; distinguishing *Data Processing* because "that case involved judicial review under the Administrative Procedure Act of regulatory agency action alleged to have caused private competitive injury" and "*Data Processing* required a showing of injury in fact, in addition to the 'zone of interest' requirement"); United States v. Students Challenging Regulatory Agency Procedures

Contemporary commentators were critical of the zone-of-interests test, expressed confusion about its scope, and—as the decade wore on—speculated that the test might have been tacitly abandoned by the Supreme Court. In his seminal article on standing, for example, Richard Stewart criticized the zone-of-interests test as "opaque" and claimed that it was "not only difficult to apply, but its very vagueness also encourage[d] courts to skirt the question of whether standing is afforded the plaintiff in order to protect his own statutorily-protected interest or as a surrogate to protect the interests of others."[45] In his view, the entire concept was an offshoot of third-party or surrogate standing; focusing on the plaintiff's interests might "obscure the surrogate basis for standing and lead the court to focus incorrectly on the plaintiff's interests while disregarding the legally relevant consideration, the interests of third parties."[46]

Robert Sedler likewise doubted whether "the zone of interests aspect of *Data Processing* has any real significance."[47] In his view, *Investment Co. Institute* had "as a practical matter . . . render[ed] the zone of interests test functionally irrelevant" because of the Court's seeming conflation of a judgment on the merits and its ruling on the plaintiff's prudential

(*SCRAP*), 412 U.S. 669, 686 & n.13 (1973) (characterizing standing under the APA as a two-pronged inquiry, conferring it "only upon those who could show 'that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated'" (quoting Sierra Club v. Morton, 405 U.S. 717, 733 (1972))); *Sierra Club*, 405 U.S. at 733 ("[I]n *Data Processing Service v. Camp* and *Barlow v. Collins*, . . . we held . . . that persons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them 'injury in fact,' and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." (citation omitted) (quoting *Data Processing*, 397 U.S. at 153)).

[44] *See, e.g.*, Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 320–21 n.3 (1977) ("The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are 'arguably within the zone of interests to be protected . . . .'" (quoting *Data Processing*, 397 U.S. at 153)); *SCRAP*, 412 U.S. at 686 n.13 (concluding that "it is unnecessary to reach any question concerning the scope of the 'zone of interests' test or its application to this case. It is undisputed that the 'environmental interest' that the appellees seek to protect is within the interests to be protected by NEPA . . . ."); *Sierra Club*, 405 U.S. at 733 n.5 ("In deciding this case we do not reach any questions concerning the meaning of the 'zone of interests' test or its possible application to the facts here presented.").

[45] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1731 (1975) (footnote omitted).

[46] *Id.* at 1730, 1732.

[47] Robert Allen Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 487 (1972).

standing to bring the claim.[48] "In practice," he wrote, "the Court's 'two-pronged' test has become 'one-pronged' because a plaintiff who establishes injury in fact, also will satisfy the zone of interests test in either the private or public action."[49]

Professor Albert, too, argued that zone-of-interests standing was *really* about third party standing.[50] He also argued that the Court's cases had improperly interlaced standing issues with judgments about the merits of the plaintiffs' cases. *Data Processing* and *Barlow*, he complained, "used improper rules of decision for standing, combined with an offhand treatment of the merits."[51] The search for "indicia of protective intent" in statutes and legislative history, he argued, was in reality a preliminary judgment on the merits.[52] That fact indicated, for him, that "the Court has not exorcised the spirit of the merits from the threshold inquiry" and in fact had "reintroduced the ghost in the more troublesome wrapping of prejudgment."[53]

Zone-of-interests standing "appear[ed] to serve no intelligible function" whether it was "seen as a standard of arguable claims or as a preview of the merits" and its "cloudy purpose" rendered "application uncertain and difficult" as well as "creat[ing] confusion over what is required for prevailing on the merits."[54] Albert concluded that "zone of interest standing is not a screen that serves any purpose that is not better served by the requirement of protected legal interest as part of a claim for relief."[55] For him, those included "[p]ersons favored by statutory protections, those representing them under principles of jus tertii and persons entitled to protection under judicially formulated principles are assured their day in court."[56]

Perhaps zone-of-interests standing's most strident critic was Professor Kenneth Culp Davis. In the mid-1970s edition of his administrative law treatise, he offered five reasons to conclude that "[t]he requirement that

[48] *Id.* at 486–87. For a discussion of *Investment Co. Institute*, see *supra* notes 40–44 and accompanying text.

[49] *Id.* at 511.

[50] Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 471 (1974).

[51] *Id.* at 494.

[52] *Id.* at 494–95. He wrote: "The protected legal interest standard was apparently left unmodified for application after the standing issue is decided. . . . [T]he zone of interest test in these two cases deals with merit issues. Canvassing the entire statute and legislative background for indicia of protective intent necessarily involved a preliminary examination of the merits and a forecast of the strength of the claims . . . ."*Id.*

[53] *Id.* at 495.

[54] *Id.* at 496.

[55] *Id.* at 497.

[56] *Id.*

a plaintiff meet the 'zone' test" was "not . . . the law."[57] First, the APA didn't mention the test.[58] Second, he claimed that "the Supreme Court itself ha[d] not followed it" because, by his count, in the 17 standing cases decided since 1970, the Court "not once . . . applied the 'zone' test."[59] Third, he characterized the test as "unsatisfactory" because it was "analytically faulty," "cumbersome, inconvenient, and artificial."[60] Fourth, he observed that "courts of appeals ha[d] written more than a hundred opinions on standing during 1970–75, and denial of standing on the basis of the 'zone' test when injury in fact has been found [was] a rarity."[61]

His "fifth and final reason for doubting that the 'zone' test is the law is that all federal courts have generally found ways to escape from applying it."[62] He observed that "[t]hree circuits have verbally disapproved it. Many have ignored it. Most have paid lip service to it while avoiding any analysis which would be necessary if the test were to enter into judicial motivation."[63] He conceded that "[t]he 'zone' test has not disappeared from the law, but [noted that] its role has become minor and is often almost the equivalent of zero."[64]

His recommendation was that courts either "ignore it" as the Supreme Court seemed to be doing, "pay homage to it verbally but . . . ignore it in substance," or "simply to announce in conclusory terms that the 'zone' test is satisfied."[65] According to Davis, the test for standing should be that "*[a] person whose interest is injured in fact or imminently threatened with injury by governmental action has standing to challenge that action in the absence of legislative intent that the interest is not to be protected.*"[66]

Four years later, in a supplement to his treatise, Professor Davis noted that "in twenty-six other major opinions on the law of standing during the 1970s, the Court has not mentioned the test even in cases to which it would apply."[67] He concluded that "[p]robably the Court is allowing the

[57] KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-11, at 509 (Supp. 1976).

[58] *Id.*

[59] *Id.*

[60] *Id.* at 509–10.

[61] *Id.* at 510.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 511–12.

[66] *Id.* at 515–16.

[67] KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02-11, at 176 (Supp. 1980); *see also id.* ("The Court has never applied the 'zone' test to deny standing, and since inventing the test the Court has often upheld standing without mentioning the test.").

test to die,"[68] instead "tacitly adopt[ing] the Brennan-White dissenting view that the sole test for standing should be 'injury in fact.'"[69]

Reports of zone-of-interests standing's death, however, were greatly exaggerated.

B. The Zone-of-Interests Test Revived

By the early 1980s, confusion reigned about the viability of the zone-of-interests test. In the second edition of his treatise, published in the early 1980s, Davis retreated from his earlier view that the Court was collapsing the test into an injury-in-fact inquiry, writing that "[w]hether or not or to what extent the Brennan-White view has prevailed as of 1982 is unclear."[70] His verdict on the test was that "[a]s of 1982, the 'zone' test is sometimes used, but most of the time it is not, and no guides exist as to whether or when it is used."[71] While he conceded that something like the zone-of-interest test might be useful,[72] the current test was "not only useless" but "a barrier to sound decisions about standing problems."[73] Its only saving grace, for Davis, was that the test "has played only a limited role in writing opinions and quite an insignificant role in deciding questions about standing."[74]

Despite the criticism, the test still had some fans. One student commentator defended the zone-of-interests test as a necessary preventative against "unwarranted judicial interference with executive branch decisionmaking while allowing private complainants to obtain redress for injuries in cases in which Congress 'arguably' intended to protect their interests."[75] Conversely, he argued, "it seems prudent for a court to deny review when Congress did not even arguably intend the statute to protect a given complainant."[76] But neither a sustained argument as to *why* that was prudent was made, nor did the author explain why that denial of review wasn't *ipso facto* a ruling on the merits.

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[68] *Id.*

[69] *Id.* at 177–78.

[70] 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24.17, at 275 (2d ed. 1983).

[71] *Id.* at 273.

[72] *Id.* at 279 ("Something resembling the 'zone' test may often be sound. A statute or rule designed to benefit a particular class may not be asserted by nonmembers of the class.").

[73] *Id.*

[74] *Id.* at 276; *see also* 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.9, at 56 (3d ed. 1994) ("Between its 1970 announcement of the 'zone of interest' test and 1984, the Court ignored the test more often than it applied the test.").

[75] Sanford A. Church, Note, *A Defense of the "Zone of Interests" Standing Test*, 1983 DUKE L.J. 447, 464 (1983) (footnote omitted).

[76] *Id.*

In 1987, the Court decided *Clarke v. Securities Industry Association*,[77] in which a trade association of securities brokers challenged the Comptroller of Currency's decision to permit two banks to offer brokerage services to the public at nonbranch locations.[78] The Comptroller argued that the trade association lacked standing because it was not within the zone of interests of a federal statute limiting the ability of banks to establish interstate branches. The lower courts found that the association had standing; the Supreme Court affirmed.[79]

As the Court characterized the test, it was "not meant to be especially demanding" and "there need be no indication of congressional purpose to benefit the would-be plaintiff."[80] Rather, "the test denies a right of review [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."[81]

Because the act itself was intended not only to "equaliz[e] the status of state and federal banks, but also [was concerned] with preventing the perceived dangers of unlimited branching,"[82] the Court concluded that the interest of the trade association "has a plausible relationship to the policies underlying . . . the National Bank Act."[83] The leading administrative law treatise remarked at the time that *Clarke* was "entirely consistent with the reality of the legislative process that spawns delegation of decisionmaking to agencies."[84] The authors thought it appropriate that "[a]bsent persuasive evidence to the contrary, the Court should assume that Congress intended to create a decisionmaking process in which all groups whose interests are likely to be affected significantly are entitled to participate effectively."[85] Still, lawyers and judges were left scratching their heads over how one ascertained whether plaintiffs' interests were remote enough from the statute's purpose to justify a denial of standing if congressional purpose to benefit need not be demonstrated.

During the early 1990s, the test again made an appearance, and for the first time the Court held that a plaintiff *lacked* zone-of-interests standing. In *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*,[86] the Court found that union postal workers lacked zone-of-interests standing to challenge the Postal Service's suspension of its statu-

[77] 479 U.S. 388 (1987).
[78] *Id.* at 390–91.
[79] *Id.* at 393–94.
[80] *Id.* at 399–400.
[81] *Id.* at 399.
[82] *Id.* at 402.
[83] *Id.* at 403.
[84] 3 DAVIS & PIERCE, *supra* note 74, § 16.9, at 60.
[85] *Id.*
[86] 498 U.S. 517 (1991).

tory monopoly on the international private courier service market.[87] Under the Private Express Statutes (PES) that codified the U.S. Postal Service's monopoly over letter carriage, the Service can suspend the PES for any route when the public interest requires the suspension.[88] The postal worker unions challenged the suspension; the Postal Service in turn challenged the standing of the unions. The lower courts found the unions had suffered injury-in-fact because the suspension of the monopoly could affect the workers' economic opportunities through increased competition and loss of revenue.[89]

The Supreme Court found that the PES had two rationales: (1) to prevent commercial centers of the Northeast from taking financial advantage of market intelligence or knowledge of international affairs before it had spread to the interior and (2) the sense that it was the duty of the service to provide mail to outlying areas, even if it had to do so at a loss.[90] "The PES," the Court wrote, "enable the Postal Service to fulfill its responsibility to provide service to all communities at a uniform rate by preventing private courier services from competing selectively with the Postal Service on its most profitable routes."[91] They were not, however, framed with the protection of postal workers' jobs in mind. Therefore, the Court concluded, the unions were not within the zone of interests of the PES.[92]

The Court rejected the unions' argument that "because one of the purposes of the labor-management provisions of the [Postal Reorganization Act (PRA)] was to stabilize labor-management relations within the Postal Service, and because the PES is the 'linchpin' of the Postal Service, employment opportunities of postal workers are arguably within the zone of interests covered by the PES."[93] It observed that "[n]one of the documents constituting the PRA legislative history suggest that those concerned with postal reforms saw any connection between the PES and the provisions of the PRA dealing with labor-management relations."[94] The Court concluded that "[i]t would be a substantial extension of our holdings in *Clarke*, *Data Processing*, and *Investment Co. Institute*, to allow the Unions in this case to leapfrog from their asserted protection under the labor-management provisions of the PRA to their claim on the merits under the PES."[95] Contrary to *Clarke*, then, the Court seemed to require

[87] *Id.* at 519.
[88] *Id.*
[89] *Id.* at 524.
[90] *Id.* at 527.
[91] *Id.*
[92] *Id.* at 528.
[93] *Id.*
[94] *Id.* at 530.
[95] *Id.* (citations omitted).

some showing by the plaintiffs that Congress affirmatively intended to benefit them.

Next, in *Bennett v. Spear*,[96] the Court rejected arguments that those with economic interests in the Klamath Irrigation Project who sought to sue under the Endangered Species Act's (ESA) citizen-suit provision lacked zone-of-interests standing.[97] In 1992, the Fish and Wildlife Service determined that certain species were threatened by the Klamath Project's continued operation and recommended actions be taken to mitigate the threat to those species.[98] Irrigation districts and ranchers filed suit seeking to prevent any change in the storage or release of water in the project.[99]

The Court held that two reasons supported a finding that the plaintiffs *were* in the zone of interests. First, the citizen-suit provision of the ESA conferred the right of "'[a]ny person'" to bring suit, which indicated a congressional willingness "to permit enforcement by everyman" as compared with more restrictive formulations used in other statutes.[100] Second, the Court felt that the subject matter—the environment—and the purpose to encourage enforcement by private attorneys general bolstered its generous reading.[101] The Court further rejected an argument that the plaintiffs' motivations—"seeking to prevent application of environmental restrictions rather than to implement them"[102]—took them outside the ESA's zone of interests. "[T]here is no textual basis," Justice Scalia wrote, "for saying that its expansion of standing requirements applies to environmentalists alone."[103]

According to one commentator, while *Bennett* "partially clear[ed] up confusion over the contours of the 'zone of interests' test,"[104] it did so in a way that "tilted [the standing inquiry] to the advantage of regulatory targets."[105] The Court's emphasis on the broad nature of the ESA's citizen suit provision, moreover, implied "that more limited citizen-suit or judicial review provisions will still require judicial analysis to see if a particular plaintiff is within the statutory 'zone' . . . ."[106] For example, "[i]n APA-based suits, plaintiffs still must link their interests to some interest evi-

[96] 520 U.S. 154 (1997).

[97] *Id.* at 179.

[98] *Id.* at 158–59.

[99] *Id.* at 159.

[100] *Id.* at 166 (alteration in original) (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210–11 (1972)).

[101] *Id.* at 165–66.

[102] *Id.* at 166.

[103] *Id.*

[104] William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 777 (1997).

[105] *Id.* at 766.

[106] *Id.* at 787.

dent in enabling act provisions underlying their claims."[107] Professor Buzbee recommended that Congress "add broad citizen-suit provisions to avoid judicial enabling act interpretations in APA-based suits that might result in a denial of standing" because the APA's cause of action was more limited than the ESA provision at issue in *Bennett*.[108] What is notable about *Bennett* is that Justice Scalia emphasized how much its holding turned on the precise language of the statute itself, an emphasis that presaged his *Lexmark* opinion.[109]

The following year, the Court finally made clear that satisfying the zone-of-interests test did *not* require proof that Congress intended to benefit a particular group of plaintiffs—an apparent shift from statements to the contrary in *Air Courier*.[110] The plaintiffs in *National Credit Union Administration v. First National Bank & Trust Co.* sued over an interpretation of the Federal Credit Union Act permitting the formation of credit unions by unrelated employer groups, as opposed to employer groups all of whose members shared a common employment bond.[111] Competitors seeking to limit competition from federal credit unions by challenging a liberal interpretation of the "common bond" requirement were, the Court held, "arguably" within the statute's zone of interests.[112] Requiring proof that the "Congress that enacted § 109 was concerned with the competitive interests of commercial banks" would require "reformulat[ion] [of] the 'zone of interests' test," which it was unwilling to do.[113]

In her dissent, Justice O'Connor accused the majority of essentially collapsing the zone-of-interests test into the injury-in-fact requirement. "Under the Court's approach," she wrote, "every litigant who establishes injury in fact under Article III will automatically satisfy the zone-of-interests requirement, rendering [that] test ineffectual."[114] Her reading of the cases interpreting the requirement would have the Court "ask . . . whether respondents' injury to their commercial interest as

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[107] *Id.* at 788.

[108] *Id.*

[109] *See infra* notes 135–153 and accompanying text.

[110] *Compare* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 492 (1998) ("Our prior cases . . . have consistently held that for a plaintiff's interests to be arguably within the 'zone of interests' to be protected by a statute, there does not have to be an 'indication of congressional purpose to benefit the would-be plaintiff.'" (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987))), *with* Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 330 (2004) ("[A]t least six statements in the Supreme Court's opinion in *Air Courier* indicate that the zone of interests test is an inquiry into whether Congress intended the would-be plaintiffs to be within the zone of interests, which in turn rests on whether Congress intended the statute at issue to benefit the would-be plaintiffs.").

[111] 522 U.S. at 483.

[112] *Id.* at 499.

[113] *Id.* at 498.

[114] *Id.* at 505 (O'Connor, J., dissenting).

competitors falls within the zone of interests protected by the common bond provision."[115] She concluded that they did not: "There is no indication in the text of the provision or in the surrounding language that the membership limitation was even arguably designed to protect the commercial interests of competitors."[116]

As the zone-of-interests test entered the 21st century, aspects of its articulation and application still confounded courts and commentators. In a prescient article critically analyzing the doctrine, Professor Jonathan Siegel noted that much "about this 'zone of interests' test . . . remain[ed] a mystery."[117] The "legal source" of the test, he noted, "is obscure"[118] and "the courts seem[ed] unable to articulate the relationship between the test and congressional intent."[119] Siegel found *National Credit* to be "puzzling in that it applie[d] the zone of interests test so liberally that the test does no work at all" and "merely duplicate[d] the injury in fact test . . . ."[120]

Only half in jest, Siegel offered the following summary of the state of the zone-of-interests test circa 2004:

> Businesses desiring to complain that the government is regulating their competitors with insufficient stringency are invariably and automatically held to fall within the zone of interests of any allegedly violated statute, without regard to Congress's intentions in passing the statute in question, but unions, environmentalists, animal rights activists, and other do-gooders do not benefit from this rule. The latter groups are not automatically denied standing, but they are required to demonstrate that Congress intended the relevant statute to further their interests.[121]

He wryly observed that "[a] cynic might conclude that the rules of standing are not legal rules at all, but rather, 'tools that judges use to further their political and ideological agendas.'"[122]

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[115] *Id.* at 508.

[116] *Id.* at 513; *see also* Fed. Elect. Comm'n v. Akins, 524 U.S. 11, 20 (1998) (concluding that plaintiffs petitioning the FEC to classify organization as a "political committee" satisfied zone-of-interests test; "[t]he injury of which respondents complain—their failure to obtain relevant information—is injury of a kind that [the Federal Election Campaign Act] seeks to address").

[117] Siegel, *supra* note 110, at 317.

[118] *Id.*

[119] *Id.* at 318.

[120] *Id.* at 335.

[121] *Id.* at 347.

[122] *Id.* at 347–48 (quoting Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742 (1999)).

C. Lexmark *and the Zone-of-Interests Test*

As it had in the past, the zone-of-interests test disappeared from view after *National Credit*, only to reemerge over a decade later in cases decided in back-to-back terms. In *Thompson v. North American Stainless, L.P.*,[123] decided in 2011, the Court held that retaliating against an employee for commencing a gender discrimination suit by firing her fiancé was actionable under Title VII.[124] The terminated employee, the Court concluded, was a "person aggrieved" for Title VII purposes.[125]

Again paying careful attention to the language of the statute, Justice Scalia wrote that "the term 'aggrieved' in Title VII [enables] suit by any plaintiff with an interest 'arguably [sought] to be protected by the statute,' . . . while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII."[126]

Applying that definition, the Court found that the plaintiff was in the zone of interests protected by Title VII because "Thompson is not an accidental victim of the retaliation—collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her."[127]

The very next term, the Court found that a plaintiff challenging the decision of the Interior Department to acquire a tract of land for a tribe so that the tribe could construct a casino, satisfied zone-of-interests standing.[128] The district court had concluded that the plaintiff lacked prudential standing under the APA to challenge the acquisition, which was authorized by a provision in the Indian Reorganization Act (IRA).[129] The plaintiff argued that construction of the casino would cause him "economic, environmental, and aesthetic harm as a nearby property owner."[130] The Government, on the other hand, argued that he was not within the zone of interests protected by that provision of the IRA authorizing the Secretary of the Interior to acquire property for the benefit of Indian tribes.[131]

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[123] 562 U.S. 170 (2011).

[124] *Id.* at 178.

[125] *Id.*

[126] *Id.* (quoting Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 495 (1998)).

[127] *Id.*

[128] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012).

[129] *Id.* at 2204.

[130] *Id.* at 2210.

[131] *Id.*

Justice Kagan's opinion began by noting that the zone-of-interests test "is not meant to be especially demanding."[132] She observed that the APA was intended to make agency action reviewable and that there was no requirement Congress specifically intended to benefit a particular class of plaintiffs. "And we have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff."[133]

In the Court's opinion, because the purpose of the land acquisition was economic development, "decisions under the statute are closely enough and often enough entwined with considerations of land use" to bring an opponent of the uses to which the land will be put—at least arguably—within the zone of interests of the specific provision.[134]

But just two terms after *Match-E-Be-Nash-She-Wish*, the Supreme Court upended its zone-of-interests standing rules, at least for statutory cases, in *Lexmark International, Inc. v. Static Control Components, Inc.*[135] The case involved a Lanham Act claim for false advertising between two printer cartridge ink manufacturers.[136] Lexmark sold printers requiring its own style of cartridges.[137] To ensure that customers returned their empty cartridges to Lexmark, rather than a competitor, Lexmark offered a 20% discount rebate to customers who returned their cartridges to the company, which it termed the "Prebate" program.[138] In addition, Lexmark added microchips to their cartridges that disabled them when the toner ran out.[139] In order for these cartridges to be used again, Lexmark would have to replace the microchips.[140]

Static Control manufactured components enabling the remanufacture of used Lexmark cartridges.[141] Lexmark sued Static Control in 2002 alleging various copyright violations; Static Control counterclaimed, alleging, among other things, false advertising in violation of the Lanham Act.[142] Static Control claimed that Lexmark engaged in false or misleading conduct through its Prebate program because Lexmark "'purposefully misle[d] end-users' to believe that they [were] legally bound by the

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[132] *Id.* (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)).

[133] *Id.*

[134] *Id.* at 2211–12.

[135] 134 S. Ct. 1377 (2014). The description of *Lexmark* draws freely on Sarah F. Bothma, Comment, *A Practitioner's Guide to Prudential Standing After* Lexmark International, Inc. v. Static Control Components, Inc., 39 AM. J. TRIAL ADVOC. 199, 206–11 (2015).

[136] *Lexmark*, 134 S. Ct. at 1383–84.

[137] *Id.* at 1383.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 1384.

[142] *Id.*

Prebate terms and [were] thus required to return the Prebate-labeled cartridge to Lexmark after a single use."[143] Additionally, when Lexmark introduced its program, it "'sent letters to most of the companies in the toner cartridge remanufacturing business' falsely advising those companies that it was illegal to sell refurbished Prebate cartridges and, in particular, that it was illegal to use Static Control's products to refurbish those cartridges."[144] Although the district court dismissed Static Control's Lanham Act claims for lack of standing, the Sixth Circuit reversed.[145] The Supreme Court affirmed the circuit court's standing holding.[146]

Lexmark argued that Static Control was not within the zone of interests of the Lanham Act and urged dismissal of its claims.[147] The Court not only rejected Lexmark's argument, but in so doing it repudiated altogether its prior cases classifying the zone-of-interests tests as part of prudential standing.

To determine whether a plaintiff was within a statutory zone of interest, a court need only apply "traditional tools of statutory interpretation"[148] to "determine the meaning of the congressionally enacted provision creating a cause of action."[149] Congress either created a cause of action, or it did not. The judiciary's job, Justice Scalia stressed, was not to determine "whether . . . Congress should have authorized [a] suit, but whether Congress in fact did so."[150] "Prudence," he stressed, simply did not figure into the equation. A court can neither "limit a cause of action that Congress has created merely because 'prudence' dictates," nor apply "its independent policy judgment to recognize a cause of action that Congress has denied."[151] In other words, the protections afforded by any statute enacted by Congress are limited to those plaintiffs that Congress intends to protect by such statute; is more expansive only when Congress explicitly states so; and the scope of the protections are to be found in the text of the applicable statute, not in judicial notions of the prudence of recognizing or denying particular claims.

Justice Scalia further observed that the prudential standing rules are "in some tension with [the Court's] recent reaffirmation of the principle that 'a federal court's 'obligation' to hear and decide cases within its jurisdiction 'is virtually unflagging.'"[152] He quoted with approval *Clarke*'s

[143] *Id.* (citation omitted).

[144] *Id.* (citation omitted).

[145] *Id.* at 1385.

[146] *Id.* at 1395.

[147] *Id.* at 1386.

[148] *Id.* at 1387.

[149] *Id.* at 1388.

[150] *Id.* (emphasis removed).

[151] *Id.*

[152] *Id.* at 1386 (quoting Spirit Commc'ns, Inc. v. Jacobs, 143 S. Ct. 584, 587 (2013)).

observation that the scope of the zone of interests "varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes."[153] The Court found that to "come within the zone of interests in a suit for false advertising under [the Lanham Act], a plaintiff must allege an injury to a commercial interest in reputation or sales."[154]

D. Zone-of-Interests Standing in Statutory Cases: A Post-Mortem

What was behind the Court's rather dramatic *volte face*—from a run-of-the-mill application in *Match-E-Be-Nash-She-Wish* to complete abjuration in *Lexmark*? While we will not know for sure anytime soon, the repudiation of the zone-of-interests test as a *rule of standing* likely resulted from the convergence of several themes in the Court's recent jurisprudence. First, there is the Court's recent tendency to recharacterize what had previously been understood to be prudential standing rules as constitutional standing rules.[155] After *Lexmark*, the only prudential rule left is the bar on the assertion of the rights of third parties, and one could easily constitutionalize that rule by characterizing plaintiffs seeking to vindicate third-party rights as having an insufficiently personal or concrete injury to confer Article III standing.[156]

Second, *Lexmark*'s declaration that the zone-of-interests inquiry is not jurisdictional corresponds to the Court's "considerable effort in recent

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[153] *Id.* at 1389 (Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 395 (1987)).

[154] *Id.* at 1390. The Court concluded that Static Control's claim came within the zone of interests protected by the Lanham Act because the Act's enumerated purposes included protecting persons engaged in commerce against unfair competition, which is "understood to be concerned with injuries to business reputation and present and future sales." *Id.* The Court also clarified that its new doctrine of "statutory standing," was not jurisdictional. *Id.* at 1387 n.4. The "absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction," i.e., the court's statutory or constitutional power to adjudicate the case. *Id.* at 1391 n.6 (quoting Steel Co. v. Citizens for a Better Env't, 532 U.S. 83, 89 (1998)). Whether and to what extent zone-of-interests standing was jurisdictional had been the subject of some debate in the lower courts and law review commentary. *See, e.g.*, Bradford Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413 (2013); Micha J. Revell, Comment, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221 (2013).

[155] *Compare* Lance v. Coffman, 549 U.S. 437, 439 (2007) (stating that "raising only a generally available . . . grievance does not state an Article III case or controversy" (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 574 (1992))), *and* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006) (stating same about taxpayer suits), *with* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471–75 (1982) (characterizing bar on assertion of generalized grievances as a prudential rule).

[156] *Lexmark* also suggests that it could be addressed by looking at the statute as well. *Lexmark*, 134 S. Ct. at 1387 n.3.

years to limit and bring greater discipline to jurisdictional rulings."[157] A discussion of the case in the *Harvard Law Review* observed that *Lexmark* is representative of recent Court efforts "to draw a clear(er) line between jurisdiction on the one hand and claim-processing rules and the merits on the other."[158]

Third, there is the author of the opinion, the late Justice Scalia. Closely inspecting statutes for evidence that plaintiffs do or do not have claims under them is entirely consistent with his well-known advocacy of textualism in all things statutory.[159] Moreover, a dislike of judicial discretion[160] and longstanding disdain for prudential standing doctrines generally were among Justice Scalia's other hobby horses.[161] At least with regard to zone-of-interests standing, Justice Scalia appears to have "united the Court and rendered judgment": the zone-of-interests test had to go—at least as part of standing doctrine.

Finally, there is malleability of the zone-of-interests test itself. While easy to articulate, the Court applied it over the years with all the predictability of a lightning strike. In its decisions, the Court repeatedly found itself unable to decide whether or not a plaintiff's presence within a statutory zone of interest depended on congressional intent. When it said one did not have to establish that the plaintiff was an intended beneficiary of a statutory scheme, the application of the zone-of-interests test looked almost desultory and duplicative of the injury-in-fact requirement. But requiring proof of congressional intent to benefit particular plaintiffs had the potential of denying a federal forum to those who had suffered concrete injuries. Unable to resolve this tension with an easily applied decision rule, the Court simply cut the Gordian knot, and declared that

[157] *The Supreme Court, 2013 Term—Leading Cases*, 128 HARV. L. REV. 321, 322 (2014).

[158] *Id.* at 329 (alteration in original).

[159] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012). For a summary and critique of Justice Scalia's brand of textualism, see William N. Eskridge, Jr., *Textualism, the Unknown Idea?*, 96 MICH. L. REV. 1509 (1998) (book review). We thank Judge Bill Pryor for urging us to make this point explicitly.

[160] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (criticizing Justice Breyer's proposed interest-balancing test for evaluating Second Amendment challenges to firearms regulation, calling it "judge-empowering"); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (arguing originalism is a superior interpretive modality because it curbs the discretion of judges); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (defending use of rules in part on discretion-curbing grounds).

[161] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (criticizing the "bifurcation" of standing doctrine into constitutional and prudential standing rules: "I find this bifurcation unsatisfying—not least because it leaves unexplained the Court's source of authority for simply granting or denying standing as its prudence might dictate").

the question whether plaintiff had "statutory standing" was answerable using familiar techniques of statutory interpretation.[162]

After *Lexmark*, then, it is clear that the touchstone for a plaintiff's standing to bring a cause of action in statutory cases is the text of the statute itself. If the statute creates a cause of action for a particular class of potential plaintiffs, and if a plaintiff satisfies Article III standing, then a court cannot decline to hear that plaintiff's case on prudential grounds. The remaining question, then, is whether the logic of *Lexmark* extends to constitutional cases as well.

III. THE ZONE-OF-INTERESTS TEST IN CONSTITUTIONAL CASES

If the Court's application of the zone-of-interests test in statutory cases has been sporadic, its appearance in constitutional cases has been even rarer. In fact, the nonappearance of the test in constitutional cases in which it could have (and perhaps should have) applied was one of the factors driving Professor Davis's conclusion that the test had been abandoned by the Court in the late 1970s.[163] The Supreme Court has never found that a plaintiff bringing a constitutional claim failed to demonstrate that she was in the zone of interests of the constitutional provision that formed the basis for the claim. But lower courts—in particular the Fifth and Ninth Circuits—have dismissed cases involving dormant Commerce Clause doctrine (DCCD) challenges after finding that the plaintiff

[162] Professor Brown argues that *Lexmark* "returns the zone of interests inquiry to its origins" and that it was never intended to be part of standing doctrine in the first place. S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 112–13 (2014). *Lexmark*'s focus on the language to the statute to determine whether a cause of action does or does not exist echoes the recent hostility to implied causes of action, which may be a further trend that influenced the Court's decision to jettison zone-of-interests standing in statutory cases. *See* Alexander v. Sandoval, 532 U.S. 275, 288 (2001) ("We . . . begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."). *See also* Tanya L. Miller, Note, Alexander v. Sandoval *and the Incredible Disappearing Cause of Action*, 51 CATH. U. L. REV. 1393 (2002). We thank Rusty Johnson for alerting us to the similarity.

[163] DAVIS, *supra* note 57, § 22.02-11, at 509 ("[T]he Court itself has ignored the test in upholding standing, even when the use of the test would require denial of standing."). Davis cited *Eisenstadt v. Baird*, 405 U.S. 438 (1972), as one instance where "the Court upheld the standing of the promoter of a product to assert the constitutional rights of the users of the product, even though the promoter's interests were not within the zone." *Id.*; *see also* 4 DAVIS, *supra* note 70, § 24.17, at 176–77, citing contraception and abortion cases, as well as *Craig v. Boren*, 429 U.S. 190 (1976), as examples of cases "holding that A has standing to assert the rights of B could be in violation of the 'zone' test. . . . In all five cases, sellers or distributors of products were allowed to challenge governmental restrictions on their own activities, and each plaintiff was held to have standing to assert the rights of those who sought his products or services. Each plaintiff lacked any ground for asserting illegality with respect to the plaintiff; each plaintiff asserted illegality with respect to someone else."

failed to demonstrate he was in the zone of interests of the dormant Commerce Clause.

In this Part, we will examine what little trace the zone-of-interests test has left in constitutional cases before the U.S. Supreme Court. Then we will look at a sample of lower court cases in which courts have denied standing. We will argue that there are no compelling reasons for retaining zone-of-interests standing as a prudential doctrine in constitutional cases after *Lexmark*. We conclude that the Court should make clear in an appropriate case that a claimant bringing constitutional claims need only establish Article III standing to proceed.

A. Constitutional Zone-of-Interests Standing in the Supreme Court

Recall that in *Data Processing*, the Court stated the question as 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."[164] In the intervening 45 years, however, members of the Court have discussed zone-of-interests standing only twice in constitutional cases. The most extensive discussion, moreover, occurred in a dissenting opinion filed by Justice Scalia.

The first constitutional zone-of-interests case was *Boston Stock Exchange v. State Tax Commission*.[165] The issue was whether New York could tax securities transactions involving an out-of-state stock exchange more heavily than those made on in-state exchanges.[166] In a footnote discussing the state tax commission's motion to dismiss, the Court addressed the standing issue. Citing *Data Processing*, Justice White wrote that the regional exchange plaintiffs had satisfied the injury-in-fact requirement: "The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are 'arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.'"[167]

Though its analysis is brief to the point of conclusory, the Court seemed to suggest that the zone-of-interests test is applied to constitutional claims the same as if the claim had been based on a statute.[168] Moreover, even though the transfer tax only indirectly affected the ex-

[164] Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added); *see also* note 17 *supra* and accompanying text.

[165] 429 U.S. 318 (1977).

[166] *Id.* at 320.

[167] *Id.* at 320–21 n.3 (alteration in original) (quoting *Data Processing*, 397 U.S. at 153).

[168] *But see infra* notes 176–177 and accompanying text.

changes, the Court deemed they were nevertheless within the DCCD's zone of interests and could challenge the New York law.[169]

Zone-of-interests standing's next appearance in a constitutional case occurred in *Wyoming v. Oklahoma*,[170] in a dissenting opinion by Justice Scalia.[171] Oklahoma required coal-burning power plants to source 10% of the coal they burned from Oklahoma mines.[172] Wyoming, which supplied a good deal of Oklahoma's coal, sued the state, alleging that the discriminatory law deprived the state of severance taxes it collected on coal extracted from mines located in Wyoming.[173] After concluding that the requirement was discriminatory, and that Congress had not authorized the states to enact such legislation, the Court invalidated the Oklahoma provision.[174] When the state's standing to bring suit was questioned, the Court briefly noted that "severance tax revenues are directly linked to the extraction and sale of coal and have been demonstrably affected by the Act."[175] Like the exchanges in *Boston Stock Exchange*, the state was at least indirectly affected because the reduction in coal extracted and exported to Oklahoma meant a corresponding diminution in revenues from severance taxes. For the majority, this indirect effect furnished a sufficient basis for the state to invoke the DCCD.

Justice Scalia criticized the Court for failing to apply the zone-of-interests test, which he thought would have mandated a dismissal of Wyoming's case. Citing *Clarke*,[176] he opined that the test ought to be applied *more* strictly in constitutional cases.[177] In his view, the zone-of-interests test would not be met if the plaintiff's interests were "marginally related to or inconsistent with the purposes implicit in the [constitutional provision]."[178]

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[169] *See also* Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the "Zone of Interests" Test Should Not Apply to Constitutional Cases*, 48 ARIZ. L. REV. 23, 37 (2006) (noting that *Boston Stock Exchange* "appeared to include indirect beneficiaries within the dormant Commerce Clause's zone of interests").

[170] 502 U.S. 437 (1992).

[171] *Id.* at 461 (Scalia, J., dissenting). He was joined by Chief Justice Rehnquist and Justice Thomas.

[172] *Id.* at 443 (majority opinion).

[173] *Id.* at 445–46.

[174] *Id.* at 458–59.

[175] *Id.* at 450.

[176] Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987). *Clarke*'s footnote stated that "the invocation of the 'zone of interest' test [in *Boston Stock Exchange*] should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the APA apply." *Id.* (quoting Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 156 (1970)).

[177] *Wyoming*, 502 U.S. at 469 (Scalia, J., dissenting).

[178] *Id.* (alteration in original).

Reasoning from the "history and purposes of" the DCCD, Scalia concluded that its purpose was to create a national common market free from discrimination and restrictive trade regulations.[179] While the *coal companies* would be within the DCCD's zone of interests, Wyoming was not, at least in the absence of evidence it was a participant in the coal market.[180]

> Wyoming's right to collect taxes presents an entirely different category of interest, only marginally related to the national market/free trade foundation of our jurisprudence in this area; indeed, it is in a sense positively antagonistic to that objective, since all state taxes, even perfectly constitutional ones, burden interstate commerce by reducing profit. Thus, when state taxes have been at issue in our prior negative Commerce Clause cases they have been the object of the plaintiff's challenge rather than the basis for his standing; and we have looked upon the State's interest in tax collection as a value to be *weighed against* the purposes of our Commerce Clause jurisprudence.[181]

He contrasted Wyoming's interest with those of the postal workers in *Air Courier*.[182] Although the workers' job security concerns were "distinct from the statute's goal of providing postal services to the citizenry," they "at least coincided with that goal a good amount of the time, [but] here the asserted interest (tax collection) and the constitutional goal invoked to vindicate it (free trade) are antithetical."[183]

He argued that if Wyoming's interest in tax collection fell within the DCCD's zone of interests, "so must every other state taxing interest. . . . [I]f and when *de facto* causality can be established," he continued, "every diminution of state revenue attributable to allegedly unconstitutional commercial regulation of a sister State will now be the basis for a lawsuit."[184] Analogizing zone-of-interests standing to other "judge-made rules circumscribing the availability of damages in tort and contract litigation," such as foreseeability and proximate cause, or limitations on recovery by third-party beneficiaries, Justice Scalia predicted a flood of suits by states alleging violations of the DCCD as a result of the majority's failure to apply of the zone-of-interests test.[185]

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[179] *Id.* at 469–70.

[180] *Id.* at 470.

[181] *Id.*

[182] *See supra* notes 86–95 and accompanying text.

[183] *Wyoming*, 502 U.S. at 471 (Scalia, J., dissenting).

[184] *Id.* at 472.

[185] *Id.* at 473 ("When courts abolish such limitations and require, as our opinion does today, nothing more than a showing of *de facto* causality, exposure to liability becomes immeasurable and the scope of litigation endless. If today's decision is adhered to, we can expect a sharp increase in state against state Commerce Clause

Before looking at the life of the doctrine in the lower courts, we pause to point out several notable aspects of Justice Scalia's dissent. First, his invocation of zone-of-interests standing at all is interesting. Recall that he was a critic of prudential standing rules since before he was named to the Court.[186] Perhaps he was simply willing to wield whatever weapon was handy to strike at the DCCD—a doctrine of which he was even less enamored.[187] It is ironic, though, that the author of a passionate defense of zone-of-interests standing would be the author of its demise—at least in statutory cases—20 years on.

Second, Justice Scalia likely overread the *Clarke* footnote. The Court in that case simply said that the zone-of-interests test might be *different* than that applied in APA cases; it did not say that it necessarily had to be more restrictive, or, if so, how much more restrictive. In any event, Justice Scalia neither indicated how much stricter the proper test would be nor articulated the form that test should take. Justice Scalia also ignored the fact that the *Boston Stock Exchange* Court, by finding that regional exchanges had standing to sue New York over its transfer tax, implicitly recognized that those indirectly burdened by a state law fell within the DCCD's zone of interests and could challenge it. As Professor Mank observed, Scalia "appeared to suggest that only direct beneficiaries of interstate trade . . . are within the Clause's zone of interests, but that indirect beneficiaries . . . are not."[188] However, as Mank aptly observes, Scalia's dissent "did not . . . offer a clear test for distinguishing between direct and indirect beneficiaries or an explanation of why the test does not reach indirect beneficiaries."[189] In contrast, "the *Wyoming* majority[] . . . implied that indirect beneficiaries of interstate trade, such as a state agency, can meet the prudential 'zone of interests' test, although the majority never explicitly addressed [it]."[190]

suits; and if its rejection of the zone-of-interests test is applied logically, we can expect a sharp increase in all constitutional litigation.").

[186] *See supra* note 161 and accompanying text.

[187] Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., concurring) (stating that the "'negative Commerce Clause' . . . is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution"); Tyler Pipe Indus. v. Wash. State Dep't Revenue, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that the Court's dormant commerce clause jurisprudence lacks a textual basis); *cf.* Mank, *supra* note 169 at 40, 43, 63, 65 (suggesting that Justice Scalia's insistence that zone-of-interests standing be used in constitutional cases was rooted in his desire to "reduce the[ir] number," and critiquing that reasoning).

[188] Mank, *supra* note 169, at 39.

[189] *Id.*

[190] *Id.* at 40.

Third, one can dispute Justice Scalia's characterization of the DCCD's purpose. As one of us has argued elsewhere,[191] the DCCD's free-trade zone was not an end in itself; rather, the antidiscrimination rules created by the Court to enforce the DCCD reflect a judgment that ending cycles of discrimination and retaliation present during the Confederation Era[192] was key to facilitating *political* union and preventing centrifugal forces from pulling the states away from one another. If that is seen as one of the purposes of the DCCD, then the doctrine's zone of interests would seem to cover Wyoming's challenge of Oklahoma's protectionist law, whose operation directly impacted Wyoming's tax collections. As Professor Mank demonstrated, the Court has frequently "focused on the impact of the challenged law on interstate markets" generally, "rather than any injury to the plaintiff in the case."[193]

Even on its own terms, we are not sure Scalia's argument follows. He reasons that the interests of the state—tax collection—and the purpose of the DCCD—elimination of discriminatory and burdensome barriers to trade—are antithetical. But the DCCD only targets discriminatory taxes and regulations that are *unduly* burdensome to interstate commerce compared to their supposed benefits. The Court has made clear that the doctrine does not immunize interstate commerce from any and all taxation or regulation. As the Court has said many times, "interstate commerce may be made to pay its way . . . ."[194] That taxes reduce profits does not mean that any and all taxes or regulations are vulnerable to a DCCD challenge, as Justice Scalia seems to suggest.

Whatever else may be said of it, Justice Scalia's dissent was the last appearance of the zone-of-interests test in a constitutional case before the Supreme Court.[195] The test has made more frequent appearances in lower court cases, but it still features in relatively few constitutional cases, most of which involve the DCCD. We will examine some of those decisions in the next Section.

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[191] Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 478–81 (2008).

[192] For examples of Confederation-era discrimination, see Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005).

[193] Mank, *supra* note 169, at 45.

[194] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 281 (1977).

[195] Which is not to say that the Court never dismissed a constitutional case on other prudential standing grounds. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17 (2004) ("In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.").

B. Constitutional Zone-of-Interests Standing in the Lower Courts: A Case Study[196]

Applications of zone-of-interests standing to constitutional claims have not been much more common in lower courts than they have been in the Supreme Court, with one exception. Perhaps because the Court addressed zone-of-interests standing in *Boston Stock Exchange*, as well as because of Justice Scalia's *Wyoming* dissent, the lower courts have applied zone-of-interests standing in DCCD cases with some frequency.

The DCCD cases, then, provide us with a case study useful to evaluate whether zone-of-interests standing should be retained for constitutional cases post-*Lexmark*. As our examination of the cases shows, courts have had as much trouble formulating and applying a zone-of-interests test for the DCCD as they have in statutory cases. There is no reason to suspect that formulating zone-of-interests tests for numerous other constitutional provisions would be any easier. Practical problems aside, whatever useful function the zone-of-interests test serves or whatever important principle it upholds could be better served by other doctrines, as we will argue in the next Section. First, we offer a thumbnail sketch of the DCCD itself, followed by a survey of four circuits' articulation and application of the zone-of-interests test for the DCCD.[197]

The DCCD is the judge-made doctrine inferred from the Constitution's delegation of power over interstate commerce to Congress that limits the ability of states to discriminate against or unduly burden interstate commerce.[198] The DCCD subjects those state or local laws that dis-

[196] This Section draws on BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.10 (2d ed. 2013 & Supp. 2016).

[197] Astute readers will note that many of the cases discussed below concern local "flow control" ordinances governing the disposal of solid waste. The common subject matter is likely a function of the legal uncertainty following the Supreme Court's 1994 decision in *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994). In *Carbone*, the Court held that the DCCD prohibited Clarkstown, New York from mandating the processing of waste generated in the town at a privately-held waste processing center. *Id.* at 393–95. Justice Souter's dissent, however, argued that the private ownership was nominal; that the processing center would soon become publicly-owned; and that the decision whether or not to monopolize a market should be one made free from limitations of the DCCD as long as in-state and out-of-state parties who did not receive the franchise were treated equally. *Id.* at 410–30 (Souter, J., dissenting). *C&A Carbone* left open the question of the constitutionality of a flow control ordinance mandating processing of waste at an actual *publicly-owned* facility. When the Court took up that question in 2007, a majority of the Court adopted Justice Souter's dissent, and created an exception to the DCCD's antidiscrimination rule, at least for public entities performing traditional governmental functions. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342–47 (2007). Many of the zone-of-interests cases involving flow control ordinances were decided during the period of uncertainty that preceded the *United Haulers* decision.

[198] For the evolution of the doctrine, see Denning *supra* note 191, at 427–48.

criminate against out-of-state commerce or commercial actors to a version of strict scrutiny that obligates the state to prove (1) a "legitimate," that is, nonprotectionist, interest is being pursued and (2) that there is no less discriminatory means available to effectuate that end. Discrimination can occur on the face of a statute, or in its purposes or effects.[199] Truly nondiscriminatory laws that burden interstate commerce are subject to a deferential balancing test, under which the *plaintiffs* must demonstrate that the burden on interstate commerce clearly exceeds the putative local benefits of the regulation.[200]

Several circuits have dismissed DCCD claims over the last two decades after concluding that the plaintiffs' claims lay outside the DCCD's zone of interests. The first case to do so, apparently, was the Ninth Circuit's decision in *Individuals for Responsible Government, Inc. v. Washoe County*,[201] in which the court dismissed a challenge to a county's mandatory garbage collection ordinance for unincorporated parts of the county.[202] While several residents sought and received an exemption permitting them to self-dispose, some residents who either did not apply for an exemption or had their exemptions revoked, sued, claiming the ordinance violated the DCCD. The court characterized the plaintiffs' complaint as being "forced to pay for unwanted garbage collection services."[203]

While the court concluded that the plaintiffs satisfied the injury-in-fact requirement, their claim fell outside the Commerce Clause's zone of interests. As the court framed the inquiry, "whether appellants have standing to raise the dormant Commerce Clause challenge in the present case" depends upon "whether their interests bear more than a marginal relationship to the purposes underlying the dormant Commerce Clause."[204] Its main purpose, the court concluded, was "to limit 'the power of the States to erect barriers against interstate trade.'"[205]

The plaintiffs contended that the ordinances placed obstacles in the way of their ability to transport garbage across state lines for disposal. While agreeing that, as to the California dump owners, the ordinances "have imposed a small barrier to interstate commerce" by reducing the flow of garbage from Nevada, the court held that the interest of the plaintiffs were only marginally related to the purposes of the Commerce Clause.[206] The plaintiffs' "injury (being forced to pay for services they do

[199] *See* DENNING, *supra* note 196, § 6.06[A].

[200] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[201] 110 F.3d 699, 703–04 (9th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997).

[202] *Id.* at 704.

[203] *Id.* at 702.

[204] *Id.* at 703.

[205] *Id.* (quoting Dennis v. Higgins, 498 U.S. 439, 446 (1991)).

[206] *Id.* at 703–04.

not want) would exist even if Independent Sanitation were to dump all the garbage it collects from Nevada across the state line in California."[207] Thus, plaintiffs were not within the Commerce Clause's zone of interests; the court concluded this despite the fact that they were at least indirectly affected by the mandatory collection fee.

Subsequent Ninth Circuit cases followed *Individuals for Responsible Government*'s lead. In *On the Green Apartments L.L.C. v. Tacoma*,[208] for example, the owner of an apartment complex challenged Tacoma, Washington's ordinance requiring the collection and disposal of garbage by a municipal utility or, if permitted to self-haul, disposal of all waste at a city-owned disposal unit.[209] According to the court, "[l]ike that of the plaintiffs in *Washoe*, On the Green's complaint here is that it is forced to pay for waste disposal services it would like to provide for itself. And similarly, its financial injury is unrelated to the purposes animating the dormant Commerce Clause jurisprudence."[210]

However, the court further held that On the Green satisfied the zone-of-interests test regarding its challenge to the requirement that self-hauled waste be disposed of at city facilities that charged higher tipping fees: "On the Green has alleged that it would pay substantially less to dump at other landfills. Hence, On the Green's injury would be remedied if it could take its garbage outside the city."[211] On the merits, however, the court held that the DCCD was not implicated, because On the Green complained only of the inability to dispose of its waste outside of the city, not outside of the state.[212] "Where, as here," the court concluded, "the plaintiff alleges only an intrastate burden, a court cannot manufacture an interstate burden to implicate the Commerce Clause. . . . [W]here a complaint alleges only an intrastate burden, then the Commerce Clause is not at all implicated."[213]

That last principle was reiterated in *City of Los Angeles v. Kern*,[214] where the Ninth Circuit found that plaintiffs challenging an ordinance prohibiting the application of biosolids—sewage sludge—as fertilizer to property in unincorporated areas of the county fell outside the DCCD's zone of interests.[215] Plaintiffs, including generators, haulers, and farmers,

[207] *Id.*

[208] 241 F.3d 1235 (9th Cir. 2004).

[209] *Id.* at 1237.

[210] *Id.* at 1239–40.

[211] *Id.* at 1241.

[212] *Id.* at 1242.

[213] *Id.*

[214] 581 F.3d 841 (9th Cir. 2009).

[215] *Id.* at 843, 849.

challenged the ordinance claiming that it violated the DCCD; the district court enjoined the enforcement of the ordinance.[216]

Reversing the district court, the court of appeals cited *Washoe County* and *On the Green* for the proposition that complaining of barriers to *intra*-state commerce did not fall within the DCCD's zone of interests, or was only marginally related to those interests.[217] "The interest the recyclers seek to secure," the court observed, "is their ability to exploit a portion of the *intra* state waste market—they want to be able to ship their waste from one portion of California to another."[218] In the case of the ordinance, however, "[n]othing . . . hampers the recyclers' ability to ship waste out of state;" moreover, "no recycler claims to apply out-of-state waste to land in Kern County."[219] The ordinance, the court concluded, "in no way burdens the recyclers' protected interest in the interstate waste market."[220]

Compare those cases to the Ninth Circuit's ruling in *Yakima Valley Memorial Hospital v. Washington State Department of Health*.[221] The hospital-plaintiff in that case alleged that the denial by the state of a certificate of need for performing certain elective heart procedures violated the DCCD, among other claims.[222] The state countered that the hospital lacked prudential standing to mount a DCCD challenge because "it operate[d] only an in-state hospital."[223] The court replied that "[b]y virtue of the certificate of need requirement, the Department prevents Memorial from soliciting out-of-state patients and competing in an interstate market to offer elective . . . services, activities that clearly involve interstate commerce."[224] Such burdens could impose costs to interstate commerce that clearly exceed local benefits, the court noted. The DCCD, the court pointed out, "protects the vitality of the national market for goods and services, not the location of a particular participant . . . ."[225]

The Ninth Circuit's zone-of-interests test seemed to exclude those plaintiffs indirectly burdened by regulations banning transport of waste to other states. Only those plaintiffs alleging that they were prevented from competing in or accessing an interstate market were deemed to be within the DCCD's zone of interests. Even those plaintiffs often lost on the merits, moreover, because they had not alleged that they planned to dispose of waste in another state. It also seems odd that the court, some-

[216] *Id.* at 844.
[217] *Id.* at 847 (citations omitted).
[218] *Id.*
[219] *Id.* at 848.
[220] *Id.*
[221] 654 F.3d 919 (9th Cir. 2011).
[222] *Id.* at 924.
[223] *Id.* at 933.
[224] *Id.*
[225] *Id.*

times sua sponte, raised the standing issue when a merits ruling would have produced the same results—dismissal of the claim. In none of the four Ninth Circuit cases did the plaintiffs seem to plead facts sufficient to support a DCCD claim.[226] On the Green's self-hauling claim, for example, made no allegations that it was prevented from hauling waste out of the *state*.

For its part, the Fifth Circuit has articulated the zone-of-interests test in a rather curious fashion. It first discussed the test in *National Solid Waste Management Ass'n v. Pine Belt Regional Solid Waste Management Authority*.[227] Plaintiffs challenged yet another flow control ordinance mandating the disposal of waste at a publicly owned landfill.[228] According to the court, "[t]he two-staged analysis for dormant Commerce Clause claims is instructive as to the relevant zone of interests to be protected."[229] It continued, "with respect to laws that facially discriminate against out-of-state economic interests, the dormant Commerce Clause seeks to protect against local economic protectionism and retaliation among the states."[230] In the alternative, it would "consider whether plaintiffs nonetheless have standing to challenge the flow control ordinances on the basis of the claim that they excessively burden interstate commerce."[231]

The plaintiffs had no standing to challenge the ban on the export of waste outside the region because "*these* plaintiffs do not ship (and, so far as the record shows, have never shipped) *any* waste they collect within the Region to any location outside Mississippi" and had not "alleged that they [had] any plans to do so . . . ."[232] Moreover, the plaintiffs had not suggested "that some other party currently ships waste from the Region outside of Mississippi, or [had] any plans to do so, or that any out-of-state waste processor receives (or has plans to receive) any of the Region's waste out of state."[233]

The plaintiffs *did* have standing to challenge the ordinances "on the basis of the claim that they excessively burden interstate commerce," according to the court.[234] "An allegation that the plaintiff is involved in interstate commerce and that the plaintiff's interstate commerce is burdened by the ordinance in question," the court wrote, "is sufficient to satisfy the zone of interests test with respect to ordinances that assertedly

[226] *See infra* notes 296–309 and accompanying text.

[227] 389 F.3d 491 (5th Cir. 2004).

[228] *Id.* at 493.

[229] *Id.* at 499.

[230] *Id.*

[231] *Id.* at 500.

[232] *Id.* at 499.

[233] *Id.* at 499–500.

[234] *Id.* at 500.

impose an excessive burden on interstate commerce."[235] Because the plaintiffs engaged in interstate commerce—because they negotiated contracts on national basis—even though they did not ship any of the region's garbage out of state, they were in the zone of interests because they alleged that "an effect on the Mississippi portion of such a contract would ripple to the portion of the contract in other states."[236] The court ruled against the plaintiffs on the merits, however.[237]

The Fifth Circuit more recently employed its version of the zone-of-interests test for the DCCD again in *Cibolo Waste, Inc. v. San Antonio*.[238] In yet another waste disposal case, the plaintiffs challenged a city ordinance that imposed a permit fee of $2,250 for each vehicle heavier than 7,000 pounds used for the collection and disposal of waste collected within the city limits.[239] Here the plaintiffs lacked prudential standing because "the ordinance is applicable to *any* commercial or industrial hauler, regardless of where the hauler originated or planned to end its trip" and "favors neither interstate nor intrastate commerce. Accordingly, Appellants lack standing to challenge the ordinance on the basis that it is facially discriminatory against out-of-state interests."[240] Moreover, the plaintiffs could not "satisfy the second prong of the zone-of-interests test since they have not shown that the ordinance imposes an excessive burden on interstate commerce" because "[b]y their own admission, [plaintiffs] are not engaged in interstate commerce. Their business is purely intrastate . . . ."[241]

Notice that the Fifth Circuit's zone-of-interests test simply tracks the DCCD's two-tiered standard of review.[242] Its test, unlike that of the Ninth Circuit, seems indistinguishable from a ruling on the merits of the plaintiffs' claims. In truth, the Fifth Circuit's test actually collapses into tautology: A plaintiff must prove that she has standing to challenge a facially discriminatory law by demonstrating that the law is, in fact, facially discriminatory. In addition, the *Cibolo Waste* plaintiffs again seem to have failed to plead facts sufficient to sustain a DCCD claim because they admitted they did not engage in interstate commerce at all.

The Sixth Circuit also addressed zone-of-interests standing in two cases involving—wait for it—flow control ordinances. Warren County, Kentucky's ordinance designated a private entity as the exclusive franchisee for waste collection and disposal; the ordinance also effectively pro-

[235] *Id.* (emphasis removed).
[236] *Id.* at 501.
[237] *Id.* at 501–03.
[238] 718 F.3d 469 (5th Cir. 2013).
[239] *Id.* at 472.
[240] *Id.* at 475 & n.5.
[241] *Id.*
[242] *See supra* notes 197–199 and accompanying text.

hibited transport of the waste out of the state.[243] The plaintiff, a detergent manufacturing company located in the county, sued, claiming, *inter alia*, that the prohibition on the export of garbage out of the state violated the DCCD.[244]

In its discussion of standing, the court characterized the DCCD as "designed to prevent economic protectionism and insure the free movement of goods between State borders, prohibiting 'laws that would excite . . . jealousies and retaliatory measures' among the several States."[245] Because the plaintiff "seeks to protect its right to contract with a company that can transport its waste for out-of-state processing and/or disposal," it "is asserting its individual right as a consumer to purchase waste processing and disposal services across State boundaries, an interest that falls squarely within the zone of interests protected by the Commerce Clause," the court concluded.[246] In a similar challenge to another flow control ordinance,[247] the Sixth Circuit later clarified that a showing that "actual movement of goods or services across state lines" was not required because the DCCD "protects the right to contract across state lines."[248] The Sixth Circuit's articulation of the zone-of-interests test for the DCCD is probably the best, because it links the elimination of barriers to interstate trade and creation of a free-trade union among the states to the initial goal: reducing the political friction that would be engendered by states engaging in cycles of discrimination and retaliation.[249]

Finally, the Eighth Circuit articulated the DCCD's zone of interests in terms nearly identical to those used by the Sixth Circuit. In *Ben Oehr-*

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[243] Huish Detergents, Inc. v. Warren Cty., 214 F.3d 707, 708–09 (6th Cir. 2000).

[244] *Id.* at 709.

[245] *Id.* at 710 (alteration in the original) (quoting C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994)).

[246] *Id.* at 710–11. On the merits, the Sixth Circuit reversed the district court's dismissal of the claim and remanded it for further proceedings. *Id.* at 717.

[247] Nat'l Solid Wastes Mgmt. Ass'n v. Daviess Cty., 434 F.3d 898 (6th Cir. 2006), *cert. granted and vacated sub. nom.*, Daviess Cty. v. Nat'l Solid Wastes Mgmnt. Ass'n, 550 U.S. 931 (2007).

[248] *Id.* at 902 n.1 (citation omitted); *see also* Oxford Assocs. v. Waste Sys. Auth., 271 F.3d 140, 148–49 (3d Cir. 2001) (holding that waste generators subject to a waste generation fee that exceeded the interstate rate for garbage collection and disposal were within the DCCD's zone of interests and had standing to challenge the fee). *But see id.* at 151 (Barry, C.J., dissenting) (arguing that they lacked zone-of-interests standing because "Building Owners are merely consumers of hauling services who are subject to a flat fee for services they may not or do not want. Without even an allegation that they are also parties to the transaction or decision they claim is burdened or that their ability to contract directly with an out-of-state company is adversely affected, the injury of which the Building Owners complain is simply not within the zone of interests the Commerce Clause was intended to protect.").

[249] *But see* Mank, *supra* note 169, at 53 (arguing that "[t]he Sixth Circuit's approach to prudential standing is not as liberal as the First and Ninth Circuits' . . . .").

leins and Sons and Daughter, Inc. v. Hennepin County,[250] the court held that while waste *haulers* possessed standing to challenge a county flow control ordinance that imposed higher tipping fees on them and prevented them from seeking lower-cost alternatives outside the county and the state, waste *generators* lacked zone-of-interests standing.[251] The court characterized their harm as "narrow, personal, and strictly local: residents of Hennepin County have to pay relatively high bills for the disposal of their garbage."[252] The judges found it "unlikely that South Dakota or Iowa are much concerned with what these plaintiffs pay for trash service, much less that high garbage bills in Minneapolis are likely to cause 'jealousies and retaliatory measures' in other states."[253] The court added that "[l]ocal consumers shouldering the end-line burden of a purely local regulation are not within the zone of interests of the Commerce Clause."[254]

In a footnote, the court worried that if consumers had standing to challenge laws like Hennepin County's, then state and local governments might be dissuaded from enacting similar economic regulations because of the enormous liability they could face if those regulations were successfully challenged.[255] "Especially in the current context, where the limits of local authority to regulate waste streams are still unclear," the court worried, "such risk presents a heavy burden to good faith efforts to enact valid laws intended to further important local goals."[256]

Though each of the four circuits characterize the DCCD's zone of interests somewhat differently, all seem to share common motives to avoid a ruling on the merits, especially in the solid waste cases predating *United Haulers*, when the constitutionality of municipal monopolization of markets was unsettled. Two other things are notable about the decisions. First, many courts seem to think that the DCCD claims were not brought by the right kind of plaintiff—that there were better-situated parties to maintain the suits. Second, even in cases in which the right plaintiff brought the claim, i.e., a plaintiff who was barred from accessing or participating in an interstate market, the plaintiffs often failed to plead facts sufficient to state a claim. In the next Section, we explain why those concerns are better addressed through existing doctrines than by zone-of-interests standing.

Pre-*Lexmark* scholarship on both statutory and constitutional zone-of-interests standing focused on describing the tests employed by the Supreme Court and by lower courts and evaluating which was the best

[250] 115 F.3d 1372 (8th Cir. 1997).
[251] *Id.* at 1381–82.
[252] *Id.* at 1382.
[253] *Id.*
[254] *Id.*
[255] *Id.* at 1382 n.9.
[256] *Id.*

one.[257] To choose a "best," however, is to beg the question that we now take up: After *Lexmark*, are there any persuasive justifications for retaining the zone-of-interests test as a prudential standing rule in constitutional cases?

C. Eliminating Zone-of-Interests Standing in Constitutional Cases

Having delivered a *coup de main* to the zone-of-interests test in *Lexmark*, we argue in this Section that the Court should take the opportunity to deliver a *coup de grace* and put the test out of its misery entirely. First, the prudential foundation for the doctrine is a constitutionally dubious one. Second, whatever other purposes the doctrine serves are likely better served by existing, more stable doctrines that lack the unpredictability of zone-of-interests standing. Third, the practical problems of formulating and applying the zone-of-interests test, apparent in statutory cases, become more acute if it is to be retained for constitutional cases. Finally, we survey two arguments for its retention—Justice Scalia's argument in *Wyoming* that it promotes judicial economy and a leading procedure treatise's argument that it ought to apply to DCCD cases, perhaps exclusively—and find both unconvincing.

1. The Zone-of-Interests Test's Prudential Foundation is Constitutionally Dubious

Since its inception in *Data Processing*, critics have argued that the zone-of-interests test serves no particular discernable purpose.[258] Justice Douglas's opinion did not even hint at one. By lumping it in with other nonconstitutional standing rules, subsequent courts vaguely gestured at its role in ensuring the "prudential" exercise of judicial power.[259] These defenses of prudential standing rules assume a distinctive role for the judiciary in modulating its power beyond Article III's irreducible minimum in the name of modesty, interbranch comity, institutional competence, and even separation of powers.[260] We wonder about the constitutional ba-

[257] *See* Siegel, *supra* note 110, at 350–65 (canvassing the various approaches to statutory zone-of-interests standing, and proposing a better approach); *see also* Mank, *supra* note 169, at 44–62 (describing and critiquing the zone-of-interests test as applied by the various circuits).

[258] *See supra* notes 45–66 and accompanying text.

[259] *See supra* notes 43–44 and accompanying text; *see also* CHEMERINSKY, *supra* note 10, at § 2.1, at 42 (citing "prudent judicial administration" and "wise policy militat[ing] against judicial review" as grounds for prudential standing rules, including zone-of-interests standing).

[260] Like the several meanings of "judicial restraint," itself, the restraint can serve a number of distinct (but related) ends. *See* Richard A. Posner, *The Rise and Fall of Judicial Restraint*, 100 CALIF. L. REV. 519, 520–21 (2012) (distinguishing the "[t]hree . . . most serious" meanings of the term); *see also* Warth v. Selden, 422 U.S. 490, 500 (1975) (noting that without prudential standing rules, like third-party standing, "the courts would be called upon to decide abstract questions of wide

sis for such "prudent" withholding of jurisdiction. A stronger version of the prudence argument claims that the limitation of judicial power fostered by zone-of-interests standing rules strengthens separation-of-powers principles, presumably by staying the court's hand in some controversies, and thereby leaving running room for the elective branches. One student note, for example, praised the doctrine as useful in "prevent[ing] abuse of the judicial process and promot[ing] the separation of powers."[261] If prudential arguments for zone-of-interests standing rest on shaky constitutional ground generally, the notion that the test promotes separation of powers values is particularly suspect.[262]

Recall that in *Lexmark*, Justice Scalia wrote that if Congress has passed a statute granting a certain class of plaintiffs a cause of action, and members of that class meet Article III standing requirements, then not only does the Court *not* uphold separation of powers values if it denies standing out of a sense of "prudence," but it also *violates* those principles.[263] What is true for statutes, would seem doubly true for constitutional claims. Where the Court is given jurisdiction to adjudicate a constitutional claim brought by a party with Article III standing, it is difficult to understand why electing not to do the job assigned to it by the Constitution represents either "prudence" or a commitment to separation of powers. In fact, declining to exercise jurisdiction in the absence of a congressional mandate to do so seems antithetical to both sets of principles.[264]

public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights").

[261] Church, *supra* note 75, at 449.

[262] In *Warth*, 422 U.S. at 500, the Court noted that without prudential standing rules, which, while related to Article III concerns, were "essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *See also* Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99–100 (1979) ("Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.").

[263] *See supra* notes 150–151 and accompanying text.

[264] Zone-of-interests standing is, of course, not the only doctrine limiting judicial review founded on prudential concerns. Versions of the political question doctrine and abstention are two other doctrines whose contours are often said to be informed by prudence. For descriptions of the political question doctrine, see, for example, CHEMERINSKY, *supra* note 10, § 2.1, at 42–43 (discussing the defenses of the political question doctrine that spring from prudential concerns about limiting judicial power); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV 237, 253 (2002)

2. Existing Doctrines Better Execute Zone-of-Interests Test's Functions

The Court's contemporary standing doctrine seems more than adequate to safeguard separation of powers principles against imprudent exercises of judicial power, though this might not have been the case when *Data Processing* was decided. Recall that zone-of-interests standing made its appearance at the dawn of the Court's standing revolution. The original articulation of the injury-in-fact test announced in *Data Processing*[265] was not as demanding as later iterations of it—iterations that coincided

(contrasting the "classical" strand of the political question doctrine, which was rooted in constitutional concerns with its "prudential" version, which "is not anchored in an interpretation of the Constitution itself, but is instead a judge-made overlay that courts have used at their discretion to protect their legitimacy and to avoid conflict with the political branches"). For abstention, see CHEMERINSKY, *supra* note 10, § 12.1 to .2, at 811–14 (suggesting that prudential concerns informed creation of *Pullman* abstention, which counsels federal court abstinence when "a state court's clarification of unclear state law might avoid a federal court ruling on constitutional grounds"); *id.* at 857 (discussing the debate of whether *Younger* abstention—the rule that federal courts may not enjoin state court and administrative proceedings—is prudential or constitutionally required). A complete analysis of the extent to which federal courts are entitled to take prudence into account at all in creating doctrines limiting the exercise of jurisdiction is beyond the scope of this Article. However, we would make a couple of observations about the political question doctrine and the various abstention doctrines specifically. First, though *Baker v. Carr*, 369 U.S. 186 (1962), included a number of factors expressing prudential concern, for example, "an unusual need for unquestioning adherence to a political decision already made," *id.* at 217, subsequent cases have tended not to stress those factors. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 228 (1993) ("A controversy is nonjusticiable—*i.e.*, involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .' But the courts must, in the first instance interpret the text in question and determine to what extent the issue is textually committed." (alteration in original) (quoting *Baker*, 369 U.S. at 217)); *see also* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1430 (2012) (refusing to find that a conflict between a congressional statute and an executive branch policy regarding the status of Jerusalem presented a nonjusticiable political question because the plaintiff's "[c]laim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do."). In similar fashion, many of the abstention doctrines—*Pullman* abstention, for example—seem as driven by structural federalism principles as by notions of prudence unmoored to other constitutional values. *See generally* Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811 (arguing that abstention doctrines come from structural constitutional principles). By contrast, there has been no suggestion that zone-of-interests standing is anything but a prudential standing rule or that it is tethered to larger constitutional concerns. Thus, we think that to condemn the prudential basis for zone-of-interests standing is not necessarily to commit us to abandon all doctrines of judicial limitation that might be described in part as prudential. We thank Marcia McCormick and Caprice Roberts for pressing us on this point.

[265] Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152–53 (1970).

with an explicit linkage of standing doctrine with the case-and-controversy requirements of Article III and that clause's role in promoting separation of powers.[266] Article III standing, therefore, is the Court's first line of defense against unwise judicial encroachment on the constitutional prerogatives of other branches. It is, moreover, a rather formidable defense—altogether too formidable for standing's critics.[267]

Whether one views the Court's current Article III standing rules as altogether too restrictive or as an invaluable tool for keeping judicial power within its proper channels, it is hard to make the case for retaining zone-of-interests standing in constitutional cases. If you think the Court's standing jurisprudence is too restrictive, you would hardly want to see a plaintiff who managed to run the Court's Article III gauntlet barred by a doctrine that rests on the slender reed of prudence. If you think the Court is, in the main, getting it right with standing, then the belts-and-suspenders nature of zone-of-interests standing has little to recommend it, especially if the test is as easily satisfied as it almost always was in pre-*Lexmark* statutory cases.

A number of scholars have argued that zone-of-interests standing is either related to or is in fact an iteration of the rule against third-party

[266] *Compare* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (permitting students to challenge a decision to raise railroad rates 2.5%; alleging injury in increased air pollution and increases in littering despite the fact that injuries seemed to be shared by everyone in the United States), *with* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (denying standing to challenge United States aid to complete foreign construction projects said to endanger threatened wildlife; *held*, plaintiffs failed to show sufficient injury-in-fact). For cases grounding standing doctrine in the case-and-controversy requirement and separation of powers principles, see Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); Raines v. Byrd, 521 U.S. 811, 820 (1997) ("As we said in *Allen* 'the law of Art. III standing is built on a single basic idea—the idea of separation of powers.'" (quoting Allen v. Wright, 468 U.S. 737, 752 (1984) (internal citations omitted)). The statement of the Court in *Allen* is representative of the new standing doctrine:

> Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.' As the Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'

Allen, 468 U.S. at 750 (quoting *Warth*, 422 U.S. at 498 (internal citations omitted)).

[267] For an influential critique of the Court's standing project after *Lujan*, see Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). A summary of the critical literature can be found in 2 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3–14, at 391–92 (3d ed. 2000); *see also* CHEMERINSKY, *supra* note 10, at § 2.3, at 55–58.

standing.[268] That rule states that, all things being equal, parties should only assert their rights and not those of others.[269] The rule is justified variously on autonomy grounds (third parties should be able to choose whether to bring a claim or which claims to bring) and on the ground that the presentation of "concrete factual situation[s]" involving injuries to parties will produce better decisions.[270]

In a number of the DCCD cases discussed above,[271] including the *Wyoming* case,[272] courts imply that the plaintiffs are actually raising claims belonging to other, better-situated parties. One wonders then why third-party standing rules are not sufficient to sort plaintiffs appropriately? Why the doctrinal duplication? It appears to us that third-party standing alone is a sufficient guarantee against tenuous claims brought by indirect beneficiaries of various constitutional provisions; it does not require a zone-of-interests backstop, especially when the doctrine is one of such "uneven application and uncertain meaning."[273]

3. The Practical Difficulties Applying Zone-of-Interests Standing in Statutory Cases Would Multiply in Constitutional Cases

Not only is constitutional zone-of-interests standing undertheorized—to put it mildly—but even if there *were* some normative value in

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[268] *See, e.g.*, CHEMERINSKY, *supra* note 10, at § 2.3.4, at 84. He writes:

> The prohibition against third-party standing . . . serves many of the underlying objectives of the standing doctrine. The Court has emphasized that the people actually affected may be satisfied, and thus the ban on third-party standing avoids "the adjudication of rights which those before the Court may not wish to assert." Also, the Court has stated that requiring people to assert only their own injuries improves the quality of litigation and judicial decision-making. In part this is because the Court believes that the "third parties themselves usually will be the best proponents of their own rights." Furthermore, it is thought that decisions might be improved in a concrete factual situation involving an injury to a party to the lawsuit.

Id. (footnotes omitted); *see also* 1 TRIBE, *supra* note 267, at § 3–19, at 446 ("Properly conceived, the zone-of-interest inquiry is part of third-party standing analysis: to say that a particular plaintiff's claim does not fall within the zone of interests of a given constitutional provision is another way of saying that the right claimed is one possessed not by the party asserting it, but rather by others, and that the plaintiff will not have standing to assert a violation of these rights of absent third parties, whose claims *would* fall within the applicable zone of interests."); Albert, *supra* note 50, at 471–72 (suggesting kinship between zone-of-interests standing and third-party standing).

[269] Fallon, *supra* note 13, at 1359 ("The Supreme Court has often intoned that one party generally may not assert the rights of another."); Monaghan, *supra* note 13, at 277 ("A litigant may invoke only his own constitutional rights or immunities; [and] he may challenge a statute only in the terms in which it is applied to him . . . .").

[270] *See* CHEMERINSKY, *supra* note 10, § 2.3.4, at 84.

[271] *See supra* notes 200–220, 238–241, 250–256, and accompanying text.

[272] *See supra* notes 177–185 and accompanying text.

[273] 1 TRIBE, *supra* note 267, § 3–19, at 446.

retaining the test in constitutional cases, practical obstacles, apparent in the Court's struggles to apply the test in statutory cases, also remain. These difficulties are perhaps even more challenging when applying the zone-of-interests test to constitutional claims.

What does it mean, precisely, to say that a plaintiff is within a given constitutional provision's zone of interests? Attempting to answer the question would seem to throw the Court back onto the horns of the same dilemma that plagued its attempts to apply the test in a statutory context. Would plaintiffs have to show that they were the intended beneficiaries of a particular provision or doctrine?[274] How would one even make such a showing? Would it be sufficient for a plaintiff to show that she "may have interests that systematically, rather than fortuitously, coincide with the interests" that the constitutional provision seeks to further?[275] Or should the Court exclude plaintiffs whose suits "are more likely to frustrate than to further" the constitutional provision's objectives?[276] The problem with adopting any of those approaches "in non-administrative law settings" is that it requires courts to engage in the difficult determination about "the content of the substantive rights invoked . . . ."[277]

4. Two (Unconvincing) Cases for Retaining Zone-of-Interests Standing in Constitutional Cases

Much like fully theorized accounts, full-throated defenses of zone-of-interests standing are rare. However, two important defenders have argued that (1) its use would curb the number of constitutional cases, thereby promoting judicial economy;[278] or (2) that it should be retained

[274] Siegel, *supra* note 110, at 350–51 ("One possibility is for the Supreme Court to adopt the approach . . . by which a plaintiff would be held to be within the zone of interests of a statute only if the plaintiff were a member of a class that Congress intended the statute to benefit.").

[275] *Id.* at 354.

[276] *Id.* at 356 (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 397 n.12 (1987)).

[277] 1 TRIBE, *supra* note 267, § 3–19, at 447. Implicit in our argument here is a belief that statutory and constitutional claims are equivalent. Certainly the *Data Processing* Court placed them on an equal footing. While it is true that statutes will often contain both a cause of action and the substantive legal standard, whereas constitutional claims will usually be brought using something like the Declaratory Judgment Act or § 1983 that *lacks* the substantive legal standard, we would argue that constitutional doctrine that has built up around the constitutional provision at issue will provide the substantive standard. For example, DCCD challenges against states may be brought under § 1983. The substantive legal standard to decide whether the plaintiff wins is the familiar two-tiered standard of review for the DCCD; she must prove either that the state law at issue is discriminatory or, if evenhanded, that its burdens on interstate commerce clearly exceed the putative local benefits. We thank Lou Virelli for suggesting that we clarify this point.

[278] Mank, *supra* note 169, at 40, 43, 63, 65 (suggesting that Justice Scalia's insistence that zone-of-interests standing be used in constitutional cases was rooted in his desire to "reduce the[ir] number").

only for particular constitutional claims. We find each of these defenses normatively unattractive, unconvincing, or both.

a. Promoting Judicial Economy

Justice Scalia's *Wyoming* dissent characterized zone-of-interests standing as a tool for ensuring judicial economy, similar to common-law doctrines like proximate cause that reduce the number of potential claimants.[279] Justice Scalia bemoaned the likely increase of similar DCCD suits brought by states as a result of the majority's opinion. Clearly, as Professor Mank observed, zone-of-interests standing's potential for reducing the number of constitutional cases was, for Justice Scalia, a feature, not a bug.[280]

Justice Scalia's dissent is one version of a familiar judicial trope: that the recognition of a particular type of claim will "open the floodgates," potentially overwhelming lower courts and perhaps even the Supreme Court itself.[281] Recent scholarship, however, has persuasively argued that the particular version of the "floodgates argument" offered up by Justice Scalia is, in fact, the least normatively defensible one.

Professor Marin Levy recently offered a taxonomy of floodgates arguments made by Justices since the 1940s. She generally classifies them as expressing (1) "[i]nterbranch concerns"; (2) "[i]ntersystemic concerns"; and (3) "[c]ourt-centered [concerns]."[282] She further subdivided interbranch concerns into those that worry about burdening the executive branch[283] and those that have the courts encroach on the legislative branch.[284] Intersystemic concerns she also subdivided into concerns about taking too many cases from state courts[285] and placing too many cases or obligations in or on state courts.[286] Finally, she distinguished between

[279] *See supra* note 185 and accompanying text.

[280] *See supra* note 187 and accompanying text.

[281] *See, e.g.*, Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013); *see also* Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation*," 6 U. PA. J. CONST. L. 377, 378 (2003) (characterizing "the floodgates argument as a special type of judicial economy argument").

[282] Levy, *supra* note 281, at 1012–14.

[283] *Id.* at 1017 ("The justices have occasionally entertained, and even invoked sua sponte, floodgates arguments when considering the impact their decisions will have on executive branch officials."); *id.* at 1017–22 (offering examples).

[284] *Id.* at 1022 ("In a second category of cases, the Court has considered floodgates arguments in the context of the relationship between the federal courts and Congress."); *id.* at 1022–28 (offering examples).

[285] *Id.* at 1028 ("The justices have considered in some cases whether a particular decision will lead to a flood of new claims into federal court—claims that would otherwise fall to state courts."); *id.* at 1028–32 (offering examples).

[286] *Id.* at 1032 ("[T]he justices have also worried about the inverse problem: creating too many cases—and obligations more generally—for state courts"); *id.* at 1032–35 (offering examples).

court-centered concerns in which the Court worries that "a given holding will unleash a flood of new claims—particularly frivolous claims,"[287] and those that could flood the courts with what she terms "[s]tandard [c]laims,"[288] or those "cases in which the merits of the claims in the flood were not in doubt."[289]

Justice Scalia's *Wyoming* dissent would be properly classified as expressing a court-centered concern that meritorious DCCD would flood the courts and—if the Court's original jurisdiction is invoked by states suing other states—perhaps the Supreme Court itself. Justice Scalia implied that complaints the Oklahoma statute was unconstitutional had merit because he readily conceded that Wyoming coal producers would easily have standing to challenge the discriminatory law.[290]

Assuming that applying a stringent zone-of-interests standing test in DCCD (and other constitutional) cases would reduce their number, stem any incipient flood of cases, and otherwise promote judicial economy, is that reduction desirable? Defensible?

Professor Levy has her doubts and offers a number of reasons why court-centered concerns about judicial volume are suspect. First, such concerns invoke the "self-regarding or even 'self-interested'" reason for not hearing cases "that the federal courts will have additional cases to decide (which is, of course, precisely their official obligation)."[291] Second, "it is unclear just what provision in the [C]onstitution could justify using workload concerns as an independent basis to alter substantive law or decline to hear a case."[292] In addition, Article III seems to grant Congress—not the judiciary—the power to reduce volume by alteration of the courts' jurisdiction.[293] Another commentator put it bluntly: floodgates claims "simply lack[] a proper basis in the law."[294]

We think that any analogous attempt to justify the retention of zone-of-interests standing in constitutional cases in the name of judicial economy likewise "need[s] some sort of affirmative normative justification—a

[287] *Id.* at 1037; *id.* at 1037–53 (canvassing examples).

[288] *Id.* at 1053.

[289] *Id.* at 1053–56 (canvassing examples).

[290] *Supra* note 180 and accompanying text.

[291] Levy, *supra* note 281, at 1064–65.

[292] *Id.* at 1066; *see also* Stern, *supra* note 281, at 397 (noting that "the Constitution creates a judicial system in which all cases (or controversies) within certain subject matters are meant to be heard, not one in which they must be heard unless they become too numerous").

[293] U.S. CONST. art. III, § 2, cl. 2; Levy, *supra* note 281, at 1069; *see also* Stern, *supra* note 281, at 379, 399 (arguing that congressional control over jurisdiction means that decisions not to hear cases or to alter law because of volume concerns violates separation of powers principles).

[294] Stern, *supra* note 281, at 399.

justification that the justices have yet to offer."[295] Prudential standing rules generally close the courthouse door to plaintiffs who have satisfied Article III standing in the name of vague and undertheorized notions of judicial "prudence," which to us are as self-regarding as floodgates arguments and similarly lacking in constitutional foundation. Moreover, if there is to be any prudential withdrawal of jurisdiction from classes of cases, it seems like Congress is the constitutionally appropriate branch to do the withdrawing.

Finally, Levy noted that the judiciary already has tools at its disposal to manage its caseload. The Federal Rules of Civil Procedure permit summary judgment to quickly resolve cases whose facts are not in dispute.[296] Courts can also sanction attorneys who bring frivolous claims.[297] Moreover, the Court has recently tightened pleading requirements in *Bell Atlantic Corp. v. Twombly*[298] and *Ashcroft v. Iqbal*,[299] which enable courts to dispose of more cases at earlier stages of litigation.[300] In light of these "legitimate options for managing caseload," Levy concluded, "the Court [should] shy away from using caseload as a reason to shift the direction of the law" to avoid an increase in volume.[301]

If Justice Scalia's concern was that the recognition of a broad zone of interest, particularly in DCCD cases, would breed a hoard of frivolous cases,[302] then the heightened pleading requirements of *Twombly* and *Iqbal* would be even more useful—more useful certainly than the vague and uncertain zone-of-interests test. In *Twombly*[303] and then *Iqbal*,[304] the Court interpreted Rule 8 of the Federal Rules of Civil Procedure, which requires a "short and plain statement of the claim showing that the pleader is entitled to relief,"[305] to require more "than an unadorned, the-defendant-unlawfully-harmed-me accusation."[306] Instead,

> [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

[295] Levy, *supra* note 281, at 1069.

[296] FED. R. CIV. P. 56.

[297] Levy, *supra* note 281, at 1070.

[298] 550 U.S. 544 (2007).

[299] 556 U.S. 662 (2009).

[300] *Id.* at 678–79.

[301] Levy, *supra* note 281, at 1073.

[302] Siegel, *supra* note 110, at 364 (suggesting that the Court sees the doctrine as useful in performing its "judicial role in sorting plaintiffs").

[303] *Twombly*, 550 U.S. at 557.

[304] *Iqbal*, 556 U.S. at 678.

[305] FED. R. CIV. P. 8(a)(2).

[306] *Iqbal*, 556 U.S. at 678.

> misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief."[307]

Scholars have argued that these decisions have functioned to screen out a number of cases at the motion-to-dismiss stage, prior to the undertaking of any discovery.[308] For our purposes, we think that these heightened pleading requirements could have been invoked in some of the cases discussed above where the plaintiffs had not pleaded certain facts necessary to maintain a DCCD claim—e.g., that they were engaged in interstate commerce or wished to contract with an interstate firm to haul and dispose of garbage.[309]

b. Retain the Test for DCCD Cases Only?

One of the most extensive arguments, grounded as well in notions of prudential self-restraint, in favor of zone-of-interests standing in constitutional cases is found in the Wright, Miller, and Cooper federal practice treatise—and it is not terribly detailed.[310] While conceding that "it is attractive to argue that standing should be recognized whenever permitted by constitutional constraints," the authors felt that "it is likely better to adapt" a "useful" doctrine like the zone-of-interests test, "than to create another abstract category."[311] They expressly approved of its use in DCCD cases where, they argue, the "cases do not affect fundamental personal liberties, often involve complex (or confused) doctrine, and may involve plaintiffs whose interests have little to do with unimpeded commerce."[312]

By contrast, they argue that plaintiffs seeking remedy for violations of "constitutional provisions that protect personal dignity or liberty . . . should not be subjected to further standing inquiry."[313] And when constitutional and statutory claims are mixed, as in § 1983 cases, "[a]pplication of the zone-of-interests test . . . would be so completely dependent on interpretation of § 1983 that it seems better to go straight to the § 1983 remedy question," the authors commented.[314]

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[307] *Id.* (quoting *Twombly*, 550 U.S. at 570, 556, 557).

[308] For a good summary of *Twombly-Iqbal* and reactions to it, see Brian T. Fitzpatrick, Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012). For representative criticism of the two cases, see Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010).

[309] *See supra* Part III.B.

[310] 13A WRIGHT ET AL., *supra* note 1, at § 3531.7, at 532.

[311] *Id.*

[312] *Id.* at 532–34.

[313] *Id.* at 534.

[314] *Id.* at 536.

This defense of zone-of-interests standing as a matter of judicial restraint *particularly* in DCCD cases is unconvincing. First, they neither provide justification for treating some constitutional claims as more important than others, nor do they provide criteria for distinguishing constitutional claims involving "fundamental personal liberties" from other personal liberties or constitutional rights. As for "complex (or confused) doctrine," that label could attach to any number of constitutional claims, including those involving "fundamental personal liberties."[315] And plaintiffs whose interests in unimpeded commerce are "minimal" can be screened out either by pleading standards or by invoking third-party standing rules, if not Article III standing itself. Their argument is further undercut by the fact that DCCD claims *are* recognized as "rights" that can be vindicated in § 1983 suits.[316]

Ultimately, we think that the "skepticism" *Lexmark* "exudes . . . about the general concept of prudential standing" should "carry over to . . . the zone-of-interest test for constitutional claims" and that the test should be interred for good.[317] For us, any plaintiff who pleads sufficient facts to survive a motion to dismiss and can satisfy Article III's injury-in-fact, causation, and redressability requirements, deserves to have her constitutional claim heard in a federal forum. The courts exist for the vindication of rights and the prescription of remedies for violation of those rights.[318]

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[315] *Id.* at 532; *see, e.g.*, Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 39–40 (2010). Berman offers the following partial statement of First Amendment doctrine:

> A law constitutes an impermissible abridgment of the freedom of speech if: it regulates expression on the basis of its content or viewpoint and is not narrowly tailored to achieve a compelling governmental interest, except that content-based regulation of non-misleading speech that proposes a lawful economic transaction is permitted if the regulation directly advances a substantial government interest that could not be advanced equally well by a less speech-restrictive regulation, and except too that content-based regulation of speech is freely permitted if, inter alia, the regulated speech proposes an unlawful economic transaction or a lawful transaction in a misleading way, or if it is sexually explicit and as a whole appeals to the prurient interest, and depicts or describes sexual conduct in a patently offensive way, and lacks serious artistic, political, or scientific value, or if it includes the sexually explicit depiction of children, or if the speech, by its very utterance inflicts injury or tends to incite an immediate breach of the peace; all subject to the caveat that even when speech may permissibly be regulated, if that regulation takes the form of a prior restraint on its issuance, then the regulation is ordinarily presumptively impermissible; and furthermore, a content-neutral regulation of speech is impermissible unless it is narrowly tailored to achieve a significant government interest and leaves open ample alternative channels of communication.

Id.

[316] *See* Dennis v. Higgins, 498 U.S. 439 (1991).

[317] 13A WRIGHT ET AL., *supra* note 1, § 3531.7, at 121 (3d ed. 2008 & Supp. 2016).

[318] *See* Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 163 (1803) (observing that it is a fundamental maxim that the law furnishes remedies for violations of rights).

It should be no more within the power of the courts to deny plaintiffs a forum for their constitutional claims for reasons of mere prudence than it is for them to deny a particular plaintiff the benefit of a statutory cause of action created by Congress.

IV. CONCLUSION

Zone-of-interests standing in constitutional cases is even more obscure in its origins and difficult in its application than it was in statutory cases. Now that *Lexmark* abjured statutory zone-of-interests standing, we urge the Court to take the next logical step and make clear that it no longer applies in constitutional cases either. Whatever values were served by zone-of-interests standing—and those are not obvious—can be better served by the Article III standing rules, by third-party standing doctrine, or by the heightened pleading standards of *Twombly* and *Iqbal*.