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## Is Prudential Standing Jurisdictional?

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# IS PRUDENTIAL STANDING JURISDICTIONAL?

*Bradford C. Mank†*

## ABSTRACT

The Supreme Court has clearly treated the Constitution's Article III standing requirements as mandatory jurisdictional hurdles that a plaintiff must meet for each form of relief sought before federal courts may consider the merits of a case. But the Supreme Court has never squarely held that prudential standing is a jurisdictional issue that must be decided before the merits in every single case. A 1975 Supreme Court decision suggested in dicta that prudential standing doctrine plays a crucial role in preventing federal courts from addressing political questions, but a 1984 Court decision implied in dicta that prudential standing is less important than Article III constitutional standing. In light of the Court's conflicting dicta about the importance of prudential standing doctrine, it is not surprising that lower federal courts have split over whether prudential standing

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requirements are jurisdictional or whether such barriers may be waived if a party fails to raise the issue.

This Article generally agrees with recent judicial arguments that prudential standing should not be treated as a jurisdictional issue. The greatest weakness of these arguments is that, although they relied in part on the Supreme Court's recent trend to narrow the issues considered jurisdictional, they did not address why the Court has engaged in such a trend. This Article attempts to supplement these arguments by examining the adversarial traditions that underlie the Anglo-American legal system. It further explains that the argument for limiting the scope of jurisdictional rules would have been more convincing if it also pointed out that judges' *sua sponte* jurisdictional decisions are generally contrary to the Anglo-American legal system's party-controlled adversarial model of legal decision making and, as a result, should only be mandated where absolutely necessary. Indeed, the Court itself has referenced the adversarial model in relation to jurisdictionality, noting that "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system."

After considering various Court dicta on the relationship between prudential and Article III standing, this Article concludes that prudential standing is not so closely entwined with Article III jurisdiction to require an exception to our adversarial traditions of party autonomy in a free society. Furthermore, this Article maintains that where jurisdictionality is a close question, courts should give significant weight to the impact of mandatory *sua sponte* jurisdictional decisions on the fundamental principle of adversarial party control.

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INTRODUCTION

The Supreme Court has clearly treated the Constitution's Article III standing requirements as mandatory jurisdictional hurdles that a plaintiff must meet for each form of relief sought before a federal court may consider the merits of a case.<sup>1</sup> A federal court must dismiss a case without deciding the merits if the plaintiff fails to meet the constitutional standing test, and a court must raise the issue of

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1. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”). See generally Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1709–10 (2008) (providing a brief overview of constitutional standing).

Article III standing *sua sponte* if the parties fail to do so.<sup>2</sup> Indeed, in *Steel Co. v. Citizens for a Better Environment*,<sup>3</sup> the Supreme Court rejected the “doctrine of hypothetical jurisdiction,” which was employed by some lower courts and described as “‘assuming’ jurisdiction for the purpose of deciding the merits.”<sup>4</sup>

As examined in Part I.B, whether the Supreme Court’s judge-made prudential standing rules<sup>5</sup> are jurisdictional is much less clear.<sup>6</sup> The Court has never squarely held that prudential standing is a jurisdictional issue that must be decided before the merits in every single case.<sup>7</sup> Part I.C follows by discussing the conflicting Supreme Court dicta on the issue: first, a 1975 decision that suggested prudential standing doctrine plays a crucial role in preventing federal courts from addressing political questions and second, a 1984 decision that implied prudential standing is less important than Article III

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2. *Friends of the Earth*, 528 U.S. at 180 (“[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation.”); *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (labeling Article III standing as a “threshold question in every federal case”).
  3. 523 U.S. 83 (1998).
  4. *Id.* at 93–94 (quoting *United States v. Troescher*, 99 F.3d 933, 934 n.1 (9th Cir. 1996)); *see also* *Alliance for Env’tl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 85 (2d Cir. 2006) (observing that the Supreme Court in *Steel Co.* rejected the practice of deciding merits before resolving Article III standing).
  5. *Elk Grove Unified Sch. Dist. v. Newdow* 542 U.S. 1, 12 (2004) (discussing the nature and definition of prudential standing requirements).
  6. *See* Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 *FORDHAM L. REV.* 1241, 1266 (2011) (noting the disagreement among the federal circuits on this issue).
  7. The Supreme Court has stated that it may decide ripeness questions *sua sponte*, even if the questions are prudential. *Reno v. Catholic Soc. Servs., Inc.*, 509 US 43, 57 n.18 (1993) (“Even when a ripeness question in a particular case is prudential, we may raise it on our own motion, and ‘cannot be bound by the wishes of the parties.’” (quoting *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974))); *see also* *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) (allowing parties to waive prudential ripeness issue but stating, “We express no view as to whether, in a similar case, a federal court may consider a question of prudential ripeness on its own motion.”). But the Supreme Court has never clearly addressed whether all prudential standing issues are jurisdictional. *See* Meier, *supra* note 6, at 1266 n.155 (providing examples of when the Supreme Court has been “ambiguous” with regard to prudential standing requirements); *see also* Micah J. Revell, Comment, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 *EMORY L.J.* 221, 252–59 (2013) (arguing that recent Supreme Court cases imply that prudential standing is nonjurisdictional but acknowledging that the Court has not squarely addressed the issue).

constitutional standing. In light of the Court's conflicting direction about the definition, application, and importance of prudential standing doctrine, it is not surprising that lower federal courts have split over whether prudential standing requirements are jurisdictional or whether such barriers may be waived if a party fails to raise the issue, although six circuits since 1999 have held that prudential standing is nonjurisdictional.<sup>8</sup>

Part III discusses Supreme Court and circuit court precedents invoked by recent judicial arguments regarding the jurisdictionality of prudential standing, including the recent trend by the Supreme Court to narrow the issues considered jurisdictional. This Article generally agrees that prudential standing should not be treated as a jurisdictional issue. But the greatest weakness of the judicial arguments is that they did not thoroughly address *why* the Court has sought to narrow the range of jurisdictional issues. While the Supreme Court has clearly sought to narrow which issues are jurisdictional, that trend alone does not resolve the jurisdictionality of prudential standing.

The traditional approach to resolving whether prudential standing is jurisdictional involves examining the separation of powers principles that lie at the heart of standing doctrine.<sup>9</sup> Part IV of this Article will examine a possible separation of powers argument for treating prudential standing as nonjurisdictional. There is a plausible argument that the executive branch should be able to deliberately waive prudential standing barriers in some cases, but there are also concerns that executive waivers might in some cases be contrary to congressional intent and that judicial line drawing would be difficult.<sup>10</sup>

A comparative law perspective can help to address the core values behind whether prudential standing should be jurisdictional and why

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8. See *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 181–90 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (arguing that prudential standing should not be jurisdictional, observing that six circuits since 1999 have held that prudential standing is nonjurisdictional, and discussing the trend in the circuit courts to treat the issue as nonjurisdictional), *cert. denied*, 133 S. Ct. 2880 (2013). Other commentators have also noted this discrepancy among the courts. Meier, *supra* note 6, at 1266 n.156 (citing cases); Revell, *supra* note 7, at 224 n.16 (“The Fifth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits have all held that prudential standing is not jurisdictional and is subject to waiver. The Second, Sixth, and D.C. Circuits have held to the contrary.” (citations omitted)).
  9. See Recent Case, *Federal Civil Procedure—Standing—D.C. Circuit Raises Prudential Standing Sua Sponte to Dismiss Regulator Challenge on Jurisdictional Grounds—Grocery Manufacturers Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012), *reh'g en banc denied*, No. 10-1380 (D.C. Cir. Jan. 15, 2013), 126 HARV. L. REV. 1446, 1449–51 (2013) [hereinafter Recent Case] (summarizing judicial approaches to standing).
  10. See *id.* at 1451–53.

the court may have moved toward limiting the use of the jurisdictional label. Thus, Part V examines the adversarial traditions that underlie the Anglo-American legal system. Part V.D explains that the judicial arguments for limiting the scope of jurisdictional rules would have been more convincing had they also pointed out that judges' *sua sponte* jurisdictional decisions are generally contrary to the Anglo-American legal system's party-controlled adversarial model of legal decision making and should therefore only be mandated when absolutely necessary. This contention is supported by the Court's best explanation for making a sharp distinction between jurisdictional and nonjurisdictional rules, which invokes the traditional adversarial model and states that "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system."<sup>11</sup>

To summarize, this Article proceeds as follows. Parts I.A and I.B discuss the separate doctrines of constitutional Article III standing and prudential standing. Part I.C then examines conflicting Supreme Court dicta on whether prudential standing is as important as constitutional Article III standing. Part II follows by examining why some issues are jurisdictional and the impact of such a label. Part III discusses the precedential support invoked by recent judicial arguments regarding the jurisdictionality of prudential standing. Part IV addresses a separation of powers argument for allowing the executive branch to waive prudential standing barriers, but it raises the concerns that such waivers can be contrary to congressional intent and that judicial line drawing between appropriate and inappropriate waivers would be difficult. Part V concludes by discussing the distinction between adversarial and inquisitorial legal systems and argues that prudential standing should be treated as a nonjurisdictional issue that may be waived if the parties choose not to raise the topic. Finally, while the definition of prudential standing may be in flux after the Court's recent ruling in *Lexmark International, Inc. v. Static Control Components, Inc.*,<sup>12</sup> this Article maintains that where jurisdictionality is a close question, courts should give significant weight to the impact of mandatory *sua sponte* jurisdictional decisions on the fundamental principle of adversarial party control.

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

12. No. 12-873 (2014); *see supra* Part I.B.

## I. STANDING BASICS

### A. *Constitutional Standing*

The Constitution does not explicitly require that a plaintiff possess “standing” to file suit in federal courts.<sup>13</sup> Since 1944, however, the Supreme Court has inferred from the Constitution’s Article III limitation of judicial decisions to “Cases” and “Controversies” that federal courts must utilize standing requirements to guarantee that the plaintiff has a genuine interest and stake in a case.<sup>14</sup> Thus, federal courts have jurisdiction over a case only if at least one plaintiff can prove standing for each form of relief sought,<sup>15</sup> and a federal court must dismiss a case without deciding the merits if the plaintiff fails to establish constitutional standing.<sup>16</sup>

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13. Article III, Section 2 of the Constitution reads in part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

14. *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (stating explicitly for the first time in a Supreme Court case the Article III standing requirement); *see also* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339–41 (2006) (explaining why the Supreme Court infers that Article III’s case and controversy requirement necessitates standing limitations); Mank, *supra* note 1, at 1709–10 (providing an overview of Article III standing, including the three standing requirements). *But see* *Am. Bottom Conservancy v. U.S. Army Corps of Eng’rs*, 650 F.3d 652, 655–56 (7th Cir. 2011) (Posner, J.) (questioning whether standing is based on Article III requirements and citing academic literature); Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1036–38 (2009) (discussing the debate about whether the Constitution implicitly requires standing to sue).
15. *DaimlerChrysler*, 547 U.S. at 351–54 (“[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press.”); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”).
16. *See DaimlerChrysler*, 547 U.S. at 340–42 (propounding that plaintiffs must “carry the burden of establishing their standing under Article III”); *Friends of the Earth*, 528 U.S. at 180 (“[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation.”).



By “enforc[ing] the Constitution’s case-or-controversy requirement,” Article III standing supports two broader constitutional principles.<sup>17</sup> First, standing prevents courts from issuing advisory opinions.<sup>18</sup> Furthermore, standing requirements support separation of powers principles, defining the division between the judiciary and political branches so “that the Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’”<sup>19</sup> There is disagreement, however, regarding the extent to which the separation of powers principles limit Congress’s power to authorize standing for private citizens to sue in federal courts and challenge alleged executive branch under- or nonenforcement of statutory requirements mandated by Congress.<sup>20</sup>

For constitutional standing, the Court uses a three-part test, requiring a plaintiff to show: (1) she has “suffered an ‘injury in fact,’” which is (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical”; (2) “a causal connection between the injury and the conduct complained of” such that the injury is “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court”; and (3) “likel[i]hood, as opposed to mere[ ] speculat[ion], that the injury will be redressed by a favorable decision.”<sup>21</sup> A plaintiff has the burden of establishing all three prongs of the standing test.<sup>22</sup>

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17. *DaimlerChrysler*, 547 U.S. at 342 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)).
  18. *See id.* (requiring plaintiffs to establish Article III standing and thereby demonstrate that the constitutional law question raised is “presented in a ‘case’ or ‘controversy’”); *FEC v. Akins*, 524 U.S. 11, 24 (1998) (discussing the injury in fact requirement and noting that harm of an abstract nature “prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion”).
  19. *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).
  20. *Compare* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–78 (1992) (concluding, in an opinion authored by Justice Scalia, that Article III and Article II of the Constitution limit Congressional authority to authorize citizen suits by any person lacking a concrete injury), *with id.* at 602 (Blackmun, J., dissenting) (arguing that the “principal effect” of the majority opinion’s restrictive approach to standing was “to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates”), *and* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 496 (2008) (arguing that courts should not use standing doctrine “as a backdoor way to limit Congress’s legislative power”).
  21. *Lujan*, 504 U.S. at 560–61 (internal quotation marks and citations omitted).
  22. *DaimlerChrysler*, 547 U.S. at 342; *Lujan*, 504 U.S. at 561; LARRY W. YACKLE, *FEDERAL COURTS* 336 (3d ed. 2009).

B. *The Uncertainties of Prudential Standing*

In addition to constitutional Article III standing requirements, federal courts may impose prudential standing requirements to limit unreasonable demands on limited judicial resources or for other judicial policy reasons.<sup>23</sup> To inform whether prudential standing should be jurisdictional or nonjurisdictional, this Part explores the Court's historical and recent treatment of prudential standing and highlights some of the remaining questions and ambiguities. Specifically, this Part addresses disagreement on the Court regarding how to define and apply the principles, where to draw the line between prudential and Article III standing requirements, and whether prudential standing should even exist. The Supreme Court's prudential standing doctrine is arguably even less defined and more open to interpretation than its constitutional standing doctrine.<sup>24</sup> Thus, the uncertainty surrounding the requirements and application of prudential standing doctrine support the argument that prudential standing should be treated differently than Article III standing, that is, as nonjurisdictional.

Regarding the definition of prudential standing, the Court recently clarified some aspects while placing others, and the future definition of prudential standing, in flux. In *Elk Grove Unified School District v. Newdow*,<sup>25</sup> the Supreme Court explained that prudential standing has not been "exhaustively defined."<sup>26</sup> And up until recently the doctrine included at least three components: (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."<sup>27</sup> But with *Lexmark*

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23. See, e.g., YACKLE, *supra* note 22, at 318 (stating that prudential limitations are policy based "and may be relaxed in some circumstances").

24. See Gregory Bradford, Note, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065, 1079 (2011) (describing prudential standing doctrine as "a malleable framework").

25. 542 U.S. 1 (2004).

26. *Id.* at 12.

27. *Id.* at 12 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Professor Meier has similarly summarized the Court's previous formulation of the prudential standing doctrine:

The Court has been less precise in identifying prudential standing requirements, but the most commonly recognized are: (1) the requirement that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the

*International, Inc. v. Static Control Components, Inc.*,<sup>28</sup> a unanimous Court disposed of two of these as outside the “rubric” of prudential standing: the zone of interests test<sup>29</sup> and the ban against generalized grievances, which is now more properly considered a constitutional barrier to standing.<sup>30</sup> While it is clear that, at least for now, the ban against third party standing remains within the prudential rubric,<sup>31</sup> the structure and definition of prudential standing barriers remains to be seen. Regardless of how the Court defines prudential standing, it is noteworthy that Congress may enact legislation to override prudential limitations.<sup>32</sup>

Nevertheless, two relatively recent decisions highlight the Court’s disagreement regarding how to define and apply prudential standing principles. First, the recent *United States v. Windsor*<sup>33</sup> might indicate that prudential standing includes the requirement that the parties are truly adverse in their positions,<sup>34</sup> but the majority’s treatment of the issue was harshly criticized by the dissent as one of convenience.<sup>35</sup> *Windsor* involved a challenge to section 3 of the Defense of Marriage Act<sup>36</sup> (DOMA), which excluded same-sex marriage partners from numerous federal laws otherwise applicable to lawfully married

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suit,” *Bennett v. Spear*, 520 U.S. 154, 162 (1997); (2) the requirement that a plaintiff “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties,” *Warth v. Seldin*, 422 U.S. 490, 499 (1975); and (3) a prohibition against “‘generalized grievance[s]’ shared in a substantially equal measure by all or a large class citizens,” *id.* More recently, however, the Court has tended to articulate the prohibition against generalized grievances as deriving from Article III rather than prudential concerns.

Meier, *supra* note 6, at 1243 n.4.

28. No. 12-873 (2014).
29. *Id.*, slip op. at 8.
30. *Id.*, slip op. at 8 n.3.
31. *Id.* (noting that the restrictions against third-party standing is “harder to classify” and declining to address the issue definitively).
32. Keith B. Hall, *Federal Jurisdiction and Procedure*, 46 LOY. L. REV. 101, 123 (2000) (noting Congress’s previous acts to alter limitations on third-party standing).
33. 133 S. Ct. 2675 (2013).
34. *Id.* at 2687.
35. *Id.* at 2701 (Scalia, J., dissenting) (“Relegating a jurisdictional requirement to ‘prudential’ status is a wondrous device, enabling courts to ignore the requirement whenever they believe it ‘prudent’—which is to say, a good idea.”).
36. 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675 (2013).

spouses.<sup>37</sup> Specifically, the Court held that the United States met Article III standing because, despite its agreement with the lower court's ruling, the United States had not refunded the money to which Windsor was entitled under that ruling and thus suffered an economic injury.<sup>38</sup> Furthermore, the Court found it proper to allow arguments provided by the Bipartisan Legal Advisory Group (BLAG) supporting DOMA to satisfy the prudential concerns that the United States and Windsor were "friendly" parties.<sup>39</sup>

Second, in *Newdow*, the Court found standing lacking due to family law concerns and thus dismissed an Establishment Clause suit brought by an elementary school student's father. The suit challenged the constitutionality of a school district's policy requiring daily teacher-led recitation of the Pledge of Allegiance.<sup>40</sup> The Court cited prudential standing concerns, stating, "[I]t is improper for 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."<sup>41</sup> The child's mother, who was the custodial parent, intervened to dismiss the complaint, and there were complex issues based in California family law about the father's right to influence his daughter's religious upbringing.<sup>42</sup> Thus, as a result of these family law issues, the majority concluded that the Court should prudentially avoid a case involving family law matters defined by California domestic relations law.<sup>43</sup> But in his concurring opinion, Chief Justice Rehnquist, who was joined by Justices O'Connor and Thomas, complained that the majority had invented a novel prudential standing principle based on "ad hoc improvisations" to dismiss a troublesome case rather than developing "general principles" for the doctrine of prudential standing.<sup>44</sup>

Additionally, the line between constitutional Article III standing doctrine and prudential standing doctrine is often unclear.<sup>45</sup> Some commentators have argued that the Court's

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37. *Id.*

38. *Windsor*, 133 S. Ct. at 2686.

39. *Id.* at 2687–88 (citing other cases where the Court has entertained adversarial arguments from nonparties).

40. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 4–5 (2004).

41. *Id.* at 17–18.

42. *Id.* at 13–16.

43. *Id.* at 16–18.

44. *Id.* at 18–25 (Rehnquist, C. J., concurring).

45. See Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692–94 (1990) (arguing that the Court's distinction between prudential and constitutional standing is often arbitrary);

distinction between constitutional and prudential standing sometimes rests only on the Court's arbitrary determination to classify an issue as constitutional or prudential for its convenience without any genuine logical basis.<sup>46</sup> For example, the Court's first major case denying taxpayer standing, *Frothingham v. Mellon*,<sup>47</sup> established that an individual taxpayer generally cannot sue the government to challenge how tax dollars are appropriated because his generalized interest in government expenditures "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, [is] so remote, fluctuating and uncertain, that no basis is afforded."<sup>48</sup> In its subsequent *Flast v. Cohen*<sup>49</sup> decision, the Court acknowledged that *Frothingham* could be read to rely on either constitutional Article III or prudential standing doctrine to deny standing, but the *Flast* Court preferred to read *Frothingham* as using prudential or policy reasons to deny taxpayer standing.<sup>50</sup> After many years of uncertainty,<sup>51</sup> the

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Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1173 (2008) (arguing that the Court sometimes shifts the line between prudential and constitutional standing, especially in generalized grievances cases).

46. As Professor Chemerinsky laments:

But what makes some requirements constitutional and others prudential? For example, why are injury, causation, and redressability deemed constitutionally mandated, but the rules against third party standing and generalized grievance merely prudential? None are mentioned in the Constitution. All are created by the Court because they are viewed as prudent limits on federal judicial power. Each is of quite recent origin. So what makes some constitutional and the others prudential? The only apparent answer sounds terribly cynical: a requirement is constitutional if the Court says it is, and it is prudential if the Court says it is that. Nothing in the content of the doctrines explains their constitutional or prudential status.

Chemerinsky, *supra* note 45, at 692. *But see* Warth v. Seldin, 422 U.S. 490, 499–500 (1975) (explaining the reasoning for prudential rules against third-party standing and generalized grievances).

47. 262 U.S. 447 (1923).

48. *Id.* at 487.

49. 392 U.S. 83 (1968).

50. *Id.* at 92–94; *see also* Solimine, *supra* note 14, at 1042 (suggesting that *Flast* interpreted *Frothingham* as a prudential rather than a constitutional standing case).

51. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442–49 (2011) (discussing Article III barriers to taxpayer standing); Anne Abramowitz, Comment, *A Remedy for Every Right: What Federal Courts*

Court only recently ruled explicitly that generalized grievances are constitutional rather than prudential.<sup>52</sup>

In a law review article written when he was a judge on the D.C. Circuit, now-Justice Scalia questioned the very existence of “the so-called ‘prudential limitations of standing’ allegedly imposed by the Court itself, subject to elimination by the Court or by Congress.”<sup>53</sup> He commented, “Personally, I find this bifurcation [between prudential and constitutional standing] unsatisfying—not least because it leaves unexplained the Court’s source of authority for simply granting or denying standing as its prudence might dictate.”<sup>54</sup> Instead, then-Judge Scalia suggested that federal courts should eliminate prudential standing doctrine and hear all cases for which there is constitutional standing: “As I would prefer to view the matter, the Court must always hear the case of a litigant who asserts the violation of a legal right.”<sup>55</sup>

As a member of the Supreme Court, Justice Scalia has not directly called for the abolition of prudential standing. But in cases where the line between constitutional and prudential standing is debatable, he appears to prefer to classify issues as constitutional standing rather than prudential.<sup>56</sup> In *Hein v. Freedom from Religion Foundation, Inc.*,<sup>57</sup> Justice Scalia argued in his concurring opinion, which was joined by Justice Thomas, that the Court should overrule *Flast* and squarely hold that the bar against taxpayer standing is constitutional and not just prudential.<sup>58</sup> Thus, Justice Scalia

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*Can Learn From California’s Taxpayer Standing*, 98 CALIF. L. REV. 1595, 1605–07 (2010) (providing various scholars’ views on the issue).

52. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, No. 12-873, slip op. at 8 n.3 (2014).
53. Antonin Scalia, Essay, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983). See generally Bradford C. Mank, *Judge Posner’s “Practical” Theory of Standing: Closer to Justice Breyer’s Approach to Standing Than to Justice Scalia’s*, 50 HOUS. L. REV. 71, 106–07 (2012) (discussing Justice Scalia’s 1983 criticism of prudential standing and comparing it to Judge Posner’s more discretionary approach).
54. Scalia, *supra* note 53, at 885.
55. *Id.*
56. See Mank, *supra* note 53, at 107–08 (analyzing Justice Scalia’s view of standing in *Lujan*).
57. 551 U.S. 587 (2007).
58. See *id.* at 633–37, (Scalia, J., concurring) (“*Flast* was explicitly and erroneously premised on the idea that Article III standing does not perform a crucial separation-of-powers function.”); see also *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449–50 (2011) (Scalia, J., concurring) (reiterating his view from *Hein* that the Court should overrule *Flast* and reject taxpayer standing on constitutional

effectively suggested that the Supreme Court can clarify or reclassify an issue as a constitutional standing issue, and not a prudential standing question, if the Court believes the issue goes to fundamental federal jurisdiction. This, interestingly enough, is exactly what Justice Scalia did in *Lexmark*. Writing for a unanimous court, Justice Scalia stated clearly that generalized grievances, although once considered under prudential concerns, are “barred for constitutional reasons, not ‘prudential’ ones.”<sup>59</sup>

As discussed further in Parts I.C and V.D, the uncertainties of prudential standing counsel against treating it as jurisdictional. If it addresses the split in the lower courts about the jurisdictionality of prudential standing, the Court should also reexamine the broader question of how it defines and applies prudential standing requirements.

*C. Conflicting Supreme Court Dicta on Whether Prudential Standing Is as Important as Article III Standing*

The Supreme Court has never directly decided whether prudential standing is jurisdictional. The Court has, however, compared, at least in dicta, the importance of prudential standing to that of Article III standing. This Part discusses the relative importance of prudential standing because it can inform whether prudential standing should be treated the same as Article III standing, that is, jurisdictional. If the two doctrines are of the same importance, the argument to treat prudential standing differently weakens. But, as this Part concludes, the Court seems to imply that prudential standing is not of equal importance relative to Article III standing requirements, thus supporting the argument to treat prudential standing as nonjurisdictional in most cases.

In its 1975 decision *Warth v. Seldin*,<sup>60</sup> the Court suggested that prudential standing doctrine is very important to constraining federal courts from addressing political questions better left to the political branches, but it did not directly decide the jurisdictionality of prudential standing. Specifically, the court labeled prudential limitations as “closely related to Art. III concerns” and noted that “without such limitations . . . 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

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grounds); Solimine, *supra* note 14, at 1045 (summarizing Justice Scalia’s position in his *Flast* concurrence).

59. *Lexmark Int’l, Inc. v Static Control Components, Inc.*, No. 12-873, slip op. at 8 n.3 (2014).

60. 422 U.S. 490 (1975).

protect individual rights.”<sup>61</sup> In *Thompson v. County of Franklin*,<sup>62</sup> the Second Circuit interpreted the language in *Warth* as concluding that prudential standing concerned the court’s subject matter jurisdiction, thus meaning that the court had a duty to sua sponte examine the issue despite the failure of the parties to raise the question.<sup>63</sup>

On the other hand, in its 1984 decision *Allen v. Wright*,<sup>64</sup> the Supreme Court declared that Article III standing, but not prudential standing, is “perhaps the most important” of the case or controversy doctrines, including “mootness, ripeness, political question, and the like.”<sup>65</sup> The *Allen* Court suggested that Article III standing—as a “core component” of standing “derived directly from the Constitution”—is more important than prudential standing doctrines.<sup>66</sup> In *Alliance for Environmental Renewal, Inc. v. Pyramid Crossgates Co.*,<sup>67</sup> the Second Circuit interpreted *Allen* as treating Article III standing as “[m]ore fundamental than judicially imposed, prudential limits on the exercise of federal jurisdiction.”<sup>68</sup> While not

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61. *Id.* at 500.

62. 15 F.3d 245 (2d Cir. 1994).

63. *Id.* at 248–49 (noting the “jurisdictional nature of the standing inquiry” and indicating that a court’s “obligation to examine subject matter jurisdiction” includes “the prudential rules of standing that, apart from Art. III’s minimum requirements, serve to limit the role of the courts in resolving public disputes” (quoting *Warth*, 422 U.S. at 500)).

64. 468 U.S. 737 (1984).

65. *Id.* at 750; *see also* *Alliance for Envntl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 85 (2d Cir. 2006) (discussing the Supreme Court’s emphasis in *Allen* that Article III standing is the most important of the case or controversy doctrines).

66. *Allen*, 468 U.S. at 751 (“Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”) (citations omitted); *see also* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (“[The Article III requirement] states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called ‘prudential’ considerations.”); *Alliance for Envntl. Renewal*, 436 F.3d at 85 (discussing the Supreme Court’s suggestion in *Allen* that Article III standing is more important than prudential standing).

67. 436 F.3d 82 (2d Cir. 2006).

68. *Id.* at 85.



directly addressing the jurisdictionality of prudential standing, the *Allen* Court's suggestion that prudential standing is less important than Article III standing supports the idea that prudential standing could be treated as nonjurisdictional since it is less important than the core jurisdictional questions of Article III standing.

In light of the Court's conflicting dicta in *Warth* and *Allen* about whether prudential standing doctrine is as crucial to federal courts as Article III standing principles, it is understandable that lower federal courts are split regarding the jurisdictionality of prudential standing.<sup>69</sup> A recent Supreme Court case that involved prudential standing, *United States v. Windsor*,<sup>70</sup> however, did not provide any guidance to lower federal courts on the issue. Justice Kennedy's majority opinion drew sharp distinctions between prudential standing and Article III standing, stating that prudential standing rules are "more flexible" than the jurisdictional requirements of Article III standing.<sup>71</sup> Further distinguishing the two standing doctrines, Justice Kennedy reasoned that the general principle that prevailing parties cannot appeal a decision—which would normally prevent the Supreme Court from hearing the case because the executive branch agreed with lower court decisions favoring Ms. Windsor and invalidating DOMA—was a mere prudential rule to which the Court could apply an established exception because the principle "does not have its source in the jurisdictional limitations of Art[icle] III."<sup>72</sup>

In his dissenting opinion, which was joined by Chief Justice Roberts and Justice Thomas, Justice Scalia justifiably complained that the majority's act of "[r]elegating a jurisdictional requirement to "prudential" status is a wondrous device, enabling courts to ignore the requirement whenever they believe it "prudent"—which is to say, a good idea."<sup>73</sup> The *Windsor* Court did not specifically address the jurisdictionality of prudential standing, but it implied that the Court could treat its rules as nonjurisdictional at its convenience. It remains to be seen whether the Court will apply *Windsor*'s lax approach to prudential standing in cases where the Court is less eager to ignore or elide standing difficulties in a quest to address the merits of a case.

Thus, even after *Windsor*, the questions and ambiguity stemming from the *Warth* and *Allen* dicta remain. Judge Posner and a number of scholars have argued that the Court's standing doctrine is so confused that the whole doctrine should be either abolished or radically reformed, but it is more likely that the Court will modify the

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69. See *supra* Part III.B.

70. 133 S. Ct. 2675 (2013).

71. *Id.* at 2686.

72. *Id.* at 2687.

73. *Id.* at 2701 (Scalia, J., dissenting).

doctrine around the edges.<sup>74</sup> If it eventually addresses the jurisdictionality of prudential standing, the Court should take at least a modest step toward clarifying its complex and confusing standing doctrine. For the purposes of this Article, however, it is noteworthy that *Warth* preceded *Allen* and, as discussed in Parts III.C and V.D, more recent Court decisions, while not explicitly overruling *Warth*, have clearly sought to narrow the scope of which issues are jurisdictional. Thus, the *Allen* Court's suggestion that Article III standing requirements outweigh prudential standing requirements in terms of importance supports this Article's argument that prudential standing should be treated differently, that is, as nonjurisdictional.

## II. WHY ARE SOME LEGAL ISSUES JURISDICTIONAL?

The Supreme Court has interpreted the "Cases" and "Controversies" language in Article III of the Constitution to mean

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74. While many scholars and Judge Posner have agreed that the Supreme Court's current Article III standing doctrine is hopelessly flawed and should be drastically changed or abandoned, they differ on how to change that doctrine. *See, e.g.*, *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 655–56 (7th Cir. 2011) (Posner, J.) (questioning the Supreme Court's Article III doctrine of standing in light of the many scholarly criticisms of the doctrine and instead arguing that the "solidest grounds" for the doctrine of standing are "practical"); 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.1 (3d ed. 2008) ("All of these [standing] concepts, both constitutional and prudential, are slippery. Difficult tasks of judgment are required, invoking an elaboration of competing judicial philosophies that leads often to hot dispute and sometimes to disingenuous manipulation."); Daniel A. Farber, *A Place-Based Theory of Standing*, 55 *UCLA L. REV.* 1505, 1543–46 (2008) (questioning the historical evidence and constitutional basis for modern standing requirements); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 *NOTRE DAME L. REV.* 447, 512–17 (1994) (finding a lack of historical support for contemporary standing requirements); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *STAN. L. REV.* 1371, 1376 n.26, 1418–25 (1988) (pointing to the lack of discussion about standing in Felix Frankfurter's casebook, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* 194–363 (Felix Frankfurter & J. Forrester Davison eds., 1932) and tracing the early development of the concept in the Court).

Nevertheless, like Justice Breyer, this author believes it would be more fruitful to adapt and liberalize current standing precedent and doctrine through a "realistic threat" test than to completely scrap existing doctrine and establish a new system. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 503–10 (2009) (Breyer, J., dissenting) (arguing that Supreme Court precedent establishes the realistic-threat standing test, which should not be more stringent than the word realistic implies); Mank, *supra* note 53, at 115–19 (discussing favorably Justice Breyer's realistic approach to liberalizing current standing precedent and doctrine).

that Article III courts are courts of limited jurisdiction, empowered only to hear certain kinds of cases for which they have jurisdiction and required to dismiss all cases in which there is not federal jurisdiction.<sup>75</sup> The Supreme Court has defined jurisdiction as going to the essential “authority” of federal courts to decide a case in light of the separation of powers principles in the Constitution.<sup>76</sup> Because defining federal jurisdiction is crucial to deciding which cases a federal court can consider, federal courts have established rigid distinctions between jurisdictional and nonjurisdictional issues.<sup>77</sup> Because jurisdiction is considered absolutely mandatory for the authority of federal courts, a federal court must raise the issue *sua sponte* on appeal to dismiss a case even if the parties have not raised the issue.<sup>78</sup>

On the other hand, nonjurisdictional issues are generally left in the control of the parties and may even be ignored.<sup>79</sup> As Professor Dodson has observed, “[N]onjurisdictional rules usually are defined as having all the inverse effects of jurisdictionality—they can be waived, forfeited, or consented to, and they are subject to equitable exceptions, estoppel, and judicial discretion.”<sup>80</sup> A federal court must *sua sponte* dismiss a case for jurisdictional reasons, but it may freely ignore a nonjurisdictional issue if a party does not challenge the issue within defined time limits.<sup>81</sup>

But labeling a question as jurisdictional or nonjurisdictional does not mean that federal courts will automatically hear a case if the

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75. *See* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339–54 (2006) (explaining why the Supreme Court infers that Article III’s case and controversy requirement necessitates standing limitations and demands a plaintiff prove jurisdiction for each form of relief sought); *supra* Part I.A.
76. *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1445 (2011).
77. *See* Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 4 (1994) (“In modern Anglo-American legal doctrine, legal issues are either ‘jurisdictional’ or ‘non-jurisdictional.’”); Dodson, *supra* note 76, at 1444 (“The usual conceptualization of jurisdictionality and nonjurisdictionality is that of separate spheres and mutually opposing characteristics—they are antitheses of each other.”).
78. Dodson, *supra* note 76, at 1445.
79. *Id.*
80. *Id.*
81. *See* *Day v. McDonough*, 547 U.S. 198, 205 (2006) (“A statute of limitations defense . . . is not ‘jurisdictional,’ hence courts are under no obligation to raise the time bar *sua sponte*.” (emphasis omitted)); *see also id.* at 213 (Scalia, J., dissenting) (“We have repeatedly stated that the enactment of time-limitation periods such as that in §2244(d), without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture.”); Dodson, *supra* note 76, at 1446–47 (noting the use of a jurisdictional appeal time limit in a murder case).

parties satisfy jurisdictional requirements; that federal courts lack the power to raise nonjurisdictional issues sua sponte; or that federal courts lack discretion in determining whether the facts of the case satisfy the particular requirement. First, even though the Supreme Court has declared that jurisdiction is a “virtually unflagging obligation,”<sup>82</sup> federal courts have developed several doctrines, most notably abstention doctrines, that allow a federal court to decline jurisdiction, especially if a case may proceed instead in a state court or administrative hearing.<sup>83</sup> Notably, for the purposes of this Article, some have argued that prudential standing doctrine is a discretionary principle that federal courts can invoke to avoid federal jurisdiction, even if they have the constitutional authority to hear the case pursuant to Article III.<sup>84</sup> Yet despite scholarly criticisms of judicially created discretionary exceptions to federal jurisdiction,<sup>85</sup> doctrines

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82. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”).
83. *See* *Dodson*, *supra* note 76, at 1456–57 (“[Courts exercise] judicially created discretion [in order] to repeatedly decline jurisdiction. . . . [E]ven if the jurisdiction is proper, and despite the common rhetoric that jurisdiction is not subject to court control.”).
84. *See id.* (observing that prudential standing is an example of a discretionary exception to the rule that federal courts have a duty to exercise federal jurisdiction). *But see* *Warth v. Seldin*, 422 U.S. 490, 501–02 (1975) (discussing prudential standing as being on par with mandatory, jurisdictional Article III standing in “serv[ing] to limit the role of the courts in resolving public disputes”).
85. A number of scholars have criticized or questioned federal courts for using abstention and other doctrines to avoid asserting federal jurisdiction. Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971, 990 (2009) (discussing abstention in the context of jurisdictional obligation); *Dodson*, *supra* note 76, at 1456–57 (observing that the exercise of federal jurisdiction is subject to discretionary doctrines such as abstention); Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 103–04 (1986) (criticizing the abstention doctrine as inconsistent with the duty of federal courts to exercise jurisdiction and for being “an unprincipled means of serving the convenience of the federal courts”); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 71–75 (1984) (citing separation of powers principles and questioning the authority of federal courts to decline jurisdiction under the abstention doctrine). *But see* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (“[S]uggestions of an overriding obligation, subject only and at most to a few narrowly drawn exceptions, are far too grudging in their recognition of judicial discretion in matters of jurisdiction.”). *See generally* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1061–62 & n.4 (Thomson Reuters/Foundation

such as prudential standing and abstention remain valid.<sup>86</sup>

Second, even though an issue may be deemed nonjurisdictional and apparently left to the parties—without a duty on the court’s part to consider the issue before the merits—federal courts may exercise discretion and raise the issue *sua sponte* where appropriate. Whether this discretionary authority already exists for prudential standing, as Judge Silberman has argued,<sup>87</sup> or should exist, as others have argued,<sup>88</sup> is an issue that remains to be addressed by the Court. Both arguments, however, point to the fact that the Court permits other seemingly nonjurisdictional issues, including prudential ripeness, to be raised *sua sponte* by courts.<sup>89</sup>

Finally, while jurisdiction may be fundamental for the proper exercise of federal-court authority over a case, federal courts have some discretion regarding “the manner in which jurisdictional issues are . . . resolved [and] the degree to which a court must be persuaded that jurisdiction exists.”<sup>90</sup> This discretion stems from the fact that “[m]any questions of jurisdiction turn on issues of fact, which, in turn, present evidentiary questions that can admit of a variety of rational solutions.”<sup>91</sup>

Thus, while the distinctions between jurisdictional and nonjurisdictional questions—including the different ramifications that flow from each categorization—remain highly relevant to this Article’s argument about the jurisdictionality of prudential standing, the story does not end there. This Article argues that prudential standing should be considered nonjurisdictional. But, even treating prudential

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Press 6th ed. 2009) (contrasting various scholars’ views on whether federal courts should exercise discretionary jurisdiction).

86. See Dodson, *supra* note 76, at 1456–57.

87. *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 678 (D.C. Cir. 2013) (Silberman, J., concurring) (citing two Supreme Court cases and the 1994 D.C. Circuit case that established prudential standing as jurisdictional in that circuit).

88. William James Goodling, Comment, *Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing*, 88 WASH. L. REV. 1153, 1179–86 (2013).

89. *Id.* at 1183 (discussing prudential ripeness, *Pullman* abstention, and state-remedy exhaustion for habeas corpus petitioners); *Ass’n of Battery Recyclers*, 716 F.3d at 678 n.6 (“Prudential standing might therefore stand on the same footing as prudential ripeness.”); see also *supra* note 7 and accompanying text (discussing prudential ripeness).

90. Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1896–97 (2007).

91. *Id.*

standing as nonjurisdictional, courts could still exercise discretion and invoke the doctrine's requirements *sua sponte* to decline jurisdiction.<sup>92</sup>

### III. PRECEDENTIAL SUPPORT INVOKED BY RECENT JUDICIAL OPINIONS ADDRESSING THE JURISDICTIONALITY OF PRUDENTIAL STANDING

As Parts I.B and I.C explained, the Supreme Court has never precisely defined the scope and nature of the prudential standing doctrine. Accordingly, it is not surprising that federal courts are divided regarding whether prudential standing is jurisdictional.<sup>93</sup> Two judges in particular have addressed in detail whether prudential standing is or may be jurisdictional—Judges Kavanaugh<sup>94</sup> and Silberman<sup>95</sup> of the D.C. Circuit—although both of the underlying cases involved statutory zone of interests questions,<sup>96</sup> which are no longer considered prudential standing.<sup>97</sup> Despite this limitation, both judges' arguments invoked precedents that still apply to prudential standing generally. This Part discusses the support relied on by Judges Kavanaugh and Silberman, including the recent Supreme Court trend to narrow which issues are jurisdictional. Ultimately, however, this Article proposes that the argument for treating prudential standing as nonjurisdictional can be strengthened by considering *why* the Court has recently engaged in such narrowing.<sup>98</sup>

#### A. *Supreme Court Precedent and the Recent Trend to Narrow Jurisdictional Issues*

Judges Kavanaugh and Silberman both pointed to recent Supreme Court cases indicating that the issues considered jurisdictional should be limited. Additionally, Judge Kavanaugh argued that a Court

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92. Although not central to this Article's argument, the same principle of adversarial-party-controlled litigation that supports considering prudential standing nonjurisdictional also supports the notion that courts should use their discretion judiciously, raising prudential standing issues *sua sponte* only after considering the impact of such a move as an exception to the adversarial system. *See infra* Part V.
93. *See infra* Part III.B (discussing conflicting court of appeals decisions on the jurisdictionality of prudential standing).
94. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 180 (D.C. Cir. 2012) (Kavanaugh, J., dissenting), *cert. denied*, 133 S. Ct. 2880 (2013).
95. *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) (Silberman, J., concurring).
96. *Id.* (per curium); *Grocery Mfrs.*, 693 F.3d at 179 (majority opinion).
97. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No. 12-873, slip op. at 8 (2014).
98. *See infra* Part V.

statement specific to prudential standing suggests that the issue should not be considered jurisdictional.

Regarding the Court's recent trend to narrow issues that are jurisdictional, Judge Kavanaugh provided a more in-depth analysis than Judge Silberman. But both of these arguments are limited because the cases cited as constituting the Supreme Court's recent trend all involve statutory zone of interests questions,<sup>99</sup> which are no longer considered prudential standing.<sup>100</sup> Nevertheless, it is worthwhile to explore the arguments to the extent that Judges Kavanaugh and Silberman interpreted the Supreme Court cases as applicable to prudential standing generally. Moreover, lending support to the generalizability of the trend beyond statutory zone of interests questions, at least one court has found the trend persuasive in finding a comity issue nonjurisdictional.<sup>101</sup>

In his dissenting opinion, Judge Kavanaugh first argued more generally that in the last several years, the Supreme Court has been "tighten[ing]" the definition of what constitutes a genuine jurisdictional issue.<sup>102</sup> In his view, the Court has, in recent years, placed "the terminology of jurisdiction . . . under a microscope."<sup>103</sup> More importantly, Judge Kavanaugh opined that "the Court has not liked what it has observed—namely, sloppy and profligate use of the term 'jurisdiction' by lower courts and, at times in the past, the Supreme Court itself."<sup>104</sup> Finally, Judge Kavanaugh cited several cases to support his argument that "recent Supreme Court cases have significantly tightened and focused the analysis governing when a statutory requirement is jurisdictional."<sup>105</sup> Although Judge Kavanaugh

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99. See *infra* notes 105, 111 (listing the Supreme Court cases cited by Judges Kavanaugh and Silberman).

100. *Lexmark*, slip op. at 8.

101. *Capra v. Cook Cnty. Bd. of Review*, 733 F.3d 705, 713 n.6 (7th Cir. 2013) *cert. denied*. 134 S.Ct. 1027 (2014).

102. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 184 (D.C. Cir. 2012) (Kavanaugh, J., dissenting), *cert. denied*, 133 S. Ct. 2880 (2013).

103. *Id.* at 183.

104. *Id.*

105. *Id.* at 184. The cited cases include *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012); *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202–02 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Bowles v. Russell*, 551 U.S. 205, 213 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); and *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). *Grocery Mfrs.*, 693 F.3d at 184. *But see generally* Erin Morrow Hawley, *Jurisdictional Quandaries: A Way Forward* 1–4 (Univ. of Mo. Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2012-37, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2188101](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188101) (noting the recent "sea-change" in the Supreme Court's treatment of

concluded that construing prudential standing as nonjurisdictional would be consistent with the Court's recent trend, his conclusion's generalizability is limited because he equated prudential standing and the aggrieved party provision of the Administrative Procedure Act<sup>106</sup> (APA) and thus analyzed a zone of interests question rather than prudential standing generally.<sup>107</sup>

Judge Silberman, on the other hand, made clear in his concurring opinion that statutory zone of interests questions were distinct from other prudential standing issues.<sup>108</sup> He did, however, also make a more general statement pertaining to the Supreme Court's recent trend to narrow the issues considered jurisdictional.<sup>109</sup> Specifically, Judge Silberman noted that the Supreme Court has recently "appear[ed] to limit jurisdictional issues (besides Article III) to subject-matter and personal jurisdiction."<sup>110</sup> To support his statement, Judge Silberman cited two cases that were also cited by Judge Kavanaugh.<sup>111</sup> Notably, however, Judge Silberman stressed that the Court's statements were made in dicta, and that the Court has

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"preconditions to suit" as nonjurisdictional and arguing that such treatment is problematic).

106. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

107. *Grocery Mfrs*, 693 F.3d at 182. Judge Kavanaugh explained that under the APA, parties must be "aggrieved" by the [complained of] agency action" and that this requirement "is referred to (somewhat loosely and imprecisely) as prudential standing." *Id.* (citing 5 U.S.C. § 702 (2012)). Stated another way, Judge Kavanaugh attributed the APA provision as the source from which prudential standing, "an aspect of the cause of action[,] . . . stems." *Id.* at 183 ("Prudential standing concerns who may sue; it is an aspect of the cause of action that stems from the Administrative Procedure Act's limiting its cause of action to 'aggrieved' parties." (citing *Bond v. United States*, 131 S. Ct. 2355, 2362-63 (2011); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 & n.2 (1998))). Thus, to assess the jurisdictionality of prudential standing, Judge Kavanaugh analyzed the jurisdictionality of the APA's aggrieved party requirement.

108. *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675-76 (D.C. Cir. 2013) (Silberman, J., concurring) ("[T]he term 'prudential standing' is a misnomer—at least in the context of whether a plaintiff . . . is within the 'zone of interests' . . ."). A unanimous Supreme Court recently endorsed Judge Silberman's view when it excluded the zone of interests test from prudential standing. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No. 12-873, slip op. at 8 (2014).

109. *Ass'n of Battery Recyclers*, 716 F.3d at 677.

110. *Id.*

111. *Compare id.* (citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-61 (2010); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)), with *supra* note 105 (listing the Supreme Court cases cited by Judge Kavanaugh).



not ruled specifically as to the jurisdictionality of prudential standing.<sup>112</sup>

Looking to specific language rather than the Supreme Court's recent trend to narrow the issues considered jurisdictional, Judge Kavanaugh argued that the Supreme Court, although not directly addressing the issue, had suggested that prudential standing is not jurisdictional.<sup>113</sup> For this proposition, Judge Kavanaugh cited a passage from *Tenet v. Doe*,<sup>114</sup> where the Court "noted that prudential standing is a 'threshold question' that 'may be resolved *before addressing jurisdiction.*'"<sup>115</sup> Furthermore, while Judge Kavanaugh acknowledged that the "snippet alone may be too thin a reed on which to base a definitive conclusion," he contended "it certainly is consistent with the thrust of the recent Supreme Court precedents on jurisdiction and points us further in the direction of saying that prudential standing is not jurisdictional."<sup>116</sup> Thus, Judge Kavanaugh proposed that the Court's suggestion in *Tenet*, while not binding, should be adopted as a new rule in light of the Court's recent trend of narrowing the definition of jurisdictional issues.

*B. Circuit Courts Split but Trend Points Toward Prudential Standing Being Nonjurisdictional*

Judges Kavanaugh and Silberman also looked to circuit court precedents, including some from the D.C. Circuit, to support their arguments. Unlike the cases cited as part of the Supreme Court's recent trend—all of which addressed statutory zone of interests questions<sup>117</sup>—many of the cited circuit court cases dealt with issues other than the zone of interests test, such as the prudential ban on third-party standing.<sup>118</sup> Thus, these cases may provide more direct support for the argument that prudential standing is not jurisdictional. Finally, because Judges Kavanaugh's and Silberman's

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112. *Ass'n of Battery Recyclers*, 716 F.3d at 677. The Court has, however, recently noted the jurisdictionality of the zone of interests test and the ban against generalized grievances, both of which were previously considered prudential standing. *Lexmark*, slip op. at 8 n.3, 9 n.4 (holding that generalized grievances is a constitutional barrier, and thus jurisdictional, and that statutory standing is not jurisdictional, despite past indications and treatment by the Court).

113. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 184 (D.C. Cir. 2012) (Kavanaugh, J., dissenting), *cert. denied*, 133 S. Ct. 2880 (2013).

114. 544 U.S. 1 (2005).

115. *Grocery Mfrs.*, 693 F.3d at 184 (quoting *Tenet*, 544 U.S. at 6 n.4).

116. *Id.*

117. See *supra* text accompanying notes 96–97 and notes 105, 111 (listing the Supreme Court cases cited by Judges Kavanaugh and Silberman).

118. See *infra* note 121 for a list of cases cited by Judge Kavanaugh.

arguments differ slightly, their reliance on the circuit precedents also varies.

Judge Kavanaugh sought to persuade the three-judge panel to part from previous D.C. Circuit precedent holding prudential standing is jurisdictional.<sup>119</sup> To support this proposition, Judge Kavanaugh argued more broadly that since 1999, six federal circuits had concluded that prudential standing is not jurisdictional and that these decisions coincided with and reflected the Supreme Court's intensified focus on the proper use of the term jurisdiction.<sup>120</sup> Notably, although these six circuit decisions state that prudential standing is not jurisdictional, they do not provide the full substantive analysis found in Judge Kavanaugh's dissent.<sup>121</sup>

Specific to the D.C. Circuit, Judge Kavanaugh claimed that "our more recent cases have *indicated* that prudential standing is not jurisdictional,"<sup>122</sup> but he acknowledged that some older cases had

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119. Judge Tatel—who wrote a separate concurrence and agreed with Judge Kavanaugh that prudential standing is nonjurisdictional—found that the court, absent clear conflict with Supreme Court precedent, was bound to follow D.C. Circuit precedent that prudential standing is jurisdictional. *Grocery Mfrs.*, 693 F.3d at 180 (Tatel, J., concurring). Judge Kavanaugh disagreed, stating the court's "duty" was "to obey the clear charge given by the Supreme Court rather than to cling to a stale slice of our precedent—precedent which not only has been undermined by subsequent Supreme Court decisions but also has not been followed by our Court in several recent cases." *Id.* at 185 n.4 (Kavanaugh, J., dissenting).

120. *Id.* at 184–85; Recent Case, *supra* note 9, at 1449.

121. Judge Kavanaugh's list of six circuit decisions is as follows: *Board of Mississippi Levee Commissioners v. EPA*, 674 F.3d 409, 417 (5th Cir. 2012); *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008); *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008); *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007); *Gilda Industries, Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006); and *American Iron & Steel Institute v. OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999). *Grocery Mfrs.*, 693 F.3d at 184–86.

122. *Grocery Mfrs.*, 693 F.3d at 185 n.4 (emphasis added); see also *Oryszak v. Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009) (Ginsburg, J., concurring) ("That the court may in its discretion address a threshold question before establishing that it has jurisdiction does not render the question jurisdictional nor, significantly, does it mean the court must address that question at the outset of the case."); *Am. Chiropractic Ass'n v. Leavitt*, 431 F.3d 812, 816 (D.C. Cir. 2005) (contrasting "the less-than-demanding zone-of-interest test" with "[t]he jurisdictional question"); *Toca Producers v. FERC*, 411 F.3d 262, 265 n.\* (D.C. Cir. 2005) ("[T]he prudential standing doctrine, like the abstention doctrine, 'represents the sort of "threshold question" [that] may be resolved before addressing jurisdiction'" (quoting *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005))); *Amgen Inc. v. Smith*, 357 F.3d 103, 111 (D.C. Cir. 2004) ("That Amgen has prudential standing does not resolve this appeal,

“said that prudential standing was jurisdictional.”<sup>123</sup> Judge Kavanaugh’s word choice, however, is revealing: by using the weak word “indicated,” Judge Kavanaugh impliedly conceded fellow panel member Judge Tatel’s point that the statements in the more recent cases constituted dicta that were in “tension” with, but never actually overruled, the earlier cases.<sup>124</sup> Nevertheless, Judge Kavanaugh argued that the older cases should be read not in isolation but in the context of recent Supreme Court precedent. And such a reading suggested that “[t]o the extent older cases assumed prudential standing to be jurisdictional, that assumption is no longer correct after [recent] Supreme Court cases.”<sup>125</sup>

Judge Silberman, on the other hand, argued that circuit courts’ differing treatment of statutory zone of interests questions and other prudential issues, such as the ban against third party standing, and the lack of clarity from the Court counsel against parting from the D.C. Circuit’s precedent treating prudential standing as jurisdictional until the Court provides clear guidance.<sup>126</sup> Thus, Judge Silberman distinguished most circuit court decisions that had held that prudential standing is nonjurisdictional by arguing that they “concerned only third-party standing, which really is a judge-made concept.”<sup>127</sup> He further argued that the two decisions holding that the zone of interests test is nonjurisdictional had failed to “recognize or discuss any difference between statutory standing and prudential standing generally.”<sup>128</sup>

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however. Another threshold issue is whether the court has jurisdiction to entertain Amgen’s complaint.”).

123. *Grocery Mfrs.*, 693 F.3d at 185 n.4 (citing *Animal Legal Def. Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994)).
124. *Compare id.* at 180 (Tatel, J., concurring) (“[P]assing statements by subsequent panels may be in some tension with these earlier decisions.”), *with id.* at 185 n.4 (Kavanaugh, J., dissenting) (“[O]ur more recent cases have *indicated* that prudential standing is not jurisdictional.”) (emphasis added)).
125. *Id.* at 185 n.4 (Kavanaugh, J., dissenting).
126. *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 677–78 (D.C. Cir. 2013) (Silberman, J., concurring).
127. *Id.* (citing four cases from the Fifth, Seventh, and Ninth Circuits). Three of the cases cited by Judge Silberman were also cited by Judge Kavanaugh. *See id.*; *supra* note 121 (listing the circuit court cases cited by Judge Kavanaugh). Additionally, Judge Silberman cited *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993). *Ass’n of Battery Recyclers*, 716 F.3d at 677.
128. *Id.* (citing *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007); *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006)). These two cases were also cited by Judge Kavanaugh. *See supra* note 121 (listing the circuit court cases cited by Judge Kavanaugh).

In conclusion, although both Judges Kavanaugh's and Silberman's arguments arise from cases involving the statutory zone of interests test, which is no longer considered prudential standing, their analyses remain relevant to the extent that they consider the impact of Supreme Court and circuit court precedents on the jurisdictionality of prudential standing generally. But, as discussed in Part V, their arguments can be further strengthened by considering why the Supreme Court has sought to narrow issues that are jurisdictional.

#### IV. SEPARATION OF POWERS ARGUMENT FOR TREATING PRUDENTIAL STANDING AS NONJURISDICTIONAL BY ALLOWING THE EXECUTIVE BRANCH TO WAIVE THE ISSUE

Part I.A demonstrated that separation of powers principles are central to standing doctrine.<sup>129</sup> Accordingly, separation of powers principles should be the key to resolving the jurisdictionality of prudential standing. This Part examines a possible separation of powers argument for treating prudential standing as nonjurisdictional.<sup>130</sup> There is a plausible argument that the executive branch should be able to waive prudential standing barriers in some cases—thus treating prudential standing as a discretionary, nonjurisdictional issue because jurisdiction cannot be consented to by waiver<sup>131</sup>—but there are also concerns that executive waivers might in some cases be contrary to congressional intent.<sup>132</sup> Ultimately, separation of powers principles are important in understanding whether prudential standing should be considered jurisdictional, but there may often be conflicting arguments about the application of those principles in a particular case. Given this weakness, this Article posits that, consistent with traditional adversarial system principles, the parties, rather than the executive, should be able to waive prudential standing.

A *Harvard Law Review* student commentary addressing *Grocery Manufacturers Association v. EPA*<sup>133</sup> argues for executive branch

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129. For additional analysis of the separation of powers principle's relationship to standing, see Recent Case, *supra* note 9, at 1449–53.

130. Not addressed in detail in this Article but worthy of mention is a recent student comment arguing prudential standing should be nonjurisdictional because, among other things, “only the Constitution and Congress hold the power to set federal courts’ jurisdiction.” Goodling, *supra* note 88, at 1156.

131. *People’s Bank v. Calhoun*, 102 U.S. 256, 260–61 (1880) (“It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.”).

132. Recent Case, *supra* note 9, at 1448–53.

133. 693 F.3d 169, 184 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2880 (2013).

waiver of prudential standing in certain circumstances.<sup>134</sup> The commentary notes that “the courts should not simply defer to the executive;” rather courts should—“consistent with the separation of powers principles underlying prudential standing”—“consider whether an executive branch decision to concede prudential standing respects the proper roles of the three branches, or instead is an attempt to advance the executive’s own priorities at the expense of the other branches.”<sup>135</sup> After observing that *Grocery Manufacturers* leaves the federal circuits divided on an important question that should be resolved more thoroughly by the D.C. Circuit or the Supreme Court, the commentary criticizes the majority for imposing a “mandatory” jurisdictional rule for prudential standing that precludes the executive branch from waiving prudential standing barriers, even when such a waiver would advance separation of powers principles.<sup>136</sup>

The commentary presents two strong separation of powers reasons for allowing the executive branch to waive prudential standing barriers, but it acknowledges a third situation where such a waiver might undermine those principles if the executive is taking the action to contravene congressional intent.<sup>137</sup> First, under separation of powers principles, courts should not interfere with the executive branch’s decision to waive prudential standing if the executive is simply seeking to resolve a disputed regulatory issue as quickly as possible by allowing a case to be resolved on the merits rather than be dismissed for prudential standing concerns.<sup>138</sup> The executive branch may legitimately believe that both the government and regulatory parties are better served by a clear decision on the merits than a procedural victory on prudential standing that delays the resolution of an important merits question.<sup>139</sup> Moreover, a swift resolution of a merits question is generally consistent with Congress’s legislative purposes because it promotes legal certainty.<sup>140</sup> In *Grocery Manufacturers*, it would have been reasonable for the government to seek a merits determination on the partial waiver by declining to raise prudential standing barriers rather than simply delay the resolution of that important question through a dismissal based on procedural prudential standing issues.<sup>141</sup> Second, and relatedly, because of the

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134. Recent Case, *supra* note 9, at 1449.

135. *Id.*

136. *Id.* (emphasis added).

137. *Id.* at 1450–53.

138. *Id.* at 1451–52.

139. *Id.*

140. *Id.* at 1452.

141. *Id.* at 1452–53.

value of resolving merit questions, a presidential administration could adopt a policy of never invoking prudential standing where the doctrine would either delay a decision or insulate it from judicial review.<sup>142</sup>

On the other hand, the commentary acknowledges that executive waivers of prudential standing doctrine might be used in ways that contravene congressional intent and, therefore, separation of powers principles. For example, although the Carter Administration failed to convince Congress to adopt legislation that would ease standing requirements for citizen suits challenging government actions, the administration then refused to challenge plaintiff standing in environmental litigation, despite Congress's lack of endorsement for that approach.<sup>143</sup> Similarly, the Obama Administration—which has often failed to win congressional approval for its agenda of reducing greenhouse gases—might choose to waive standing barriers so it can obtain court decisions on the merits that support those unendorsed policy goals.<sup>144</sup> Thus, as the commentary concedes, some executive waivers of prudential standing doctrine might be contrary to congressional policy goals.

In its conclusion, the commentary argues for a separation of powers approach to prudential standing. Specifically, the commentary would give judges the discretion to allow the executive branch to waive prudential standing as long as such actions were not contrary to congressional intent.<sup>145</sup> A problem with this approach is that determining when an executive waiver of prudential standing is contrary to congressional intent is more difficult than suggested. Is legislative inaction or opposition by one house of Congress enough to constitute a contrary congressional intent, or must there be an express congressional enactment at odds with the executive waiver for a court to override the waiver by invoking prudential standing doctrine despite executive acquiescence? Because of the difficulties in determining when executive waivers and congressional intent either coincide or disagree, this Article proposes, in accordance with the adversarial system's principle of party control, to give the parties sole control of when to waive prudential standing.

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142. *Id.* at 1453.

143. *Id.*

144. *Id.*

145. *Id.*

V. THE ANGLO-AMERICAN LEGAL SYSTEM'S ADVERSARIAL  
APPROACH FAVORS TREATING PRUDENTIAL STANDING AS  
NONJURISDICTIONAL AND ALLOWING PARTIES TO CONTROL  
THE ISSUE

The Supreme Court has in recent years sought to limit the scope of which issues are considered jurisdictional.<sup>146</sup> As I argued in the Introduction, however, the greatest weakness of Judges Kavanaugh's and Silberman's opinions is that they did not fully explain *why* the Court has sought to narrow the range of jurisdictional issues. This Part examines the historical development of the Anglo-American adversarial system and discusses how jurisdictional issues are an inquisitorial exception to the usual operation of that system. Part V.D argues that our adversarial legal system is based on the premise that the parties should control the proceedings, except in rare cases where a federal judge may intervene *sua sponte* to ensure that the court has Article III jurisdiction. As this Part concludes, prudential standing is not so closely entwined with Article III jurisdiction to require an exception to our adversarial traditions of party autonomy in a free society. Finally, the fact that prudential standing questions are often entangled with merits questions lends further support for treating prudential standing as nonjurisdictional.

A. *The Historical Development of Adversarial and Inquisitorial Court Systems*

During the centuries following the collapse of the western Roman Empire in the 400s, continental European nations gradually developed inquisitorial court systems in which judges, rather than adversarial parties, exercised a significant role in controlling civil litigation.<sup>147</sup> The continental European inquisitorial, or civil law, tradition drew upon both Roman law and the Catholic Church's canon law, which itself

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146. See *supra* Part III.A.

147. See THOMAS GLYN WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 2, 13 (1999) (referring to the fifth-century collapse of the western Roman Empire and the reemergence of Roman civil law in Italy and France in the eleventh and twelfth centuries, thus "influenc[ing] first the legal culture of the western catholic Church and then the legal arrangements of many of the secular societies of western Europe"); Robert W. Emerson, *The French Huissier as a Model for U.S. Civil Procedure Reform*, 43 U. MICH. J.L. REFORM 1043, 1053 (2010) ("[T]he customs, traditions, and judicial concepts that form the basis of the Continental and French procedural systems emerged out of Rome."); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1193, 1198–1201 (2005) (describing the procedure "used in the courts of continental Europe" as being "derived from the Roman-canon tradition and thus . . . significantly inquisitorial").

was heavily influenced by Roman law.<sup>148</sup> Even today, civil litigation in France and many other continental European courts is largely controlled by an inquisitorial judge who is solely in charge of collecting evidence.<sup>149</sup> That judge, or a lesser nonjudge court official acting on the court's behalf, plays an active role in conducting discovery and interviewing witnesses in civil cases.<sup>150</sup> Although parties initiate proceedings for their claims, determine the issues, identify evidence to support their allegations, and now may be present with counsel for testimony, many aspects are controlled by the court, which can often pursue evidence and issues *sua sponte*.<sup>151</sup> Moreover, parties must obtain permission of the judge before they may engage in discovery, question witnesses, or demand evidence from the opposing party.<sup>152</sup>

From the Middle Ages through the late eighteenth century, the English legal system and the American colonial courts that grew from that system contained a mixture of inquisitorial and adversarial elements, with the inquisitorial aspects concentrated in the courts of equity and adversarial lawyering gradually growing as the predominant method of proving cases in the courts of common law.<sup>153</sup>

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148. WATKIN, *supra* note 147, at 9–10 (noting that while modern civil law “is rooted in the law of ancient Rome,” many elements derive from the “canon law of the western Church, . . . [which was] based on decidedly Roman legal foundations”); Emerson, *supra* note 147, at 1053; Kessler, *supra* note 147, at 1193, 1200–03.
149. WATKIN, *supra* note 147, at 390–91 (noting that many countries “follow[] the traditional French inquisitorial practice” of appointing one of the judges to assemble the evidence in a dossier” and that “[w]here the evidence has been collected by an instruction judge, the trial amounts very often to no more than the confirmation of that evidence as presented in the dossier”); Emerson, *supra* note 147, at 1046–47, 1050–53, 1068–86; Kessler, *supra* note 147, at 1260–73.
150. WATKIN, *supra* note 147, at 390–91; Emerson, *supra* note 147, at 1079–86; Kessler, *supra* note 147, at 1263–70.
151. WATKIN, *supra* note 147, at 390–91; Kessler, *supra* note 147, at 1261–67 (describing the initial stage of French litigation, known as the *mise en état*, the procedure for collecting witness testimony, known as the *enquête*, and the processes for engaging experts).
152. Kessler, *supra* note 147, at 1261–62.
153. Compare Emerson, *supra* note 147, at 1054–58 (discussing the inquisitorial aspects of American equity courts), and Kessler, *supra* note 147, at 1199–1202 (discussing the history and development of the Anglo-American equity tradition through the English Court of Chancery), with Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 272–86 (2002) (discussing the adversarial nature of Anglo-American common law courts and how *sua sponte* decisions are inconsistent with this nature).



In the centuries leading up to the American Revolution, Anglo-American common law courts gradually developed an adversarial tradition in which the parties played a central role in determining the facts and truth in civil litigation.<sup>154</sup> Compared to the inquisitorial judges in Europe, Anglo-American common law judges play a more neutral and passive role in civil litigation, although there are occasional exceptions to their passivity when they decide jurisdictional issues.<sup>155</sup> Some commentators argue that the party-controlled litigation model in the Anglo-American legal system is based on the fundamental premise that free individuals in a democratic society ought to have the autonomy and dignity to make litigation decisions instead of being directed by a paternalistic inquisitorial judge.<sup>156</sup>

Before 1800, Anglo-American equity courts were in many respects inquisitorial.<sup>157</sup> Even into the nineteenth century, Anglo-American equitable courts traditionally exercised quasi-inquisitorial functions, especially through the use of masters to investigate a case and question witnesses.<sup>158</sup> During the nineteenth century, however, American equity courts gradually granted parties a greater role in investigating cases and questioning witnesses so that equitable cases increasingly became adversarial rather than inquisitorial.<sup>159</sup>

*B. The Federal Courts from the Eighteenth Century Until the 1938 Rules of Civil Procedure: A Mostly Adversarial System with Some Role for Inquisitorial Checking of Jurisdiction*

Article III of the U.S. Constitution makes clear that federal courts only possess limited jurisdiction, unlike the broad common law jurisdiction of the state courts.<sup>160</sup> The “Cases” and “Controversies” limitations in Article III of the United States Constitution limits the role of the federal courts to deciding actual cases presented by parties with real injuries and, therefore, prevents federal judges from acting on their own initiative “to review and revise legislative and executive

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154. Kessler, *supra* note 147, at 1202–10.

155. See Milani & Smith, *supra* note 153, at 272–86 (arguing that judicial sua sponte decisions are inconsistent with the adversarial nature of American courts).

156. See *id.* at 282–86 (“The adversary system’s commitment to party control of litigation . . . preserves individual autonomy and dignity by allowing a person the freedom to make his case to the court.”).

157. Emerson, *supra* note 147, at 1054–57; Kessler, *supra* note 147, at 1203–04.

158. Emerson, *supra* note 147, at 1056–57, 1057 n.71; Kessler, *supra* note 147, at 1208–10.

159. Kessler, *supra* note 147, at 1224–33.

160. Collins, *supra* note 90, at 1836–38.

action.”<sup>161</sup> Accordingly, federal courts may not issue advisory opinions about matters not presented by parties in a real legal dispute.<sup>162</sup>

Because federal courts are of limited jurisdiction, the Supreme Court recognized early in its history that federal courts could raise the issue of federal jurisdiction *sua sponte*.<sup>163</sup> Professor Collins, however, has persuasively shown that federal courts before 1875 primarily relied on the jurisdictional facts alleged in the pleadings to establish jurisdiction and usually relied upon the parties to raise jurisdictional questions.<sup>164</sup> Furthermore, before 1875, federal courts often followed common law pleading rules that complicated and obscured when parties or courts could challenge or reconsider pleadings that falsely suggested the parties had federal jurisdiction, for example, by pleading diversity of state citizenship that was in fact not true.<sup>165</sup> Professor Collins explains that common law pleading rules contained strong disincentives to challenging federal jurisdiction:

Common-law pleading requirements discouraged objections to jurisdiction when it had been properly alleged. At common law, a party who raised a plea in abatement requiring the resolution of a disputed issue of jurisdictional fact would automatically lose on the merits if he lost on the motion. . . . Thus, the parties—who, often more than the courts, were the primary guardians of the limits of the federal courts’ jurisdiction—faced disincentives to objecting to jurisdiction even when they might otherwise have been so inclined. Only if the jurisdictional

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161. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009); *see also supra* Part I.A (discussing separation of powers and standing).
162. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006); *FEC v. Akins*, 524 U.S. 11, 24 (1998) (“[A] plaintiff [is prevented] from obtaining what would, in effect, amount to an advisory opinion.”).
163. *See, e.g.*, *Tyler v. Hand*, 48 U.S. (7 How.) 573, 584 (1849) (“If the matter of abatement be . . . intrinsic, the court will act upon it upon motion, or notice it of themselves.”); *Jackson v. Ashton*, 33 U.S. (8 Pet.) 148, 149 (1834) (dismissing a case on jurisdictional grounds, despite an apparent lack of any objection from the parties); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) (“[I]t was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.”); *Turner v. Bank of N.-Am.*, 4 U.S. (4 Dall.) 8, 11 (1799) (“[T]he fair presumption is (not as with regard to a Court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears.”); Collins, *supra* note 90, at 1836–38 (describing *Capron*).
164. Collins, *supra* note 90, at 1831–33, 1838–61 (discussing pre-1875 federal jurisdiction practices).
165. *Id.* at 1838–44.

objection presented a question of law, as opposed to fact, could such harsh results be avoided.<sup>166</sup>

By enacting The Judiciary Act of 1875,<sup>167</sup> (“1875 Act”) Congress sought to eliminate the common law pleading rules that prevented federal courts from dismissing cases in which jurisdiction was established through false pleadings.<sup>168</sup> Section 5 of the 1875 Act stated that a federal court “shall dismiss” a suit “at any time” after being filed in or removed to federal court when “it shall appear to the satisfaction of [the] court” that the suit “does not really and substantially involve a dispute or controversy properly within the jurisdiction of [the] court, or that the parties . . . have been improperly or collusively made or joined.”<sup>169</sup> The Supreme Court interpreted section 5 as follows: “[U]nder the act of 1875, the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist.”<sup>170</sup> Because section 5 of the 1875 Act authorized federal courts to dismiss a case at “any time” it became clear that federal jurisdiction was lacking, federal courts became more willing to dismiss a case at any time during the proceedings, even if traditional common law procedures would not have allowed them to do so after the initial pleadings were filed.<sup>171</sup>

Despite language in the 1875 Act that federal courts had the authority to address jurisdictional defects “at any time,” federal courts for many years disagreed over which party had the burden of establishing or disproving jurisdiction if the plaintiff properly pleaded good jurisdiction facts.<sup>172</sup> Only in 1936, in *McNutt v. General Motors Acceptance Corp.*,<sup>173</sup> did the Supreme Court conclude that the 1875 Act placed the burden on the party asserting jurisdiction to prove its

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166. *Id.* at 1841.

167. Ch. 137, 18 Stat. 470.

168. Collins, *supra* note 90, at 1861–62.

169. § 5, 18 Stat. at 472; *see also* Collins, *supra* note 90, at 1861 (indicating that section 5 was “potentially applicable to all jurisdictional categories of cases filed in the federal courts”).

170. *Wetmore v. Rymer*, 169 U.S. 115, 120 (1898); *see also* Collins, *supra* note 90, at 1862 (indicating that the *Wetmore* Court’s explanation of section 5 presented an “altogether new” possibility).

171. *See* Collins, *supra* note 90, at 1868–70 (describing how the Supreme Court adopted an “inflexible rule” to dismiss pending cases for lack of jurisdiction).

172. *Id.* at 1870–72.

173. 298 U.S. 178 (1936).

allegations of jurisdictional fact by a preponderance of the evidence.<sup>174</sup> Additionally, the *McNutt* Court clearly stated that federal courts could sua sponte challenge the plaintiff's alleged jurisdictional facts, although the defendant in that case had contested the plaintiff's allegation that the amount of money in controversy was sufficient to meet the then-required jurisdictional amount.<sup>175</sup>

In the 1938 Federal Rules of Civil Procedure, Rule 12(h) endorsed the *McNutt* approach by stating that a district court "shall dismiss" an action "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter."<sup>176</sup> On the other hand, the drafters of the 1938 Federal Rules of Civil Procedure merged law and equity in federal procedure and, in doing so, eliminated many of the inquisitorial elements still remaining in equity law.<sup>177</sup> Thus, while the 1938 Rules were based on a generally adversarial approach, they allowed courts a limited inquisitorial function in reviewing federal jurisdiction.

C. *Modern Federal Courts: A Trend Toward Limiting Jurisdictional Inquisitorialism*

Contemporary civil litigation in the United States and the United Kingdom remains primarily adversarial but may include some inquisitorial aspects.<sup>178</sup> U.S. federal courts usually follow the

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174. *Id.* at 189 ("If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof . . . by a preponderance of the evidence."); see also Collins, *supra* note 90, at 1872 n.191 (pointing out that "the Court noted that the failure to make such an objection would not prevent the court from demanding proof by a preponderance of the evidence").
175. *McNutt*, 298 U.S. at 189 ("[W]here [jurisdictional facts] are not so challenged [by his adversary] the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence."); see also Collins, *supra* note 90, at 1872–73 (discussing *McNutt*).
176. FED. R. CIV. P. 12(h)(2) (1938) (current FED. R. CIV. P. 12(h)(3)); see also Collins, *supra* note 90, at 1873 (providing that Rule 12(h) "confirmed" the "implications" of *McNutt*).
177. See Emerson, *supra* note 147, at 1054–60 (describing the reduced rules of masters); Kessler, *supra* note 147, at 1233, 1242, 1251–52 (noting the elimination of out-of-court testimony and describing the creation of the trial master).
178. See Robert Thomas, *From 'Adversarial v Inquisitorial' to 'Active, Enabling, and Investigative': Developments in UK Administrative Tribunals*, in *THE NATURE OF INQUISITORIAL PROCESSES IN ADMINISTRATIVE REGIMES: GLOBAL PERSPECTIVES* 52, 52–53 (Laverne Jacobs & Sasha Bagley eds., 2013) (observing most civil and criminal litigation in the United Kingdom is still largely adversarial).

adversarial system by relying on the parties to present facts and raise arguments for decision.<sup>179</sup> But some specialized state courts for small claims, family matters, or juvenile issues use less formal and less adversarial approaches.<sup>180</sup> Moreover, some administrative tribunals may use a combination of adversarial and inquisitorial methods to hasten the pace of adjudication and encourage settlements, or they may allow administrative judges to assist unrepresented litigants who lack the resources to hire expensive attorneys.<sup>181</sup>

Nevertheless, despite any possible trend in federal administrative proceedings to use inquisitorial methods,<sup>182</sup> Article III courts remain primarily adversarial, although they occasionally exercise inquisitorial powers when they make *sua sponte* decisions regarding jurisdictional issues.<sup>183</sup> But the Supreme Court, through its trend to limit the issues

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179. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (“Under [our adversarial] system, courts are generally limited to addressing the claims and arguments advanced by the parties.”); *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring) (“Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”).

180. *Cf. Thomas, supra* note 178, at 51 & n.2 (explaining that small claims, family, and children’s courts in the United Kingdom are less formal and adversarial than other civil litigation).

181. For example, in the United States, Social Security Disability benefit hearings, which entail large numbers of applicants and cases, contain a mixture of adversarial and inquisitorial elements, but there is no adverse party—no one appears for the government to argue for denial of benefits, and a federal administrative judge has the duty to assist the applicant in making his case. PETER L. STRAUSS ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW* 317–18 (11th ed. 2011). By contrast, enforcement proceedings by administrative agencies in administrative hearings are usually much more adversarial. *Id.* at 308, 331–32. In the United Kingdom, administrative hearings involve both adversarial and inquisitorial aspects, with some tribunals being closer to one end of the spectrum than the other, but there is a trend to allow administrative judges to assist unrepresented litigants. *See Thomas, supra* note 178, at 56–62 (discussing the pressures for and against active litigation).

182. STRAUSS ET AL., *supra* note 181, at 331–332.

183. *See Dodson, supra* note 76, at 1444–45 (arguing federal courts exercise inquisitorial *sua sponte* authority in deciding jurisdiction issues but treat nonjurisdictional issues as within control of adversarial parties); Milani & Smith, *supra* note 153, at 247–50 (arguing the American legal system is primarily adversarial but that courts exercise inquisitorial *sua sponte* authority in deciding certain issues such as jurisdiction); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1279–88 (2002) (discussing types of cases and circumstances where Article III courts make *sua sponte* decisions); *see also Day v. McDonough*, 547 U.S. 198, 205 (2006) (“A statute of limitations defense . . . is not ‘jurisdictional,’ hence courts are under no obligation to raise the time bar *sua sponte*.”)

that are considered jurisdictional,<sup>184</sup> has gradually sought to limit jurisdictional exceptions to party control of litigation. In particular, in *Gonzalez v. Thaler*,<sup>185</sup> the Supreme Court recently declared, “[W]e have pressed a stricter distinction between truly jurisdictional rules, which govern ‘a court’s adjudicatory authority,’ and nonjurisdictional ‘claim-processing rules,’ which do not.”<sup>186</sup> And previously, the Court, in *Kontrick v. Ryan*,<sup>187</sup> had explained the distinction between truly jurisdictional rules and nonjurisdictional claim-processing rules by stating that “[c]larity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”<sup>188</sup> Thus, the Supreme Court’s trend to reduce the issues considered jurisdictional attempts to limit the inquisitorial exceptions to party-controlled litigation in federal courts and adhere to the traditional adversarial practices of American courts.

*D. The Case for Adversarial Party Control and Treating Prudential Standing as Nonjurisdictional*

This Part argues that prudential standing should be considered nonjurisdictional for several reasons. First, such treatment would be consistent with the principle of adversarial party control, which supports the dignity of parties and, regardless if it is the only or best way of obtaining the truth, is the norm accepted by the Supreme Court. Second, based on an analysis of recent Supreme Court dicta, prudential standing is not so entwined with Article III standing such that it should automatically be treated similarly, that is, as jurisdictional. Finally, practical reasons regarding the entanglement of prudential issues and merits questions suggest that prudential standing, or at least most aspects of prudential standing, would be best treated as nonjurisdictional.

The Anglo-American legal system is based on party control of litigation, and the justification for party control is grounded in the broad principle that each individual litigant should have the freedom

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(emphasis omitted); *id.* at 213 (Scalia, J., dissenting) (“We have repeatedly stated that the enactment of time-limitation periods such as that in §2244(d), without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture.”).

184. *See supra* Part III.A.

185. 132 S. Ct. 641 (2012).

186. *Id.* at 648 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). *But see* Hawley, *supra* note 105, at 23–54 (criticizing the recent trend by the Supreme Court to narrow scope of jurisdictional issues).

187. 540 U.S. 443 (2004).

188. *Id.* at 455.

and dignity to make litigation decisions instead of being directed what to do by a paternalistic inquisitorial judge.<sup>189</sup> In *Henderson ex rel. Henderson v. Shinseki*,<sup>190</sup> the Supreme Court addressed jurisdictionality and its impact on the role of parties in a lawsuit:

This question [of a procedural rule's jurisdictionality] is not merely semantic [but one of considerable practical importance for judges and litigants. Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system. Under that system, courts are generally limited to addressing the claims and arguments advanced by the parties. Courts do not usually raise claims or arguments on their own.]<sup>191</sup>

Emphasizing the role, and implied dignity, of parties in the American legal system, Justice Scalia has stated, "Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."<sup>192</sup>

With regard to the best strategy for establishing the truth in a particular case, adversarial and inquisitorial systems illustrate differing views. Proponents of adversarial judicial systems typically argue that party advocates are more likely to establish the true facts of a case than an inquisitorial judge who has no personal stake in the litigation other than professional duty.<sup>193</sup> By contrast, the French inquisitorial system is premised on the opposite view that judges and other judicial employees are better suited to finding the truth than interested parties and that, accordingly, judges must carefully control any attempt at investigation or questioning of witnesses by the parties.<sup>194</sup> Even if one might question the Anglo-American legal system's premise that party-controlled litigation is better at finding facts than inquisitorial judges, our Anglo-American legal tradition is based upon party control of litigation and requires judges to act in a neutral and relatively passive role compared to European inquisitorial judges.<sup>195</sup>

The *Henderson* decision demonstrates that the current Supreme Court believes that party control of the arguments and evidence in a

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189. See *id.* at 282–86 ("The adversary system's commitment to party control of litigation . . . preserves individual autonomy and dignity by allowing a person the freedom to make his case to the court.").

190. 131 S. Ct. 1197 (2011).

191. *Id.* at 1202 (citations omitted).

192. 540 U.S. 375, 386 (2003) (Scalia, J., concurring).

193. Milani & Smith, *supra* note 153, at 273–75.

194. See *supra* notes 149–52 and accompanying text.

195. Milani & Smith, *supra* note 153, at 279–82.

case is the “normal operation of our adversarial system.”<sup>196</sup> By contrast, the decision makes clear that jurisdictional decisions are an inquisitorial exception to our adversarial tradition that should be invoked only when Article III courts must fulfill their “independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.”<sup>197</sup> Accordingly, the *Henderson* Court concluded, “We have urged that a rule should not be referred to as jurisdictional unless it governs a court’s adjudicatory capacity, that is, its subject-matter or personal jurisdiction. Other rules, even if important and mandatory, we have said, should not be given the jurisdictional brand.”<sup>198</sup> The *Henderson* decision is consistent with the Supreme Court’s recent trend to limit jurisdictional exceptions to party control of litigation.<sup>199</sup> The *Henderson* Court, however, does not directly answer whether prudential standing should be jurisdictional.

While this Article argues that prudential standing, for the most part, is nonjurisdictional, the author must concede that the Supreme Court’s definition and treatment of prudential standing issues is complicated<sup>200</sup> and that there is a plausible argument for treating prudential standing, or many aspects of prudential standing, as jurisdictional. The strongest argument for treating prudential standing as jurisdictional is the suggestion by the *Warth* Court that prudential standing doctrine is critical in constraining federal courts from addressing political questions that are better left to the political branches.<sup>201</sup> But *Warth* did not directly address whether prudential standing is jurisdictional and therefore is not binding precedent on that issue. And while not directly questioning *Warth*, the subsequent *Allen* decision suggested that Article III constitutional standing is more important than prudential standing in deciding federal jurisdiction.<sup>202</sup> Furthermore, while the Court has never overruled or

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

197. *Id.*

198. *Id.* at 1202–03 (citations omitted).

199. *See supra* Part III.A.

200. *See supra* Part I.B–C.

201. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“Without such limitations—closely related to Art. III concerns but 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.”).

202. *Allen v. Wright*, 468 U.S. 737, 750 (1984); *see also Alliance for Env’tl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 85 (2d Cir. 2006)



questioned its decision in *Warth*, more recent Court decisions have clearly sought to narrow the scope of which issues are jurisdictional.<sup>203</sup> It is possible to reconcile *Warth* and more recent decisions such as *Henderson* or *Gonzalez* by treating prudential standing as nonjurisdictional but still giving prudential considerations significant weight when a court considers whether to dismiss a case after reviewing the merits.

But unlike fundamental Article III standing, most, if not all, aspects of prudential standing are not so directly related to the core question of defining the limited jurisdiction of federal courts to demand an inquisitorial exception to the normal rule of party control. As the *Allen* Court suggested, there are substantial differences between constitutional Article III standing and prudential standing that are relevant to whether each should be treated as jurisdictional. Thus, because Article III standing doctrine raises stronger separation of powers issues than prudential standing, it is more appropriate for federal courts to prohibit consideration of the merits if a suit violates fundamental Article III requirements than discretionary prudential limitations. Furthermore, because Congress may statutorily waive prudential standing principles but not Article III standing requirements,<sup>204</sup> courts should treat these principles as less fundamental and thus less jurisdictional than Article III requirements.

Finally, it is sometimes necessary and appropriate for a court to consider merits questions before deciding prudential standing issues, even if one agrees with *Steel Co.* that a federal court may never consider the merits before deciding Article III standing jurisdiction.<sup>205</sup> The view that one may decide prudential questions along with the merits is even consistent with the *Tenet* Court's suggestion that prudential standing is a "threshold question" that "may be resolved *before addressing jurisdiction*" because, as Judge Kavanaugh suggests, prudential standing is not a jurisdictional issue and therefore may be decided when it is most convenient for the court, unlike a jurisdictional issue that must be decided before considering the

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(discussing the *Allen* Court's implication that Article III standing is more important than prudential standing).

203. See *supra* Part III.A.

204. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 162 (1997) ("Prudential principles . . . unlike their constitutional counterparts . . . can be modified or abrogated by Congress.").

205. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998); see also notes 107–08 and accompanying text (discussing the entanglement of issues of fact with jurisdiction questions and the resulting discretion available to courts in resolving jurisdiction).

merits.<sup>206</sup> Accordingly, because prudential standing issues are often better evaluated at the end of the case after a court has reviewed the merits of the case, it is better to treat prudential standing as a nonjurisdictional issue, despite the implication from *Warth* that prudential standing should be treated similarly to Article III standing. And as is mentioned in Part II.B, the Supreme Court could reclassify some prudential standing issues as going to Article III standing if the Court reasoned that a certain standing issue should be treated as a jurisdictional question that must be decided before the merits.

## CONCLUSION

The strongest argument for treating prudential standing questions as jurisdictional is the suggestion by the *Warth* Court that prudential standing doctrine is crucial to constraining federal courts from addressing political questions better left to the political branches. The *Warth* Court suggested that prudential standing issues are similar in some ways to Article III issues, but it did not directly address the jurisdictionality of prudential standing. In *Allen*, however, the Court suggested that Article III standing—as a “core component” of standing “derived directly from the Constitution”—is more important than prudential standing doctrines.<sup>207</sup> While the *Allen* Court did not directly address the jurisdictionality of prudential standing, its suggestion that prudential standing is less important than Article III standing supports the argument that prudential standing could be treated differently than Article III standing, that is, nonjurisdictional.

A *Harvard Law Review* student commentary’s proposal to use separation of powers principles to treat prudential standing as nonjurisdictional and selectively allow the executive branch to waive prudential standing barriers in some cases but not others is intriguing, but the proposal would present serious implementation problems. In some cases, the executive branch has sound grounds to seek a swift decision on the merits and to avoid delays caused by the prudential standing doctrine. In other cases, the executive branch might waive the doctrine to obtain a decision that contravenes congressional policy or intent. The commentary’s proposal to give judges the discretion to decide when an executive waiver of the prudential standing doctrine either comports with or contravenes congressional intent raises too many difficult problems of interpretation. Instead of having courts engage in difficult line drawing between executive actions arguably favored or disfavored by the complex issue of congressional intent, it

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206. *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 184 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (quoting *Tenet v. Doe*, 544 U.S. 1, 1, 6 n.4 (2005)), *cert. denied*, 133 S. Ct. 2880 (2013).

207. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

would be better to give parties the freedom to waive prudential standing barriers based on the fundamental principles of party-controlled adversarial litigation.

The greatest weakness of Judges Kavanaugh's and Silberman's opinions is that they did not thoroughly address why the Court has sought to narrow the range of jurisdictional issues. The argument for limiting the scope of jurisdictional rules would have been more convincing if it had also pointed out that *sua sponte* jurisdictional decisions by judges are generally contrary to the party-controlled adversarial model of legal decision making in the Anglo-American legal tradition. This connection has been acknowledged by the Court in its best explanation for making a sharp distinction between jurisdictional and nonjurisdictional rules: "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system."<sup>208</sup> While a close issue, prudential standing questions are less crucial to fundamental separation of powers concerns than Article III constitutional standing questions and therefore can be left to the parties to raise as part of the "normal operation of our adversarial system."<sup>209</sup>

Additionally, as it did in *Lexmark*, the Supreme Court could reclassify some prudential standing issues as going to Article III standing if the Court reasoned that a certain standing issue should be treated as a jurisdictional question. If it addresses which types of prudential standing issues are either jurisdictional or nonjurisdictional, the Court should do a better job of properly distinguishing between prudential and Article III issues and even providing a better rationale for its entire doctrine of standing. Moreover, if the issue of whether a prudential issue is jurisdictional or nonjurisdictional is a close question, courts should consider the fundamental principle of adversarial party control as a tiebreaker.

Finally, the *Windsor* Court did not specifically address whether prudential standing is jurisdictional, but it implied that the Court could treat its rules as nonjurisdictional at its convenience. Because the *Windsor* majority seemingly had a strong interest in resolving the merits of DOMA's legality—despite the problem that the executive branch sided with the challengers rather than defending the law—the Court appeared willing to allow an exception to satisfy standing difficulties. Accordingly, one may question whether the Court would be able to treat prudential standing as nonjurisdictional outside the specific facts of that case. Because the Court has denied certiorari in *Grocery Manufacturers*, scholars, attorneys, litigants, and lower court judges will have to wait for another case for the Court to specifically address the jurisdictionality of prudential standing.

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

209. *Id.*