# Undemocratic Restraint

*Fred O. Smith, Jr.**

*For almost two hundred years, a basic tenet of American law has been that federal courts must generally exercise jurisdiction when they possess it. And yet, self-imposed prudential limits on judicial power have, at least until recently, roared on despite these pronouncements. The judicial branch's avowedly self-invented doctrines include some (though not all) aspects of standing, ripeness, abstention, and the political question doctrine.*

*The Supreme Court recently, and unanimously, concluded that prudential limits are in severe tension with our system of representative democracy because they invite policy determinations from unelected judges. Even with these pronouncements, however, the Court has not eliminated any of these limits. Instead, the Court has recategorized some of these rules as matters of statutory or constitutional interpretation. This raises an important question: When the Court converts prudential limits into constitutional or statutory rules, do these conversions facilitate democracy?*

*This Article argues that recategorizing prudential rules does little to facilitate representative democracy, and in particular,* constitutionalizing *prudential limits raises acute democratic concerns. Constitutionalizing jurisdictional limits reduces dialogue among the branches and exacerbates some of the most troubling aspects of countermajoritarian judicial supremacy.*

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* Visiting Professor, Emory Law School. Assistant Professor, Berkeley Law School. Thanks are due to Tendayi Achiume, Robert Ahdieh, Eric Biber, Joseph Blocher, Curt Bradley, Andrew Bradt, Sam Bray, Alice Caswan, Jennifer Chacon, Erwin Chemerinsky, Sujit Choudhry, Dan Coenen, Charlton Copeland, Erin Delaney, Neal Devins, Raymond Diamond, Holly Doremus, Heather Elliott, Richard Fallon, Sean Farhang, Tara Leigh Grove, F. Andy Hessick, Jeffrey Hirsch, Timothy Holbrook, Craig Jackson, Melissa Murray, Anne Joseph O'Connell, Richard Re, Noah Rosenblum, Russell Robinson, Bertrall Ross, Sharon Rush, Pamela Samuelson, Robert Schapiro, Joanna C. Schwartz, A. Benjamin Spencer, Adam Steinman, Aaron Tang, Amanda Tyler, and John Yoo for reading drafts or participating in discussions about the project. Thanks as well to participants in the faculty workshops at Berkeley Law School, Emory Law School, UCLA Law School, the University of San Francisco Law School, and William and Mary Law School, as well as the John Mercer Langston Workshop at the University of Miami Law School, Culp Colloquium at Duke Law School, the Junior Federal Courts Workshop at UC Irvine Law School, the Second Annual Civil Procedure Workshop at the University of Washington Law School, the Constitutional Law Colloquium at Loyola Chicago Law School, the Southeastern Association of Law Schools Annual Meeting, and the Southeastern Association of Law Schools Junior Faculty Forum at the University of North Carolina Law School. Sincere thanks to Ryan Pulley and Matt Rice for excellent research assistance.

*Further, constitutionalizing judicial prudence has and will make it more difficult for Congress to expand access to American courts for violations of federal rights and norms. When measured against newly constitutionalized limits on judicial power, American democracy is better served by self-imposed judicial restraint, guided by transparency and principle.*

## INTRODUCTION

*[A] virulent variety of free-wheeling interventionism lies at the core of [some] devices of restraint.*[1]
*–Gerald Gunther*

Consider two oft-stated, but nonetheless contradictory, tenets of federal judicial power. The first was articulated by Chief Justice John Marshall almost two centuries ago in *Cohens v. Virginia*, and has often been repeated since. Federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[2] The failure to hear such cases "would be treason to the [C]onstitution."[3] More recently, the Court has reaffirmed that it is an "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."[4]

In contrast to this "undisputed" obligation is another rather entrenched tenet of federal jurisdiction: because prudence counsels against resolving certain disputes, there are "judicially self-imposed limits on the exercise of federal jurisdiction."[5] Guided by norms like judicial restraint and federalism, federal courts routinely decline to resolve certain disputes even when constitutional and statutory

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1. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964).

2. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 358–59 (1989) ("Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred."); Willcox v. Consol. Gas Co., 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . ." (citation omitted)); Chicot Cty. v. Sherwood, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." (citation omitted)).

3. *Cohens*, 19 U.S. (6 Wheat.) at 404.

4. *New Orleans Pub. Serv.*, 491 U.S. at 359. Sometimes, the Court articulates a softer version of this principle, contending that, at a minimum, " 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.' " Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014)); Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 590–91 (2013) (same); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (same); *cf.* Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 71 (2009) ("While Chief Justice Marshall's statement bears 'fine tuning,' there is surely a starting presumption that when jurisdiction is conferred, a court may not decline to exercise it." (citing RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1061–62 (6th ed. 2009))).

5. *See* Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

jurisdictional requirements are met, invoking doctrines such as prudential standing,[6] prudential ripeness,[7] aspects of the political question doctrine,[8] and abstention.[9] This second tenet has come under increased scrutiny by the Court in recent years—in large part because it self-evidently conflicts with the first tenet.[10]

Prudential limitations on federal judicial power have important substantive and non-substantive features. Substantively, the various doctrines purport to give life to constitutional norms like separation of powers, due process, and federalism. Procedurally, the implementation of prudential tests sometimes involves the transparent and flexible balancing of constitutional principles.[11] Further, perhaps the most

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6. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17–18 (2004) (finding that a party lacked "prudential standing to bring this suit in federal court"), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014); Warth v. Seldin, 422 U.S. 490, 509 (1975) (calling "prudential standing" a "rule of judicial self-governance" that "is subject to exceptions, the most prominent of which is that Congress may remove it by statute"); Barrows v. Jackson, 346 U.S. 249 (1953) (noting that the bar against third-party standing is judicially created, and therefore subject to judicially crafted exceptions).

7. Simmonds v. I.N.S., 326 F.3d 351, 357 (2d Cir. 2003) (describing the functions of "prudential ripeness"); Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1141 (9th Cir. 2000) (defining the components of "prudential ripeness").

8. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 253 (2002) ("[T]he prudential political question doctrine is *not* anchored in an interpretation of the Constitution itself, but is instead a judge-made overlay that courts have used at their discretion to protect their legitimacy and to avoid conflict with the political branches." (emphasis added)); *see also* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 202 (2012) (Sotomayor, J., concurring) (stating that political question doctrine has both constitutional and prudential dimensions). *But see* Corrie v. Caterpillar, Inc., 503 F.3d 974, 980 (9th Cir. 2007) ("[D]isputes involving political questions lie outside of the Article III jurisdiction of federal courts.").

9. Younger v. Harris, 401 U.S. 37, 43–45 (1971); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 13.2 (6th ed. 2013) (discussing academic debate about whether *Younger* announces a constitutional or prudential rule). *See generally* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 990 (2009) (discussing a range of areas where federal courts have discretion to decline to exercise jurisdiction); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 546 (1985) (same); *see also* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1455–56 (2011) (explaining that jurisdictional rules are more flexible than often assumed and proposing ways to apply different blends of jurisdictional rules to different contexts depending on the values at stake).

10. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014) (concluding that prudential standing is often a misnomer, and a potentially illegitimate one at that); Micah J. Revell, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221 (2013) (setting out the issues ultimately decided in *Lexmark*). *But see* Duty Free Ams., Inc. v. Estee Lauder Cos., 797 F.3d 1248, 1273 n.6 (11th Cir. 2015) (noting that while *Lexmark* "casts doubt on the future of prudential standing doctrines such as antitrust standing," "this discussion is dicta" in contexts beyond the Lanham Act).

11. United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) (observing that, in contrast to constitutional limits,"[r]ules of prudential standing . . . are more flexible 'rule[s] . . . of federal appellate practice' " (second ellipsis in original)); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976) (balancing factors and finding that they "clearly counsel[ed]

important non-substantive feature of prudential limits is that, unlike constitutional limits, prudential rules are common law doctrines that Congress may override.[12]

And so it is the law then that courts have an "undisputed" obligation to hear cases whenever (or at least "virtually" whenever) Congress and the Constitution have conferred jurisdiction. Failure to do so is "treason" to the United States' highest legal charter. And it is also the law that there are self-imposed limits on federal judicial power when important prudential norms so counsel, regardless of whether there is jurisdiction.[13] If one takes seriously the Court's avowal that that federal courts have a virtually unflagging obligation to exercise jurisdiction when it is given, these prudential limits occupy a precarious place.

In an opinion that one leading Federal Courts scholar has called "Justice Scalia's Treatise on Prudential Standing,"[14] the Court recently addressed this apparent contradiction by expressing significant skepticism about the very notion of prudential limits. After all, such limits arguably undercut or subvert the role of the more politically accountable body—Congress. "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied," Justice Scalia wrote for a unanimous Court in 2014, "it cannot limit a cause of action that Congress has created merely because 'prudence' dictates."[15] Shortly after this pronouncement, the Court observed that—to the extent the doctrine of "ripeness" has prudential dimensions—this ripeness principle was also in "tension" with its unflagging obligation to hear cases.[16]

Even before these unanimous, sometimes categorical statements portending the end of prudential limits, various Justices had written opinions observing the tension between self-imposed limits on judicial power on the one hand and federal courts' obligation to exercise jurisdiction on the other. On the Court's left, Justice John Paul Stevens

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against . . . federal proceedings"); *cf.* Harlow v. Fitzgerald, 457 U.S. 800, 816–19 (1982) (adopting an objective test for qualified immunity, but premising the test on the "balancing of competing values").

12. Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

13. Shapiro, *supra* note 9, at 545 (discussing this quandary and defending equitable and common law limits on federal judicial power as ubiquitous and consistent with historical practice).

14. Ernest A. Young, *Prudential Standing After* Lexmark International, Inc. v. Static Control Components, Inc., 10 DUKE J. CONST. L. & PUB. POL'Y 149, 149 (2014).

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

16. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014). Because the Court found that the plaintiffs easily met these purportedly prudential requirements, however, it ultimately did decide whether these limits were valid.

observed in a 2006 concurrence that it was difficult to reconcile a prudential "probate" exception to federal jurisdiction as anything other than an "abdication of the obligation Chief Justice Marshall so famously articulated."[17] A generation earlier, Justices William Brennan and Thurgood Marshall questioned the legitimacy of expansive versions of *Younger* abstention, contending that the doctrine undermined Congress's policy choices.[18] And on the Court's right, as this Article will describe in greater detail, Justice Antonin Scalia was the leading judicial skeptic of prudential rules during his final years on the Court.

Critics of prudential limits do not always premise their arguments on precedent or formalism alone; their skepticism is also sometimes accompanied by normative appraisals of how prudential limits undermine certain democratic values. These values include deference to politically accountable bodies and transparency.[19] Justice Scalia contended that prudential limits writ large are overly "judge-empowering" at the expense of democratically accountable bodies, "thereby distort[ing] the role of the Judiciary in its relationship to the Executive and the Legislature."[20] He also charged in a 2013 dissent that "[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."[21]

This Article assesses the Court's recent efforts to translate these democratic critiques into law. Importantly, the Court has not eliminated these limits. Rather, as a descriptive matter, the Court has sought to recategorize prudential limits through two doctrinal moves. First, the Court has recast formerly "prudential" limits as matters of statutory interpretation.[22] Second, the Court has treated formerly prudential limits as constitutional.[23]

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17. Marshall v. Marshall, 547 U.S. 293, 316 (2006) (Stevens, J., concurring).

18. Juidice v. Vail, 430 U.S. 327, 343 (1977) (Brennan, J., dissenting) ("The crystal clarity of the congressional decision and purpose in adopting § 1983, and the unbroken line of this Court's cases enforcing that decision, expose . . . today's decision as deliberate and conscious floutings of a decision Congress was constitutionally empowered to make.").

19. *See* Gunther, *supra* note 1, at 5–6.

20. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 635–36 (2007) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974)).

21. United States v. Windsor, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting).

22. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386–87 (2014).

23. *Compare* Arizonans for Official English v. Arizona, 520 U.S. 43, 79–80 (1997) (treating the question of who can represent a state's interests in federal court as a matter of state law), Flast v. Cohen, 392 U.S. 83 (1968) (treating the bar against taxpayer standing as nonconstitutional and self-imposed), *and* Karcher v. May, 484 U.S. 72, 82 (1987) (same), *with Hein*, 551 U.S. at 597–600 (grounding the bar in Article III), *and* Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013) (grounding a state-agent rule in Article III).

As a normative matter, this Article argues these two moves often do little to enhance the democratic values that sometimes attend condemnations of various prudential limits. Further—if one accepts some of the leading democratic accounts of judicial review and access to justice—recasting prudential limits *as constitutional* ironically undermines democratic values. In conflict with academic accounts of judicial review that often emphasize the importance of encouraging dialogue between the various branches of government, constitutionalizing jurisdictional limits can decrease the potential for dialogue between courts and Congress.[24] Where Professor Alexander Bickel once advocated for justiciability doctrines on the ground that they could reduce imprudent instances of countermajoritarian judicial review,[25] constitutionalizing limits on judicial power invites constitutional review of democratically enacted jurisdictional legislation.[26] Where Dean John Hart Ely once encouraged judicial review that reinforces representative government, constitutionalizing prudence encourages the invalidation of laws that are not self-evidently related to that goal.

There is a common pattern with respect to the dialogues and laws impacted by the constitutionalization of prudential limits, a pattern that invites its own set of democratic concerns. Scholars such as Judith Resnik have emphasized the relationship between democracy and access to courts.[27] Open and wide access to courts affirms the equality and dignity of each individual, ensuring accountability in the private and public spheres alike.[28] And yet, constitutionalization of jurisdictional limits primarily locks Congress out of attempts to expand access to courts—at least when the Constitution's jurisdictional restrictions are expanded or interpreted robustly. In the area of justiciability, the Court has limited the reach of statutes like the Endangered Species Act and, this past Supreme Court Term, the Fair Credit Reporting Act.[29] In addition, third-party standing's status as prudential, rather than constitutional, is why Congress is capable of abrogating that limit in laws like the Fair Housing Act.

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24. *See infra* Part III.

25. *See e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

26. *See infra* Part IV.

27. *See, e.g.*, Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 6 (2011); Judith Resnik & Dennis Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court*, 38 J. SUP. CT. HIST. 207, 232–33 (2013).

28. *See generally* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657 (2016).

29. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016), *as revised* (May 24, 2016).

Relatedly, the tale of sovereign immunity should serve as a cautionary note as to the effect of constitutionalizing a limit on federal jurisdiction. The Court's choice to treat sovereign immunity as constitutional rather than a common law or prudential doctrine has contributed to why, despite Congress's unambiguous efforts, there are markedly few opportunities for the disabled, the elderly, and aggrieved workers to bring suits against states under the Americans with Disabilities Act, the Age Discrimination in Employment Act, the self-care provision of the Family Medical Leave Act, and the Fair Labor Standards Act.[30] Converting prudential limits into constitutional ones, while restricting the scope of the constitutional jurisdiction itself, spells trouble for some congressionally created causes of action and opportunities to enforce those statutes in federal court.

Part I defines "prudential limits" and provides a taxonomy of those limits in contemporary jurisprudence. Despite the notion that federal courts have a virtually unwavering obligation to hear cases, prudential limits on judicial power have characterized a significant swath of federal jurisdictional doctrines over the past half-century. The Part also discusses the doctrine of state sovereign immunity, an area of law that is not generally thought of as "prudential," but one that some scholars and jurists have argued should be treated in a way that mirrors prudential norms. This Part reveals that the boundaries between constitutional, prudential, and statutory limits are not generally fixed; they are often blurred, porous, and contested.

Part II identifies the most significant defenses of and attacks on judicial prudence. Most notably, this Part discusses Justice Scalia's success in translating at least one of these critiques into law during his final years on the Court: the notion that prudential limits are undemocratic and illegitimate.

The following three parts appraise the Court's efforts to recast "prudential" limits. Part III assesses the dialogue between the various branches that prudential limits have inspired and explores whether constitutional limits would have facilitated similar dialogues. Part IV demonstrates that constitutionalizing prudential limits on judicial power sometimes exacerbates the countermajoritarian difficulty. Part V examines dialogues the Court has inspired when it has treated limits on jurisdiction as statutory. All three parts illustrate that constitutionalizing prudence has the most profound effect on congressional efforts to expand access to federal courts.

On balance, the Article concludes that constitutionalizing formerly prudential limits deserves particular scrutiny because those

30. *See infra* Part III.

efforts entrench such limits, thereby blocking electorally accountable branches from expanding access to courts. The notion that constitutionalizing prudential limits enhances democracy is unproven and unlikely.

## I. UNDERSTANDING PRUDENCE

This Part has three aims. First, in the tradition of Professor David Shapiro's 1985 classic *Jurisdiction and Discretion*,[31] this Part provides an updated primer on prudential limits on federal judicial power, which is defined here as a self-imposed, common law limit on federal jurisdiction designed to foster core values like federalism, separation of powers, and accuracy. Despite the judicial resurgence of the view that federal courts have an unflagging obligation to hear cases within their jurisdiction, self-imposed limits on federal judicial power are rather common.[32] The test for inclusion in this Part is that (1) the United States Supreme Court has at times called the doctrine prudential or (2) that both scholars and some members of the Supreme Court have labeled it either as prudential or as a common law limitation on federal judicial power. The first part of this test leads to a discussion of standing, ripeness, adverseness, and *Pullman* abstention. The second part of this test leads to a discussion of the political question doctrine, *Younger* abstention, and state sovereign immunity, which a majority of the Court has never held to be prudential.

Second, this descriptive account is layered with an analytic one: the proverbial boundaries dividing "self-imposed" prudential limits, constitutional limits, and statutory limits are often blurred, porous, and contested.

Third, some of these liminal limits have shifted—or are at risk of shifting—from prudential to constitutional doctrines. Two doctrines that have fully undergone that conversion are the bar against federal courts' entertaining generalized grievances and the related bar against taxpayer standing. Further, some scholars have advocated treating *Younger* abstention as constitutional rather than prudential as a way of easing democratic objections to that doctrine. And, despite some jurists' protestations that extra-textual limits on sovereign immunity are best understood as sounding in common law or prudence, the Supreme Court has opted instead to treat these limits as constitutional.

31. Shapiro, *supra* note 9.

32. *See infra* Part II.

### *A. Defining Prudence*

Prudential limits on federal judicial power bear four common features. The first is that federal courts adopt them as a matter of prudence; they are not imposed by the Constitution or Congress.[33] Second, prudential limitations involve threshold inquiries, technically separate from the merits, and often considered alongside traditional jurisdictional issues like subject matter jurisdiction.[34] This is not to say that judicial avoidance strategies end at this threshold stage of litigation. As Professor Daryl Levinson has observed, concepts like federalism and separation of powers often animate remedial considerations as well.[35] And as Professor Richard Fallon has noted, the available remedy may influence courts' decisions about whether to exercise jurisdiction.[36] Still, to the extent a doctrine is itself about a remedy rather than the court's decision to exercise jurisdiction at a threshold stage, such devices of restraint are not generally labeled "prudential."

Third, the term "prudential" is generally used to describe limits on a court's so-called "mandatory,"[37] rather than entirely discretionary, jurisdiction. For example, when the Supreme Court opts not to hear a case through its discretionary certiorari process, neither scholars nor courts generally refer to these moments as "prudential" limits. Fourth, as common law doctrines, prudential limitations are reversible by Congress.[38]

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33. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014); Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

34. Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 85–86, 89–90 (2001) (describing the role of prudential rules in the initial threshold determination a court makes as to which issues to take on first); Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1124 (2013) (describing abstention doctrines' place with respect to the initial sequencing decisions).

35. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–99 (1999).

36. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 639 (2006).

37. One of David Shapiro's illuminating insights is that even with respect to "mandatory" jurisdiction, courts must often exercise discretion as to how and when to employ that jurisdiction. *See* Shapiro, *supra* note 9.

38. Gollust v. Mendell, 501 U.S. 115, 126 (1991) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975))); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 230–31 (1988) (observing this feature of prudential rules).

### *B. Identifying Prudence*

#### 1. Standing

The doctrine of standing has long been thought to have both constitutional and nonconstitutional dimensions.[39] Treatises and cases often recognize the case of *Allen v. Wright* as identifying the demarcation between where constitutional jurisdictional requirements end and self-imposed limits on federal judicial power begin. *Allen* placed three requirements on the Article III side of the line and another three on the prudential side. This symmetrical clarity found its way into books, articles, and Federal Courts syllabi.[40] The constitutional requirements are, as now-judge William Fletcher noted, "numbingly familiar."[41] A plaintiff must demonstrate that she has an (1) an injury, (2) that has been caused by the defendant's conduct, and (3) that can be redressed in a judicial forum. And if a plaintiff seeks an injunction or declaration, the plaintiff must demonstrate that she is likely to be harmed again in the future.

There are at least three aspects of standing that have often been described as sounding in judicial self-restraint. The first is the general bar against "third-party standing." As early as 1907, the Court concluded that even an injured party may not bring a claim unless she "belongs to the class for whose sake the constitutional protection is given, or the class primarily protected."[42] This bar is commonly understood to be a self-imposed rule.[43] As the Court explained in *Barrows v. Jackson*, the bar against third-party standing is "only a rule of practice," albeit a "salutary" one.[44] Relying on the third-party-

39. For example, in the 1923 case of *Frothingham v. Mellon*, the Supreme Court announced a general rule against allowing a person's status as a taxpayer to furnish a sufficient basis to challenge the constitutionality of congressional acts. 262 U.S. 447, 487–89 (1923). And for a time, case law and scholarship understood this holding as a nonconstitutional, self-imposed limitation on federal judicial power. Flast v. Cohen, 392 U.S. 83, 92–94 (1968) (referencing supporting scholarship).

40. *See, e.g.*, FALLON ET AL., *supra* note 4, at 104.

41. Fletcher, *supra* note 38, at 222.

42. New York *ex rel.* Hatch v. Reardon, 204 U.S. 152, 160 (1907); *see also* Barrows v. Jackson, 346 U.S. 249, 256 (1953) ("There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed.").

43. *See, e.g.*, Kowalski v. Tesmer, 543 U.S. 125, 128–29 (2004) (calling third-party standing prudential); *see also* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.3 (2014) (observing that "most" Supreme Court cases about third-party standing characterize it this way).

44. *Barrows*, 346 U.S. at 257; *see* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1359 (2000) ("The rule disfavoring third-party

standing bar's prudential nature, the Court has crafted two exceptions.[45] The first is that a plaintiff may raise another person's constitutional injuries if the latter is hindered from raising her own claim in court.[46] Under the second exception, a court will entertain a suit where there is a "close relationship" between the plaintiff and the person who has suffered (or is suffering) the deprivation of a constitutional right.[47]

The bar against third-party standing is not the only limitation on judicial power that the Court has described as prudential. A second limit the Court has described this way is that a plaintiff's claim should meet the zone of interests test.[48] That is, "apart from the 'case' or 'controversy' test," the Supreme Court explained in *Association of Data Processing Service Organizations, Inc. v. Camp*,[49] the "zone of interests test" looks to "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[50] Courts have often applied this limitation in cases that involve challenges to administrative regulatory action under the Administrative Procedure Act.[51]

The classification of the zone of interests test as "prudential," however, is in serious doubt. In *Lexmark International, Inc. v. Static Control Components, Inc.*,[52] which is described in greater detail in Part II, the Court held that imposing a prudential bar to standing that outpaced a congressional statute undermines democracy.[53]

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standing has never been absolute; the Supreme Court has often characterized it as 'prudential' and thus, apparently, as discretionary."); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 289 (1984).

45. *Barrows,* 346 U.S. at 258. Justice Thomas recently took aim at these two exceptions, charging that they were possibly too capacious and too flexible. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2322 (2016) (Thomas, J., dissenting).

46. *Barrows,* 346 U.S. at 258.

47. CHEMERINSKY, *supra* note 9, § 2.3. Chemerinsky also cites a third exception, the overbreadth doctrine in First Amendment cases. *Id.*

48. Bennett v. Spear, 520 U.S. 154, 162 (1997).

49. 397 U.S. 150, 153 (1970).

50. *Id.* at 153–54.

51. *See, e.g.*, *Bennett*, 520 U.S. at 162.

52. 134 S. Ct. 1377, 1387 (2014).

53. Lower courts have, correctly, understood *Lexmark* to mean that the zone of interests test is a now a mode of interpreting statutes. Maher Terminals, LLC v. Port Auth. of N.Y & N.J, 805 F.3d 98, 105 (3d Cir. 2015) ("[I]n *Lexmark International, Inc. v. Static Control Components, Inc.,* the Supreme Court criticized the placement of the zone-of-interests requirement within the rubric of prudential standing."); Pit River Tribe v. Bureau of Land Mgmt., 793 F.3d 1147, 1156 (9th Cir. 2015) ("But last year, in *Lexmark International, Inc. v. Static Control Components, Inc.,* the [C]ourt rejected the 'prudential standing' label and made clear that whether a plaintiff's claims are within a statute's zone of interests is not a jurisdictional question.").

Third, federal courts may not hear cases deemed "generalized grievances."[54] As the Court explained in *Federal Election Commission v. Akins*, "[T]he political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."[55] In cases like *Allen v. Wright*, the Supreme Court characterized this bar as a prudential, rather than a constitutional, limit. It must be noted, however, that the Court has not always been consistent about whether this limit is merely prudential. In *Lujan v. Defenders of Wildlife*, the Court described the bar against generalized grievances as constitutional.[56] But then in *Akins*, the Court articulated avowed agnosticism as to whether the generalized-grievance bar sounds in the Constitution or elsewhere. [57] But most recently, in *Lexmark*, the Court again insisted in dictum that Article III mandates the bar against generalized grievances, effectively ensuring the doctrine's conversion from a prudential limit into a constitutional limit.[58] "While we have at times grounded our reluctance to entertain such suits in the counsels of prudence," the Court acknowledged in *Lexmark*, "we have since held that such suits do not present constitutional 'cases' or 'controversies.' "[59]

Another aspect of standing, one that is perhaps intertwined with the bar against generalized grievances, is the Court's presumptive refusal to hear cases against the government when the plaintiff's injury is that her tax dollars are being used in an unconstitutional way. In *Flast v. Cohen*, a case in which plaintiffs challenged federal expenditures under the Establishment Clause, the Court characterized this judicial limitation as a prudential one.[60] More recently, however, the Court constitutionalized the taxpayer-standing doctrine and cited democratic norms while doing so. In *Hein v. Freedom from Religion Foundation, Inc.*,[61] the Court addressed whether a taxpayer could challenge a federal executive department's religious expenditure (as opposed to a congressional appropriation of the sort at issue in *Flast*). It concluded that a taxpayer may not do so, treating this question as

54. Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

55. FEC v. Akins, 524 U.S. 11, 23 (1998).

56. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

57. *Akins*, 524 U.S. at 23 ("Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.").

58. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.3 (2014).

59. *Id.* (citing Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344–46 (2006); *Lujan*, 504 U.S. at 560).

60. 392 U.S. 83, 85 (1968).

61. 551 U.S. 587 (2007).

one of "Article III standing."[62] The Court defended its choice in part on democratic grounds: "Relaxation of standing requirements is directly related to the expansion of judicial power, and lowering the taxpayer standing bar to permit challenges of purely executive actions would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government."[63] Justice Scalia concurred, noting that the prudential nature of *Flast* rendered it overly "judge-empowering" in a way that undermined the judiciary's proper place in our constitutional democracy.[64]

### 2. Adverseness

Another prudential requirement is that a federal case must have adverse parties.[65] This sometimes means that even when parties advance different positions, and even where there is an injured plaintiff who will benefit from judicial intervention, the court may nonetheless decline to hear a claim if the defendant has an insufficient stake in the result.[66] More often, however, it means that parties may not advance identical legal positions or seek identical judgments.[67]

The case of *United States v. Windsor* provides a salient recent example of this principle, while also highlighting the Court's disagreement about whether adverseness is a constitutional or prudential requirement.[68] Edith Windsor, a widow, alleged that the Defense of Marriage Act ("DOMA") violated the Constitution's guarantee of equal protection under the law.[69] DOMA, among other things, prohibited the federal government from recognizing any state-sanctioned same-sex marriage.[70] This directly impacted Windsor because the government required her to pay federal estate taxes after the passing of her spouse—taxes she would not have had to pay had her spouse been a man.[71] The federal government refused to refund her estate taxes in the absence of a federal court order. Still, both she and

62. *Id.* at 600.

63. *Id.* at 611 (internal quotation marks omitted).

64. *Id.* at 635–36 (Scalia, J., concurring).

65. Trippe Mfg. Co. v. Am. Power Conversion Corp., 46 F.3d 624, 627–28 (7th Cir. 1995); Fin. Guar. Ins. Co. v. City of Fayetteville, 943 F.2d 925, 929 (8th Cir. 1991); 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3530 (3d ed. 2016) ("The principle remains today that if both parties affirmatively desire the same result, no justiciable case is presented.").

66. WRIGHT ET AL., *supra* note 65, § 3530.

67. *See, e.g.*, Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971).

68. 133 S. Ct. 2675 (2013).

69. *Id.* at 2682.

70. 28 U.S.C. § 1738C (2012).

71. *Windsor*, 133 S. Ct. at 2682.

the federal government insisted that DOMA was unconstitutional, and the parties advanced that position at the Court of Appeals for the Second Circuit and at the Supreme Court.[72] Therefore, throughout the appellate process, Windsor and the government advanced the same legal position and sought an identical judgment.[73]

All nine members of the Supreme Court therefore took the view that the parties were not adverse, but the Justices did not agree as to whether this presented a fatal flaw in the case. The majority identified the principles that undergird the adverseness requirement.[74] These principles include the need to guard against cases in which there is no controversy, as well as the need for crisp presentation of competing legal positions. These concerns were not present in *Windsor*. DOMA had a direct impact on Windsor and thousands of other families. Further, the Bipartisan Legal Advisory Group had provided briefing and argument defending DOMA.[75]

By contrast, Justice Scalia's dissent argued that adverseness was a constitutional requirement and as such could not easily be wished away, competing values notwithstanding.[76] He traced the doctrine of adverseness to the long-standing rule against entirely feigned or collusive suits.[77] He cited *Lord v. Veazie*, in which the Court said, "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves."[78] The *Lord* Court famously added that seeking a judgment when there "is no real and substantial controversy" is an "abuse . . . [of] courts of justice."[79] Relying on this precedent and its progeny, Justice Scalia argued that absent two parties with contradictory legal positions and goals, there is no controversy at all within the meaning of Article III.[80]

### 3. Ripeness

Under the doctrine of "ripeness," federal courts decline to hear cases that are insufficiently mature to warrant adjudication. This

72. *Id.* at 2684.
73. *Id.*
74. *Id.* at 2688.
75. *Id.*
76. *Id.* at 2697, 2701.
77. *Id.* at 2703.
78. 49 U.S. (8 How.) 251, 255 (1850).
79. *Id.*
80. *Windsor*, 133 S. Ct. at 2703.

doctrine has constitutional, prudential, and statutory dimensions.[81] As a constitutional matter, the question is whether a plaintiff's injury is sufficiently imminent so as to form a "case or controversy" under Article III. Like standing, this constitutional doctrine "prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it."[82]

By contrast, prudential ripeness is "a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial."[83] The Court has used the term "prudential ripeness" to describe an exhaustion requirement in Takings Clause cases.[84] The more commonly cited two features of prudential ripeness are that a case be "fit" for judicial resolution and that the plaintiff can demonstrate that she will experience "hardship" absent judicial intervention.[85] For the purposes of challenges to governmental agencies governed by the Administrative Procedure Act, the ripeness inquiry also has a statutory component. When determining whether an agency issue is "fit" for judicial review, courts regularly consider whether an agency action is "final" within the meaning of § 704.[86]

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81. Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) (observing that ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction" (citing Reno v. Catholic Social Servs., Inc., 509 U.S. 43, 57 n.18 (1993))); *see also* Wis. Right to Life State Political Action Comm. v. Barland, 664 F.3d 139, 148 (7th Cir. 2011).

82. Simmonds v. I.N.S., 326 F.3d 351, 357 (2d Cir. 2003).

83. *Id.*(citing Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 58–64 (1961)).

84. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1013 (1992); *see also* Horne v. Dep't of Agric., 133 S. Ct. 2053, 2062 (2013).

85. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967) (explaining that ripeness doctrine seeks "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements," which requires looking to "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration"); *see also* Verizon New Eng., Inc. v. Int'l Bhd. of Elec. Workers, Local No. 2322, 651 F.3d 176, 188–89 (1st Cir. 2011) (applying these two factors); Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1164 (11th Cir. 2008) (same); McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003) (same); Neb. Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1037–40 (8th Cir. 2000) (same).

86. *See*., *e.g.*, Hawkes Co. v. U.S. Army Corps of Eng'rs, 782 F.3d 994, 1002 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 615 (2015); Am. Petroleum Inst. v. EPA, 683 F.3d 382, 387 (D.C. Cir. 2012); Univ. of Med. & Dentistry of N.J. v. Corrigan, 347 F.3d 57, 68 (3d Cir. 2003).

Still, much like prudential standing, the Court has recently called prudential ripeness into doubt.[87] The Court unanimously observed in 2014 that, to the extent the doctrine of "ripeness" has prudential components, the doctrine is in "tension with" its obligation to hear cases.[88] Courts and commentators have interpreted this language as undermining the longevity of prudential ripeness.[89]

### 4. Political Question Doctrine

As Professor Tara Grove recently observed, unlike doctrines like standing and ripeness, the political question doctrine does more than govern the circumstances in which a federal court can entertain a case.[90] Instead, the doctrine takes certain questions off of the table entirely.[91] Scholars sometimes trace the doctrine to Chief Justice John Marshall's statement in *Marbury v. Madison*, where he explained, "Questions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court."[92] Roughly a half-century later, in *Luther v. Borden*, the Court relied on the political question doctrine when declining to resolve a post-rebellion dispute involving two factions in Rhode Island.[93] Under the traditional narrative, *Luther* stands for the proposition that the Constitution's Guarantee Clause[94] is a non-justiciable political question.[95]

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87. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014); *see also* WRIGHT ET AL., *supra* note 65, § 8418.

88. *Susan B. Anthony List*, 134 S. Ct. at 2347.

89. *See, e.g.*, Kiser v. Reitz, 765 F.3d 601, 607 (6th Cir. 2014) ("Thus, the Supreme Court has cast into some doubt 'the continuing vitality' of the long-established prudential aspects of the ripeness doctrine, specifically the aspects that concern hardship to the parties and fitness of the dispute for resolution."); Nora Coon, *Ripening Green Litigation: The Case for Deconstitutionalizing Ripeness in Environmental Law*, 45 ENVTL. L. 811, 834–36 (2015) ("[T]he Supreme Court has raised doubts about the future of prudential ripeness. . . . If the Court later holds that the prudential ripeness doctrine is dead, it will have significant implications for the environmental cases heard by federal courts." (citation omitted)); *see also* Katherine Mims Crocker, *Justifying a Prudential Solution to the* Williamson County *Ripeness Puzzle*, 49 GA. L. REV. 163, 175–76 (2014) ("Interestingly, the Supreme Court has quite recently thrown some quantity of cold water on the propriety of prudential ripeness (and, indeed, all prudential justiciability doctrines).").

90. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1915 (2015).

91. The doctrine may not be, then, what Henry Monaghan once called a "who" or "when" rule of federal jurisdiction, so much as it as a "whether" rule. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

92. 5 U.S. (1 Cranch) 137, 170 (1803); *see* WRIGHT ET AL., *supra* note 65, § 8426 ("The Court first spoke of political questions in *Marbury* v. *Madison*.").

93. 48 U.S. (7 How.) 1, 33–35 (1849).

94. U.S. CONST. art. IV, § 4 (guaranteeing to every state a republican form of government).

95. Barkow, *supra* note 8, at 255; Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 648 (2014). However, Professor Tara Leigh Grove has recently,

In the mid-twentieth century, in *Baker v. Carr*, the Court purported to provide a series of factors to assist in determining whether a case amounts to a political question.[96] These six factors are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[97]

Still, as Justice Sonia Sotomayor recently observed, "*Baker* left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication."[98] And as such, it is far from settled whether the political question doctrine sounds in Article III or in judicial self-restraint. Lower courts sometimes suggest that even if prudence informs aspects of analysis under the political question doctrine, the Constitution itself is the arbiter of whether something is a non-justiciable political question.[99] Others characterize the doctrine as

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and persuasively, challenged that reading. Grove, *supra* note 90, at 1924–25 ("[A] closer look reveals that the Court in *Luther* issued no such holding; in fact, *Luther* was, in most respects, a traditional political question case."). Dean John Hart Ely called Guarantee Clause jurisprudence an "unfortunate doctrine" that extended a proper holding in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), to contexts in which political question considerations were less relevant. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118 n.* (1980); *see also* Risser v. Thompson, 930 F.2d 549, 552 (7th Cir. 1991) (stating that "this result has been powerfully criticized," but that "it is too well entrenched to be overturned at our level of the judiciary").

96. Baker v. Carr, 369 U.S. 186, 217 (1962).

97. *Id.*

98. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 202 (2012) (Sotomayor, J., concurring).

99. Corrie v. Caterpillar, Inc., 503 F.3d 974, 981–82 (9th Cir. 2007) ("[I]t is at bottom a jurisdictional limitation imposed on the courts by the Constitution, and not by the judiciary itself."); 767 Third Ave. Assocs. v. Consulate Gen. of the Socialist Fed. Republic of Yugoslavia, 218 F.3d 152, 164 (2d. Cir. 2000) ("Although prudential considerations may inform a court's justiciability analysis, the political question doctrine is essentially a constitutional limitation on the courts."). There is some support for this view in Supreme Court precedent. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974) ("[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies . . . political question doctrine[ ].").

prudential.[100] And other jurists take a middle view, suggesting that some aspects of the political question doctrine sound in the Constitution, while other aspects are prudential.[101]

### 5. Abstention

*Pullman.* The earliest form of abstention—*Pullman* abstention—is a "judge-made doctrine . . . first fashioned in 1941 in *Railroad Commission of Texas v. Pullman Co.*"[102] The doctrine involves dismissing or staying federal constitutional challenges when the resolution of an unclear question of state law would obviate the need to reach that federal constitutional question.[103] In such instances, state courts are to resolve unclear questions of state law. *Pullman* itself involved a legal challenge to a Texas regulation that facially discriminated against black Americans who worked on railcars.[104] Though a federal district court judge enjoined the practice, the Supreme Court reversed. Justice Felix Frankfurter, writing for a unanimous Court, acknowledged that the case involved "a substantial constitutional issue" that "touch[ed] a sensitive area of social policy."[105] But antecedent to that sensitive constitutional question was whether the commission overstepped its legal authority under state law by implementing the regulation. As such, the Court reasoned, "[C]onstitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."[106] Because resolving the state-law question would obviate the need to reach the federal constitutional question, and because the state-law question was unclear and unresolved, the case should have been dismissed or stayed until a state court had an opportunity to clarify state law.[107]

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100. Lin v. United States, 561 F.3d 502, 506 (D.C. Cir. 2009) ("The political question doctrine deprives federal courts of jurisdiction, based on prudential concerns, over cases which would normally fall within their purview."); Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (calling it a "nonjurisdictional, prudential doctrine[ ]").

101. *See Zivotofsky*, 566 U.S. at 202 (Sotomayor, J., concurring); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 845 (D.C. Cir. 2010).

102. Zwickler v. Koota, 389 U.S. 241, 248 (1967) (citing R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941)).

103. *See id.*

104. Under the practice, whites served as "conductors" of trains with more than one sleeping car, whereas blacks served as "porters." *Pullman*, 312 U.S. at 497.

105. *Id.* at 498.

106. *Id.*

107. *Id.* at 501. The doctrine has faced controversy. *See* David P. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 317 (1969) ("[T]he delays and added cost of [*Pullman*] abstention . . . give the practice a Bleak House aspect that in my mind is too high a price to pay for the gains in avoiding error, friction, and constitutional questions.").

While this rule persists today,[108] it primarily operates through a process called "certification."[109] Forty-eight states have adopted procedures that permit respective state courts to entertain requests from federal courts to answer questions of state law.[110] A recent memorable example of this came during the same-sex marriage litigation, in which the Court of Appeals for the Ninth Circuit asked the California Supreme Court whether, as a matter of state law, proponents of statewide initiatives may defend those initiatives in state court when elected officials decline to do so.[111]

*Younger.* In *Younger v. Harris*, the Court reasoned that "Our Federalism" could not countenance federal injunctions against ongoing criminal proceedings in state court.[112] Over time, the doctrine has come to mean that federal courts may not issue relief that unduly interferes with (1) ongoing criminal proceedings, (2) civil enforcement proceedings that resemble criminal proceedings, or (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions."[113]

Whether *Younger* abstention is better understood as prudential or constitutional is subject to confusion and debate. When directly confronted with the issue, federal courts have generally described the doctrine as prudential.[114] In support of this view, Professors Steven Calabresi and Gary Lawson have argued that *Younger* abstention is an equitable doctrine, and, as such, can and should be recalibrated to achieve the proper balance of remedies for victims of unconstitutional conduct.[115] By contrast, Professor Calvin Massey has argued that

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108. Growe v. Emison, 507 U.S. 25, 32 (1993) (describing the doctrine). In that opinion, Justice Scalia perhaps showed an early sign of his eventual open skepticism with prudential limitations on judicial power as a category, urging that the term "deferral" was more accurate and evocative to describe the doctrine than "abstention." *Id.* at 42 n.1.

109. Arizonans for Official English v. Arizona, 520 U.S. 43, 75–76 (1997) ("Certification today covers territory once dominated by a deferral device called '*Pullman* abstention,' after the generative case . . . .").

110. CHEMERINSKY, *supra* note 9, § 12.3 (noting that only Arkansas and North Carolina lack certification procedures and that Missouri's constitution prevents its certification statute from taking root).

111. Perry v. Brown, 265 P.3d 1002, 1124 (Cal. 2011).

112. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

113. Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 586 (2013) (alteration in original) (citing New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 368 (1989)).

114. Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) ("*Younger* is not . . . based on Article III requirements, but instead a prudential limitation on the court's exercise of jurisdiction grounded in equitable considerations of comity."); Benavidez v. Eu, 34 F.3d 825, 829 (9th Cir. 1994) ("*Younger* abstention . . . reflects a court's prudential decision not to exercise jurisdiction which it in fact possesses . . . .").

115. Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 256 (1992).

*Younger* abstention is a constitutionally based doctrine.[116] As evidence, he points to the interplay between the Anti-Injunction Act and *Younger* abstention. The Anti-Injunction Act bars federal courts from enjoining state court proceedings absent, among other exceptions, an express authorization by Congress.[117] The Supreme Court has held that the Anti-Injunction Act does not bar courts from issuing injunctive or declaratory relief for federal constitutional violations because 28 U.S.C. § 1983 provides an express exception that permits such relief.[118] If *Younger* abstention is prudential, Massey notes, then it is presumably abrogated by § 1983.[119] The doctrine's continued vitality, § 1983 notwithstanding, suggests that *Younger* abstention is not a prudential doctrine. Massey further contends that understanding *Younger* abstention as constitutional helps guard it against Professor Martin Redish's charge that *Younger*'s persistence is an undemocratic "judicial usurpation of legislative authority."[120] Redish's argument that *Younger* is a prudential undemocratic power-grab, and Massey's response that treating *Younger* as constitutional eases the problem, exemplifies the phenomenon at the heart of this Article.

### 6. Government Immunities

An accounting of the origins, scope, and proper way to classify these various governmental immunities warrants its own Article. In previous work, I have argued that while the Court characterizes the bar against respondeat superior liability for local governments as statutory, it is better understood as a judicially crafted doctrine designed to protect federalism interests.[121] For the purposes of this Article, I will discuss the various approaches to categorizing state sovereign immunity.

Some readers may be skeptical that the doctrine of sovereign immunity belongs in an article about prudential norms. Still, like aspects of abstention and the political question doctrine, in the absence of a constitutional mandate, it is a self-imposed, threshold doctrine of restraint that Congress may abrogate. Even if we do not typically label

116. Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811, 813.

117. 28 U.S.C. § 2283 (1988).

118. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

119. Massey, *supra* note 116, at 841.

120. *Id.* (quoting Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 114 (1984)).

121. Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 486–87 (2016).

it "prudential," perhaps we should.[122] Further, if nothing else, the changing nature of sovereign immunity helps us think about the democratic consequences of shifting a doctrine from one Congress can abrogate to one that it often cannot.

Under current doctrine, state sovereign immunity is mandated by the structure of the Constitution.[123] The Eleventh Amendment reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[124] Read literally, the words could mean that Article III's grant of diversity jurisdiction "shall not be construed to extend" to suits by a private party against a state.[125] Or, according to other scholars, the words could mean that a person may never launch a federal lawsuit against a state in which they are not a resident.[126]

But the doctrine associated with the Amendment extends far beyond its literal meaning.[127] This is true in at least six ways. First, as the Court ruled in *Hans v. Louisiana*, the provision applies to cases sounding in federal question jurisdiction, even when plaintiffs sue their own state.[128] If the words were interpreted literally, the Court has explained, this would arguably undermine this amendment's historical

122. Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1996–97 (2012) (contending that the extratextual aspects of sovereign immunity are "prudential").

123. Alden v. Maine, 527 U.S. 706, 713 (1999).

124. U.S. CONST. amend. XI.

125. William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1274 (1989) (favoring this interpretation of the amendment); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983) ("Neither federal question cases nor admiralty cases fit within [the Amendment's] language, within the intention of its framers, or within the interpretation that the Court consistently gave it prior to the constitutional crisis of 1877."); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1323–52 (1998) (contending that the amendment was an "explanatory amendment," designed to shield states from liability for debts accrued under the Articles of Confederation).

126. Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1346 (1989).

127. Smith, *supra* note 121, at 1969 ("Despite the long-running disagreement between proponents of the plain meaning thesis and proponents of the diversity thesis, there is at least one point on which they agree. The text of the Eleventh Amendment says nothing about a citizen suing her own state for violations of federal law.").

128. Hans v. Louisiana, 134 U.S. 1, 21 (1890). Some jurists have contended that even this ruling rested on nonconstitutional grounds. Emps. of the Dep't of Pub. Health & Welfare of Mo. v. Dep't of Pub. Health & Welfare of Mo., 411 U.S. 279, 314 (1973) (Brennan, J., dissenting) ("[T]he *Hans* opinion as an entirety can sensibly be read as resting the judgment squarely upon the ancient nonconstitutional doctrine of sovereign immunity.").

underpinnings.[129] Second, as the Court ruled in *Principality of Monaco v. Mississippi*, a foreign country may not sue a state in federal court. [130] The Court explained that "[b]ehind the words of the [Eleventh Amendment] are postulates which limit and control,"[131] including the postulate that states entered the union with sovereignty. Third, despite the general rule that state courts may not discriminate against federal claims,[132] state courts may refuse to entertain cases against a state that would be barred in federal court.[133]

Fourth, Congress may abrogate sovereign immunity and permit suits against states when acting pursuant to its Fourteenth Amendment enforcement authority.[134] Fifth, states may consent to suit.[135] Sixth, individuals may sue state officials in their official capacity for prospective relief to stop the violation of a federal right.[136] The Court recently considered whether to add a seventh extratextual dimension: that a person cannot sue State *A* in the courts of State *B*, regardless of what State *B*'s law says about the question. It divided 4-4 on this question.[137]

There is long-standing disagreement about the best way to understand or characterize sovereign immunity's extratextual dimensions. While current doctrine holds that the structure of the Constitution demands these limits, this view has by no means been unanimous. Some scholars and jurists have contended that the doctrine is better understood as a nonconstitutional doctrine that Congress may abrogate, regardless of whether Congress is acting pursuant to the

129. Alden v. Maine, 527 U.S. 706, 722 (1999) ("The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design.").

130. Principality of Monaco v. Mississippi, 292 U.S. 313, 330–32 (1934).

131. *Id.* at 322–23.

132. *See* Haywood v. Drown, 556 U.S. 729, 729–30 (2009); Howlett v. Rose, 496 U.S. 356, 372 (1990); Felder v. Casey, 487 U.S. 131, 150–51 (1988); Testa v. Katt, 330 U.S. 386, 389–94 (1947). For a helpful discussion of this line of cases, see Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511–90 (2011).

133. *See Alden*, 527 U.S. at 754.

134. Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976) (holding that Congress may abrogate state sovereign immunity when acting pursuant to its powers granted in Section 5 of the Fourteenth Amendment).

135. Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CALIF. L. REV. 1375, 1417–31 (2004); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1616–17 (2002).

136. *Ex parte* Young, 209 U.S. 123, 168 (1908).

137. Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. 1277, 1281 (2016).

Fourteenth Amendment. In scholarship, Professor Martha Field was a pioneering proponent of this view.[138]

In judicial opinions, two early proponents of this view were Justice Thurgood Marshall and Justice Brennan. In *Employees of the Department of Public Health & Welfare of Missouri v. Department of Public Health & Welfare of Missouri*, the Court confronted whether states could be held liable for violations of the Fair Labor Standards Act ("FLSA").[139] The Court held that, absent a clear statement from Congress, it was unprepared to hold that the FLSA intended to impose liability on offending states.[140] Writing in concurrence, Justice Marshall noted that alongside the precisely delineated strictures of the Eleventh Amendment rested a shadow sovereign immunity jurisprudence based on the common law.[141] Justice Brennan's solo dissent adopted a similar position, contending that the case involved a "nonconstitutional immunity from suit by its own citizens."[142]

By the early 1990s, no fewer than three Justices held the view that, beyond the words of the Eleventh Amendment, sovereign immunity was a nonconstitutional common law doctrine that Congress could abrogate. In *Seminole Tribe of Florida v. Florida*, the Court invalidated a provision that abrogated sovereign immunity under the Indian Gaming Regulation Act.[143] The Court reasoned that the Act was passed pursuant to Congress's Article I powers, rather than its power to enforce the Fourteenth Amendment.[144] Four Justices dissented, relying in part on sovereign immunity's common law basis. In a dissent joined by Justices Breyer and Ginsburg, Justice Souter contended that, beyond the words of the Eleventh Amendment, precedent supported only a "nonconstitutional common-law immunity."[145] The extratextual dimensions of sovereign immunity are akin to doctrines that are "prudential in nature and therefore not unalterable by Congress."[146] Justice Stevens's solo dissent expressed agreement on that point: "Congress has the power to deny the States and their officials the right to rely on the nonconstitutional defense of sovereign immunity in an

138. Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 544 (1978) ("A common law view of sovereign immunity . . . fits better with the eleventh amendment's wording than does a constitutional view[.]").

139. 411 U.S. 279 (1973).

140. *Id.* at 285.

141. *Id.* at 288 (Marshall, J., concurring).

142. *Id.* at 313 (Brennan, J., dissenting). He repeated this view in his dissent in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 125–26 (1984) (Brennan, J., dissenting).

143. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996).

144. *See id.* at 72–73.

145. *Id.* at 124 (Souter, J., dissenting).

146. *Id.* at 126.

action brought by one of their own citizens."[147] He predicted that Justice Souter's "scholarly opinion will surely be the law one day."[148] Though, it should be noted, this view is not yet the law. The most it has carried at any given moment is four votes as recently as 1999 when four Justices lamented the "constitutionalized . . . concept of sovereign immunity."[149]

## II. INTERROGATING PRUDENCE

Self-imposed jurisdictional limits are not new, and neither is controversy about their existence. Over the past century, some have defended self-imposed limits as a legitimate means to avoid undue friction with political branches, prevent hitting sensitive nerves in public opinion, reduce instances in which courts invalidate democratically enacted legislation, protect core constitutional values like federalism, and preserve the *judge*'s ability to exercise sound *judgment*.[150] Others have charged over time that the limits give power to judges to avoid controversies in unprincipled ways, undermine the judiciary's constitutional duty to answer constitutional questions that arise, reduce plaintiffs' access to federal courts, and undermine representative government by overly empowering unelected judges.[151]

That last critique—that prudential limits undermine democratic principles—gained the force of law recently, as a unanimous Court has expressed skepticism that prudential limits on judicial power have a role in the future of federal jurisdiction.[152] This Part outlines critiques of prudence over the past few decades and the recent, potentially consequential ascension of the democratic critique at the Supreme Court.

### *A. Debating Prudence*

Scholarship is limited about avowedly self-imposed prudential limits. To be sure, richly descriptive, normative, and historical accounts have been written about various doctrines that have prudential

147. *Id.* at 94 (Stevens, J., dissenting).
148. *Id.* at 100.
149. *See* Alden v. Maine, 527 U.S. 706, 761 (1999).
150. *See infra* Part II.A.
151. *See infra* Part II.A.
152. *See infra* Part II.A.

dimensions, including standing,[153] the political question doctrine,[154] and abstention.[155] Scholars have debated the merits of a robust set of constitutionally based justiciability limits.[156] Much more rare, however, are discussions about self-imposed limits as a topic in and of itself.

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153. *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (concluding that a personal interest limitation on standing cannot rest on "historically-derived constitutional compulsions"); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008); Fletcher, *supra* note 38 (arguing that standing should "simply be a question on the merits of plaintiff's claims"); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2007) (concluding that the Court should not require a showing of injury-in-fact where she alleges violation of a private right); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961) (examining standing issues related to intervention in administrative proceedings or appeals from administrative decisions on individual rights grounds) [hereinafter Jaffe, *Private Actions*]; Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) (examining the standing problem presented by individuals seeking to vindicate both personal and public rights); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1154–56 (1993) (pointing out the inadequate constitutional basis of the *Lujan* decision); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999) (applying scholarship on judicial decisionmaking to the law of standing) [hereinafter Pierce, *Standing*]; Richard J. Pierce, Jr., Lujan v. Defs. of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1200 (1993) ("The majority opinion in *Defenders* is simply inconsistent with the principal of judicial restraint.") [hereinafter Pierce, *Judicially Imposed Limit*]; Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191 (2014) (discussing the "most interesting plaintiff" rule in the context of plaintiffs asserting nontraditional interests); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188–89 (1992) (reasoning that injury cannot occur solely in fact).

154. *See, e.g.*, Barkow, *supra* note 8; Scott Birkey, Gordon v. Texas *and the Prudential Approach to Political Questions*, 87 CALIF. L. REV. 1265 (1999); Grove, *supra* note 90; J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006). Some have sought the eradication of the doctrine. *See* Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125, 127 (arguing that the doctrine should be "abandoned at this point as a thorn in the side of separated powers, properly understood"); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1033 (1985) (arguing for the elimination of the doctrine); Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 889 (1994). Louis Henkin famously questioned whether there was any such doctrine at all. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 600–01 (1976).

155. *See, e.g.,* Calabresi & Lawson, *supra* note 115, at 256 (arguing that *Younger* abstention is a common law equitable principle and that "a focus on [r]emedial equitable principles requires significant and long overdue reductions in the scope of the *Younger* doctrine"); Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Lawmaking*, 107 NW. U. L. REV. 847 (2013); Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974); Massey, *supra* note 116; Martin H. Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978); Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987.

156. *See, e.g.,* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 320 (1979) (discussing the "shortsighted" nature of typical "liberal" and "conservative" reactions to justiciability requirements); Fallon, *supra* note 36, at 663–64 (noting that the nature of requested relief influences the question of justiciability); Monaghan, *supra* note 91, at 1368 (discussing the "special function" model of judicial competence);

While discussions about prudential limits often start with writings from the 1960s,[157] a generation earlier, in the 1920s, Professor Maurice Finkelstein espoused what he called "judicial self-limitation" on the pages of the *Harvard Law Review*.[158] Writing during the judicially active *Lochner* era, Finkelstein urged judicial restraint. He identified by way of positive example the cases of *Massachusetts v. Mellon* and *Frothingham v. Mellon*,[159] wherein the Supreme Court held that neither Massachusetts nor a group of taxpayers had sufficient injury to challenge the popular Maternity Act.[160] He catalogued examples over multiple centuries in which courts across the globe declined—or should have declined—jurisdiction when cases created friction with other government officials. He contended that this tendency toward self-restraint was "a wholesome instinct among judges."[161]

Finkelstein's observation did not go uncontested. Professor Melville Fuller Weston responded that courts should exercise their constitutional responsibility to hear cases, regardless of whether rendering a decision could impinge on sensitive political matters or run counter to public opinion.[162] He argued that invoking terms like "justiciability" or "political question" were actually of little assistance in determining when a court should exercise jurisdiction.[163] This was especially true to the extent those terms purported to reflect judicial limits that outpaced the Constitution's.[164]

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Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1698–99 (1980) (defending the "liberal" doctrine of justiciability and alleging that Brilmayer "misconceives the 'liberal' approach to standing and associated article III doctrines" (footnote omitted)).

157. *See, e.g.*, Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1590–91 (1985); Kenneth Ward, *The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law: The Place of Law in Contemporary Constitutional Theory*, 18 J.L. & POL. 851 (2002).

158. Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924).

159. 262 U.S. 447 (1923).

160. The Act provided grants to states to create programs to protect the health of expectant mothers and infants. *Id.* at 480; *see also* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1148–49 (2009) (describing the challenge to the Act).

161. Finkelstein, *supra* note 158, at 339.

162. Melville Fuller Weston, *Political Questions*, 38 HARV. L. REV. 296, 333 (1925).

163. *Id.* at 297–99:

> "What are these political questions? To what matters does the term apply? It applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction." . . . The word "justiciable" will be largely avoided, because in its broadest sense it is legitimately capable of denoting almost any question.

(quoting Finkelstein, *supra* note 158, at 344–45).

164. *Id.* at 332.

A few decades later, following the landmark decision in *Brown v. Board of Education*, Professor Alexander Bickel offered his substantially more famous discussion of judicial review in *The Least Dangerous Branch*.[165] Like judicial minimalists before him—such as Professor James Bradley Thayer and Justice Louis Brandeis—Bickel expressed concern about the "countermajoritarian difficulty" that emerges when unelected, mostly unaccountable judges strike down popularly enacted legislation.[166] But Bickel's approach to dealing with this difficulty differed from their approaches. Thayer had advocated against the invalidation of legislation absent a court's confidence that the legislation was unconstitutional beyond a reasonable doubt.[167] And Brandeis advocated for the form of constitutional avoidance for which Justice Frankfurter later carried the mantle, wherein courts avoided reaching constitutional questions if a suit could plausibly be resolved on other grounds.[168]

By contrast, Bickel's influential insight is that one tool judges have is to simply decline to decide certain cases or issues, relying on "passive" doctrines like standing, mootness, ripeness, and the political question doctrine.[169] When called to decide the constitutionality of a statute, a court's options are not limited to invalidating legislation or validating legislation, he argued. A court also "may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency."[170] Professor Gerald Gunther objected that Bickelian-style, self-imposed rules of justiciability "lead

165. BICKEL, *supra* note 25, at 69; *cf.* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to the federal judiciary as "the least dangerous branch" because it controls neither the sword nor the purse).

166. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 256–57 (2002) (tracing the academic heritage of the countermajoritarian difficulty).

167. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (advocating a form of highly deferential rational basis review as a check on judicial review); *cf.* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 7 (1983) (naming Thayer's essay "the most influential essay ever written on American constitutional law"). As described in Part I, Justice Frankfurter became the architect of a number of enduring abstention principles shortly thereafter.

168. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."). Brandeis's list included the idea that "[t]he Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.' " *Id.* (citing Chi. & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892)).

169. Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 743–44 (2013).

170. BICKEL, *supra* note 25, at 69.

either to a manipulative process, whose inherent, if high-minded, lack of candor raises issues of its own, or to the abandonment of principle and the involvement of the Court in judgments of expediency, as a second-guesser of the political institutions; or, more commonly, to both."[171]

Despite this critique, as Professor Michael Coenen recently observed, "[C]onstitutional avoidance strategies—particularly those of the Bickelian variety— . . . remain widely utilized by the courts."[172] Indeed, Bickelian-style prudential limits on judicial power have come to far outpace even Bickel's initial vision. Bickel's chief targets were instances in which courts overturned acts passed by legislative bodies. By contrast, contemporary justiciability rules counsel against deciding cases that have nothing to do with constitutional adjudication.[173] Further, while Bickel's *Least Dangerous Branch* was aimed at the Supreme Court,[174] self-imposed limits now restrain inferior courts too.[175]

Another round of debate about the propriety of self-imposed limits arrived a generation later. In 1984, Professor Martin Redish challenged the notion that courts could abstain from exercising jurisdiction that Congress expressly creates.[176] This challenge rested largely on "democratic principles" that rendered refusing to hear cases inconsistent "with American political theory."[177] Absent an unconstitutional law, he argued, our system of majoritarian electoral accountability vests elected representatives, not unelected judges, with the decision to decide whether that law should take effect.[178] The failure to entertain a case when Congress has granted jurisdiction amounts to invalidating a democratically enacted law without warrant.

Professor David Shapiro rebutted this view by noting that self-imposed limits are ubiquitous and entrenched.[179] Courts, he

171. Gunther, *supra* note 1, at 25 (quoting BICKEL, *supra* note 25, at 200).

172. Coenen, *supra* note 169, at 744; *see also* Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1225 n.95 (2011) (identifying proponents and opponents of the more Brandeis-esque constitutional avoidance cannon of statutory interpretation).

173. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) (holding that a set of plaintiffs lacked standing under the Endangered Species Act to challenge executive conduct); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545 (2016), *as revised* May 24, 2016.

174. Indeed, the subtitle of the book was "The Supreme Court and the Bar of Politics." *See* BICKEL, *supra* note 25.

175. *See supra* Part I.

176. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74 (1984).

177. *Id.*

178. *Id.* at 76.

179. *See* Shapiro, *supra* note 9, at 545.

argued, employ self-imposed limitations in a wide range of circumstances. Such limits include, among others, justiciability, exhaustion, and abstention. As such, judicially created strictures on jurisdiction were not only common, but had "ancient and honorable roots."[180] Accordingly, "far from amounting to judicial usurpation, open acknowledgment of reasoned discretion is wholly consistent with the Anglo-American legal tradition."[181] As for the contention that these limits were nonetheless democratically invalid, he urged that neither separation of powers nor democratic legitimacy were undermined by self-imposed principles of judicial restraint.[182] After all, a judicial "rush to judgment, in the absence of a sufficiently concrete and immediate controversy, may unduly shorten the time between enactment and adjudication or may unduly broaden the questions held appropriate for decision."[183]

### *B. Undermining Prudence*

The charge that judicial prudence undermines democracy achieved the force of law two years ago in *Lexmark International, Inc. v. Static Control Components, Inc.*[184] At issue when the Court granted certiorari was "the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act."[185] But the case morphed into something both less and more. Less, because the Court determined that the case was not about standing at all—and was instead about a run-of-the-mill question of statutory interpretation. Who did Congress intend to empower to sue for violations of the Lanham Act? And still, the case turned out to be about more because the Court's opinion offered a path-marking discussion of prudential standing that has already prompted significant discussion in a leading federal courts treatise[186] and lower court opinions about prudential limits on judicial power.[187]

The underlying commercial dispute involved two players. The first was Lexmark, a producer of printers and toner cartridges.

180. *Id.* at 545.

181. *Id.*

182. *See id.* at 585.

183. *Id.*

184. 134 S. Ct. 1377 (2014).

185. *Id.* at 1385.

186. WRIGHT ET AL., *supra* note 65, § 8413 ("*Lexmark*, a unanimous opinion, suggests that the Court wishes to clarify, narrow, or perhaps even jettison the doctrine of prudential standing.").

187. *See, e.g.*, City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1273 (11th Cir. 2015) (calling *Lexmark* "notabl[e]").

Lexmark's cartridges contained microchips that made it impossible to refill (and reuse) the cartridges when they ran out of toner. But users could return the cartridges to Lexmark and received a monetary "prebate" at the time of initial purchase for agreeing to do so. The second player was Static Control Components. Static created a microchip that mimicked Lexmark's, thereby enabling the remanufacture and resale of Lexmark's cartridges. Lexmark sued Static for violating federal copyright laws, and Static countersued for a violation of the Lanham Act. That Act bars misleading commercial representations, and, according to Static, Lexmark misled consumers into believing that they were required to turn over the cartridges to Lexmark alone.[188]

Throughout the litigation, both parties treated the question of whether Static could sue Lexmark as a question of "prudential standing." After all, leading federal courts cases had characterized the "zone of interests" test as a prudential rule.[189] The Supreme Court, however, disavowed the notion that the case was about standing at all and expressed doubt about whether prudential standing was compatible with democratic principles. Justice Scalia's unanimous opinion explained that Lexmark's request to dismiss Static's claim on standing "grounds that are 'prudential,' rather than constitutional [was] in some tension with . . . the principle that a federal court's 'obligation' to hear and decide cases within its jurisdiction is 'virtually unflagging.' "[190] The Court shifted the focus from "whether in [its] judgment Congress should have authorized [the] suit, [to] whether Congress in fact did so."[191] "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates."[192] At bottom, then, the proper analysis should center on the "scope of the private remedy created by" the Lanham Act, a "straightforward question of statutory interpretation."[193]

The zone of interests test was not the only aspect of "prudential standing" that the Court called into doubt in *Lexmark*. In one of the

188. *Lexmark*, 134 S. Ct. at 1377–80.

189. Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

190. *Lexmark*, 134 S. Ct. at 1386.

191. *Id.* at 1388.

192. *Id.*

193. *Id.*

most important footnotes in recent federal courts jurisprudence,[194] the Court questioned other aspects of prudential standing.[195] Most notably, the Court zoomed in on its "reluctance to entertain generalized grievances."[196] Despite earlier cases affiliating that doctrine with "counsels of prudence," the Court explained that "we have since held that such suits do not present constitutional 'cases' or 'controversies.' "[197] Generalized grievances are barred for constitutional reasons, not "prudential" ones.

The Court's recategorization of both the "zone of interests" requirement and the bar against "generalized grievances" stemmed from a similar starting point—namely, skepticism that federal jurisdiction has or should have "prudential" dimensions. But this common skepticism led the Court to different destinations. The "zone of interests" test is now statutory. "Generalized grievances" is now constitutional. To be sure, some courts have questioned whether the distinction between a "prudential" and a statutory test is merely taxonomical and academic in the least charitable interpretation of that word, because Congress's role in shaping a cause of action is preserved either way.[198] The Court's treatment of generalized grievances, however, does the opposite: it diminishes Congress's ability to define causes of action.[199] As a constitutional limit, Congress may not transgress it.

There are multiple ways, beyond that of *Lexmark*, to reconcile the tension between prudence on the one hand and the democratic obligation to respect Congress's jurisdictional grants on the other. One could, as Professor Martin Redish suggested, eradicate prudential

194. Young, *supra* note 14, at 149 ("[T]he majority's discussion may spur far-reaching changes in how lawyers think and (especially) talk about standing.").

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

196. *Id.*

197. *Id.* (citing Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344–46 (2006); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

198. *See* Pit River Tribe v. Bureau of Land Mgmt., 793 F.3d 1147, 1148 n.1 (9th Cir. 2015) ("[T]he substance of the test remains unchanged for the purposes of this case."); Permapost Prods., Inc. v. McHugh, 55 F. Supp. 3d 14, 24–25 (D.D.C. 2014) ("Nomenclature aside, the question remains the same . . . ."). *But see* The Knit With v. Knitting Fever, Inc., No. 12-3219, 2015 WL 5147749, at *40 (3d Cir. 2015) ("[*Lexmark*] established a new analytical framework for determining a party's standing to bring Lanham Act false advertising claim, which abrogated our . . . five-factor test.").

199. *See Lujan*, 504 U.S. at 560 (holding that petitioners lacked standing, despite a statute that provided a cause of action to all citizens). For discussion of the ways this reduces Congress's role, see Pierce, *Judicially Imposed Limit*, *supra* note 153, at 1200; Sunstein, *supra* note 153, at 189; *cf.* Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 GEO. MASON L. REV. 237, 245 (1999) ("[W]here a statute like a private attorney general statute grants standing, the statute removes the prudential rules of judicial self-governance, including the zone-of-interests requirement." (footnote omitted)).

limitations and leave it to Congress to enact the limits that democratically accountable bodies could support.[200] Or, as David Shapiro suggested, one could abandon the principle that courts have an unflagging obligation to hear cases, as the jurisdiction and discretion are inherently intertwined.[201] But *Lexmark* did not adopt either of those approaches. It treated one limit as constitutional and another as statutory. This invites the question: Are the Court's efforts to recast prudential limits likely to succeed in furthering the Constitution's democratic commitment?

## III. CONSTITUTIONALIZING PRUDENCE: A DIALECTIC VIEW

### *A. Defining Dialogue*

Commentators have long discussed the concept of constitutional dialogues between the judiciary and other bodies.[202] Sometimes, the term "constitutional dialogue" refers to the relationship between the people and courts, especially the ways in which public opinion helps shape judicial decisionmaking.[203] Other discussions of constitutional dialogues center on the shared responsibility of courts and other politically accountable branches in illuminating constitutional ambiguities. By way of example, Professors Louis Fisher, Mark Tushnet, and Michael Paulsen are among those who have made the case that politically accountable branches have and should have a role in interpreting the Constitution's ambiguous or "thin" provisions.[204] By contrast, Professors Larry Alexander and Frederick Schauer have made a robust and unapologetic case for judicial supremacy.[205] And Professor Dan Coenen has offered a taxonomy of "semi-substantive" rules that the

200. *See* Redish, *supra* note 155.

201. Shapiro, *supra* note 9; *see also* Elliot, *supra* note 153 (advocating a prudential approach to resolving standing). Ernie Young has likewise advised that "the Court will need to recognize that it cannot do without prudential rules entirely." Young, *supra* note 14, at 163.

202. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 16–32 (1982); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1789–90 (1997).

203. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 679–80 (1993) ("When judges stray too far from the mark, pressures build—in judicial appointments and in political rhetoric—to bring them back into line. The dialogic protection is that the judiciary—or the people—always are struggling to achieve convergence." (footnote omitted)); *cf.* Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757, 762.

204. LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343–45 (1994); Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1, 25–28 (1996).

205. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

Court has created to facilitate constitutional dialogue among the political branches.[206]

Even the most ambitious defenses of judicial supremacy do not contend, however, that the politically accountable branches have no role in giving life to the Constitution in the absence of judicial decisionmaking.[207] Nor do they contend that courts should routinely abandon minimalist approaches to interpreting the Constitution[208] or crowd out other branches by reaching unnecessary constitutional conclusions. Presumably then, proponents and opponents alike have reason to consider the consequences for constitutional dialogue when the Supreme Court elevates jurisdictional barriers from prudential to constitutional status.

Methodologically, I ask two questions. First, are there examples of federal courts and Congress engaging in meaningful dialogue in jurisdictional cases?[209] Second, if there are, would constitutionalizing the respective limits have facilitated or frustrated these dialogues? To that end, I have identified examples of jurisdictional dialogues across three categories: vacatur, affirmation, and instatement. By "vacatur," I mean episodes in which Congress eliminates a prudential limit. "Affirmation" references moments when politically accountable bodies adopt and operationalize formerly prudential limits. And "instatement" references Congress's adoption of a *limit* on judicial power in response to judicial action or invitation.

On balance, I argue that constitutionalizing prudential limits is most likely to lock Congress out of dialogues about how to eliminate or operationalize federal jurisdictional limits. As a result, constitutionalizing prudential limits sometimes significantly harms congressional efforts to expand access to federal courts, especially Congress's ability to create and enforce rights. And this pattern raises its own set of democratic concerns.[210]

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206. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1587 (2001).

207. Alexander & Schauer, *supra* note 205, at 1360.

208. For brilliant, classic pieces on judicial minimalism, see Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 149–50 (1993) (expressing skepticism of minimalism as a normative lodestar); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (defending judicial democracy-enhancing minimalism).

209. I am grateful to Sean Farhang for this question, which he posed to me, and which I consequentially explored.

210. *See* Resnik, *supra* note 27, at 52–64 (exploring how decreased access to courts harms democratic precepts like equality).

### *B. Vacatur*

Does Congress ever exercise its authority to eliminate prudential limits on judicial power? The short answer is yes. Laws governing housing discrimination and state workers' rights offer illuminating examples.

#### 1. Fair Housing Act

The Court has held that the Fair Housing Act ("FHA") eliminates all prudential limits on federal judicial power and allows suits for violations of the Act to the full extent allowable under Article III.[211] One of the FHA's causes of action applies to any "person claiming to be aggrieved," thereby evincing "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."[212] The FHA's other cause of action is worded differently, stating "the rights granted by" the Act "may be enforced by civil actions in appropriate United States district courts."[213] The Court has held that this broad language also permits suits that would "otherwise would be barred by prudential standing rules."[214]

Because many early FHA cases were brought by "testers" who inquired about purchasing property, the elimination of prudential rules was potentially important to the outcome of those cases. Testers had no actual intention of purchasing the property and therefore one could (and did) argue that the testers were vindicating the interests of others.[215] Viewed this way, the claims run up against the prudential bar against third-party standing.[216] In light of the FHA's language, however, this prudential bar to jurisdiction was rejected.[217] Further, to the extent that testers were not " 'arguably within the zone of interests to be protected or regulated' by the statutory framework," the Court rejected this notion for the same reason.[218] Prudential rules gave way to congressional authorization.

It seems unlikely that these cases would have come out the same way if the bar against third-party standing were elevated to

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211. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

212. *Id.*

213. Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 122 (1979); *see* 42 U.S.C. § 3612 (2012) (permitting complainants to file a civil action under the Fair Housing Act).

214. *Gladstone, Realtors*, 441 U.S. at 100.

215. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

216. *See supra* Part I.B.1.

217. *Havens Realty Corp.*, 455 U.S. at 373–74.

218. *Gladstone, Realtors*, 441 U.S. at 100 n.6 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 39 n.19 (1976)).

constitutional status. The "nonconstitutional" nature of these requirements permitted Congress to abrogate them. In *Lexmark*, the Court explicitly noted the uncertain status of third-party standing in a post-*Lexmark* world.[219] And in lower court litigation, parties have predictably asked courts to eliminate or recast third-party standing in light of *Lexmark*.[220] Given as much, *constitutionalizing* third-party standing likely would not enhance democratic values. Such an approach would lock Congress out of discussions as to how to best enforce one of its laws.[221] Incidentally, in this scenario, the law at issue happens to also implicate democratic, egalitarian values: ending segregation.[222]

### 2. Protections for State Workers

The Fair Labor Standards Act,[223] the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the self-care provision of the Family Medical Leave Act[224] provide even starker examples of dialogue through vacatur. These laws implicate a limit on judicial power that took on an increasingly constitutional quality during the last quarter of the twentieth century: state sovereign immunity. And these shifts invited varying degrees of congressional dialogue.

In *Employees of the Department of Public Health & Welfare of Missouri v. Department of Public Health & Welfare of Missouri*,[225] the Court confronted the question whether state employees could sue their

219. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.3 ("The limitations on third-party standing are harder to classify . . . . This case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day.").

220. Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc., 778 F.3d 502, 505–06 (5th Cir. 2015) (rejecting an attempt to eliminate the rule); HomeAway Inc. v. City & County of San Francisco, No. 14-CV-04859-JCS, 2015 WL 367121, at *7 (N.D. Cal. Jan. 27, 2015) (same); Texas v. Penguin Grp. (USA) Inc. (*In re* Elec. Books Antitrust Litig.), 14 F. Supp. 3d 525, 534–35 (S.D.N.Y. 2014) (same); *see also* Calista Enters. Ltd. v. Tenza Trading Ltd., No. 3:13–CV–01045–SI, 2014 WL 3695487, at *6 n.7 (D. Or. July 24, 2014) (recognizing that prudential standing requirements exist outside of Article III requirements); Pringle v. Atlas Van Lines, 14 F. Supp. 3d 796, 799–800 (N.D. Tex. 2014) (same). One Eleventh Circuit opinion has identified the potentially significant impact of treating the FHA as no longer having abrogated the third-party standing rule in light of *Lexmark*. City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1281 (11th Cir. 2015).

221. As Sean Farhang has compellingly written, enforcing civil rights statutes through civil litigation, instead of administrative or executive agencies, is a contested, strategic policy choice. *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE (2010).

222. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (observing link between democracy and integration).

223. 29 U.S.C. § 201 (2012).

224. 29 U.S.C. § 2601 (2012).

225. 411 U.S. 279 (1973).

state for violations of the Fair Labor Standard Act. The Court rejected the claim, concluding that in the absence of "clear language" from Congress evincing an attempt to abrogate sovereign immunity, the Court was unprepared to infer such intent.[226] Eight Justices agreed on this point, though the majority and concurring opinions expressed different rationales as to why. The majority noted that it was "reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly" as to render them subject to private damages lawsuits for violations of the FLSA.[227] And while the Court asserted that sovereign immunity had constitutional dimensions, the Court simultaneously suggested that Congress had power to abrogate that immunity. "It would . . . be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without . . . indicating in some way by clear language that the constitutional immunity was swept away."[228] In addition, the two concurring Justices and the dissenting Justice all stated that Congress could abrogate extra-textual components of sovereign immunity precisely *because* they were common law principles that sounded in judicial restraint rather than the Constitution.[229]

Congress heard the call for clarity[230] and, in a moment of swift dialectical response, amended the Act to expressly include state and local governments in 1974.[231] Decades later, however, the Court changed course, making clear that Congress could no longer subject states to suit under legislation passed pursuant to the Commerce Clause.[232] Only legislation passed pursuant to the Fourteenth Amendment, the Court later held, could properly abrogate sovereign immunity.[233] The Fair Labor Standards Act's abrogation provision, therefore, eventually fell.[234] The Court's adoption of a constitution-

226. *Id.* at 285.

227. *Id.* at 286.

228. *Id.* at 285.

229. *Id.* at 297 (Marshall, J., concurring); *id.* at 319 (Brennan, J., dissenting).

230. This clear statement rule is an example both of what Dan Coenen calls "a rule of clarity" and what Ernie Young calls a "soft" rule of procedural federalism. Coenen, *supra* note 206, at 1603–04; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 16–17, 20 (2004).

231. 29 U.S.C. § 203(x) (2012); Smith, *supra* note 122, at 1965 ("In 1974, Congress responded by amending the Act to provide that the term employer included 'the government of a State or political subdivision thereof [or] any agency of . . . a State, or a political subdivision of a State.' " (alteration in original) (quoting 29 U.S.C. § 203(x))).

232. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63–66 (1996).

233. *Id.* at 59.

234. Alden v. Maine, 715 A.2d 172, 173–74 (Me. 1998), *aff'd*, 527 U.S. 706 (1999); Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1328–29 (2001) (describing this episode and its consequences for litigants); Smith, *supra* note 122, at 1965 (same).

based model (instead of a prudential or common law model) facilitated the Court's decision to cancel out Congress's clear statement in the FLSA. "Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design."[235]

At least two lessons can be learned from this episode. The first is that whether a judicial limitation sounds in the Constitution does not always tell us everything about its insulation from judicial override. For a time, sovereign immunity's constitutional status and Congress's power to abrogate it were coterminous.[236] Even after a court classifies something as a "constitutional bar," there are still opportunities to determine how democratic the constitutional rules will be.[237] All jurisdictional rules are not created equal.[238]

Second, the sovereign immunity tug-of-war nonetheless makes plain that constitutionalizing sovereign immunity facilitated the quieting of Congress's voice in rights-remedies dialogue. Adopting the prudential approach advocated in thoughtful dissents and articles would have resulted in a more relevant voice for Congress than the current doctrine allows. Because the dissenters rejected a "constitutionalized . . . concept of sovereign immunity," they believed Congress had the power to abrogate it.[239] The Court's contrary result disparages the role of Congress to participate in conversations about enforcing statutory rights, even when it has been expressly invited.

Notably, too, even when Congress purports to accept the Court's live invitation to abrogate sovereign immunity pursuant to the Fourteenth Amendment, the constitutional nature of sovereign immunity often gets in the way. Provisions under the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family Medical Leave Act's self-care provisions are among those that

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235. *Alden*, 527 U.S. at 733.

236. Pennsylvania v. Union Gas Co., 491 U.S. 1, 7, 19 (1989) (finding that Congress had the power to permit suits against states under both the Fourteenth Amendment and the Commerce Clause).

237. *See e.g.*, Coenen, *supra* note 206 (demonstrating how the Court uses various doctrines to engage other branches of government to resolve substantive constitutional questions); Young, *supra* note 230 (highlighting the distinction between "hard" constitutional limits on federal power and "soft" process-based doctrines).

238. *See* Bloom, *supra* note 9, at 990 (discussing the importance of subject-matter jurisdiction in relation to supplemental jurisdiction and abstention); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 15–20, 24–26 (2011) (exploring competing jurisdictional policies and the effects of rules versus standards); Dodson, *supra* note 9, at 1441 (explaining that "nonjurisdictional rules can have jurisdictional effects").

239. *Alden*, 527 U.S. at 761.

have fallen because Congress's record was deemed insufficient to justify legislation under its Fourteenth Amendment enforcement power.[240] It is not that Congress does not try. In passing the FMLA, for example, the Senate and House Reports expressly referenced Congress's judgment that laws banning discrimination against pregnant women were insufficient to protect women and needed to be bolstered by a gender-neutral leave policy that did not treat women as different from men with health issues.[241]

Still, when Congress attempts to abrogate sovereign immunity pursuant to the Fourteenth Amendment's enforcement power, the law must be congruent and proportional to the constitutional evils that are being addressed—a high bar. Evidence of state-sanctioned discrimination is particularly important when Congress is attempting to protect a non-suspect class. Professor Pam Karlan has associated this line of reasoning with what she calls the "Eleventeenth Amendment": "a court that used to see the Fourteenth Amendment as a limitation on the Eleventh has come to see the Eleventh as a constraint on the Fourteenth."[242]

### *C. Affirmation*

The dialogical relationships between federal courts and politically accountable bodies are not always antagonistic. These dialogues are sometimes cooperative. Politically accountable bodies have sometimes operationalized certain formerly self-imposed prudential limits on judicial power, providing an additional layer of legitimacy and order. Two examples help make the point. The first is the federal judiciary's transition from *Pullman* abstention to the widespread practice of certification.[243] The other is Congress's wide-

240. Coleman v. Court of Appeals of Md., 566 U.S. 30, 44 (2012) (Family Medical Leave Act); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000) (Age Discrimination in Employment Act). By contrast, the Court has found that certain family leave (as opposed to self-care leave) provisions are actionable against States. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727–30 (2003).

241. *See* S. REP. NO. 101-77, at 32 (1989) ("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability."); H.R. REP. NO. 99-699, pt. 2, at 22 (1986) ("Many pregnant women have been fired when their employer refused to provide an adequate leave of absence."); *see also Coleman*, 566 U.S. at 45–47 (Ginsburg, J., dissenting) (noting that the FMLA's self-care provision provided a gender-neutral leave policy).

242. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 188–93.

243. *See supra* Part I.B.5.

scale replacement of Supreme Court mandatory jurisdiction with discretionary certiorari jurisdiction in a manner that better reflected actual practices of restraint.

### 1. From *Pullman* to Certification

Under traditional *Pullman* abstention, when a federal court stayed or dismissed a case, the plaintiff could choose whether to litigate both state and federal law issues in state court, or instead litigate the state issue alone.[244] But this traditional approach is no longer dominant. In 1959, during a speech before the Conference of Chief Justices, a commentator drew attention to a dormant Florida statute that permitted state courts to entertain federal courts' certified legal questions about issues of state law.[245] Only a year later, Justice Frankfurter—the architect of *Pullman* abstention—praised the statute in an opinion for the Court, calling it an example of uncommon prescience.[246]

The number of certification statutes ballooned over the next several decades and drew continued acclaim from commentators and courts.[247] This growth is traceable to the Court's express encouragement of certification statutes. In addition to Justice Frankfurter's praise, in 1974 the Court again hailed certification because it "save[s] time, energy, and resources and helps build a cooperative judicial federalism."[248] A wave of states subsequently adopted certification statutes, and more courts used the statutes that already existed.[249] By 1977, the leading academic voice on *Pullman* abstention concluded that the doctrine made no sense when certification was available.[250] And by the mid-1990s, the Court observed that "[c]ertification today covers territory once dominated by a deferral

244. England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 416–17 (1964); Field, *supra* note 155, at 1079.

245. Philip B. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 489–90 (1960).

246. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960) ("The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision."). Kurland was a previous clerk to Justice Frankfurter. *See* Norman Dorsen, *The Religion Clauses and Nonbelievers*, 27 WM. & MARY L. REV. 863, 863 (1986).

247. 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4248 n. 30 (3d ed. 2016) (providing a list state statutes and appellate rules).

248. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

249. WRIGHT ET AL., *supra* note 247, § 4248.

250. Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 592 (1977).

device called '*Pullman* abstention.' "[251] As noted in Part I.B, forty-eight states now have certification statutes,[252] though one of those states does not use the procedure because it is incompatible with the state's constitution.[253]

Did the prudential nature of *Pullman* abstention help aid this successful dialogue between the judiciary and state legislatures? The answer to this is not as clear as instances in which Congress vacates a prudential rule. A similar result would have presumably occurred if, rather than endorsing and encouraging the adoption of certification procedures, the Court had treated the adoption of these statutes as a constitutional mandate. However, it is not apparent that type of coercion can be called dialogue. Or perhaps the Court could have held that it is unconstitutional to decide constitutional questions when unclear state law stands in the way of reaching those questions. We cannot know with certainty whether that holding would have produced the same result. What we do know is that the Court instead invited and encouraged state legislatures to engage in "cooperative judicial federalism."[254] And the net result is a successful story of inter-systemic, inter-branch participation in the making of modern federal jurisdiction.[255]

### 2. From "Curious" Dismissals to Certiorari

Prior to June 1988, the United States Supreme Court had mandatory jurisdiction over a significant number of cases, contributing to a docket of roughly 220 cases per year.[256] In that year, after years of urging by the Court, a federal law eliminated most mandatory jurisdiction, replacing it primarily with discretionary jurisdiction.[257] At the time, the Chair of the House Judiciary Committee called the move "the most significant jurisdictional reform affecting the high court in

251. Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997).

252. CHEMERINSKY, *supra* note 9, § 12.3; *see also supra* Part I.B.

253. CHEMERINSKY, *supra* note 9, § 12.3; *see also supra* note 110.

254. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

255. For additional discussions of inter-systemic governance and dialogue in other contexts, see Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 30 (2007); Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115, 118 (2007).

256. Lynn Weisberg, *New Law Eliminates Supreme Court's Mandatory Jurisdiction*, 72 JUDICATURE 138, 138 (1988).

257. Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 971–78 (2013) (describing the politically contested battles that caused an eleven-year delay in the passage of this reform).

over 60 years."[258] Congress implemented this reform in order to ease a high caseload burden, following the recommendations of a commission that Chief Justice Warren Burger had assembled.[259] "Elimination of the Court's mandatory jurisdiction, although not a panacea," the House Judiciary Committee concluded in its Committee Report, "is a necessary step to relieving the Court's calendar crisis."[260] Congress's power to do this ostensibly came by way of the Exceptions Clause, which authorizes Congress to craft exceptions to the Supreme Court's appellate jurisdiction (but not its original jurisdiction).[261]

Still, long before Congress formally eliminated most mandatory jurisdiction, the Court had adopted various methods to avoid constitutional questions or cases that it did not wish to reach. In addition to doctrines of constitutional avoidance, and doctrines of justiciability,[262] the Court sometimes dismissed controversial cases on the thinly reasoned ground that the case lacked a "properly presented" or "substantial" federal question.[263] Famously, for example, in years following *Brown v. Board of Education*, the Court dismissed a case challenging a miscegenation statute in *Naim v. Naim*.[264] In a per curiam, the Court offered that the record and briefing was "inadequa[te]" to assess the statute.[265] It accordingly vacated the Virginia Supreme Court opinion that had declared an interracial marriage void and requested that the state supreme court send the case back to a trial court for reconsideration. When the Virginia Supreme Court did not budge, and argued that it had no authority to remand the case back to a trial court,[266] the Supreme Court blinked, dismissing the case as "devoid of a properly presented federal question."[267]

Court records from the time reveal that this was not the actual basis for the dismissal.[268] Instead, the Court feared that taking on the miscegenation issue in the immediate years after *Brown* would undermine the already highly fraught school integration project. In the

258. Weisberg, *supra* note 256, at 138.

259. *Id.*

260. H.R. REP. NO. 100-660, at 14 (1988); *accord* H.R. REP. NO. 98-986, at 13–14 (1984).

261. Grove, *supra* note 257, at 939, 981.

262. *See supra* Part I.B.

263. Francis J. Ulman & Frank H. Spears, *Dismissed for Want of a Substantial Federal Question*, 20 B.U. L. REV. 501, 505–06 (1940).

264. 350 U.S. 891 (1955).

265. *Id.* at 891.

266. Naim v. Naim, 90 S.E.2d 849, 850 (Va. 1956).

267. Naim v. Naim, 350 U.S. 985, 985 (1956).

268. Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim*, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 145–55 (1998).

views of Justices, and clerks,[269] the Court had the capital to address school segregation. But it did not have the capital to address school segregation and miscegenation at the same time. Justice Clark reportedly reasoned: "[O]ne bombshell is enough."[270] The refusal to hear the case was, in Bickelian terms, an act of (un)principled expediency.

Another example of a case dismissed for a lack of a substantial federal question is a case that received renewed attention in recent years: *Baker v. Nelson*.[271] In that case, the Minnesota Supreme Court rejected a same-sex couple's claim that the state's prohibition on same-sex marriage constituted sex discrimination. On appeal, rather than affirming the lower court, the Court dismissed the case for "want of a substantial federal question."[272]

*Naim v. Naim* and *Baker v. Nelson* were not isolated cases with respect to curious dismissals for lack of a "substantial" or "properly presented" federal question. The practice was common. During the 1930s, about four hundred cases were dismissed for lack of a substantial federal question, and this continued at a similar pace in the 1940s and 1950s.[273] This pace only picked up with time; for example, this method of dismissal, which a leading Federal Courts treatise called a "curious device,"[274] resulted in sixty-five dismissals during the October 1976 Term.[275] While these dismissals had some precedential support, scholars cautioned against reading too much into what they meant about the actual merits of the case.[276] In the words of one group of commentators, "It is conceivable, but unlikely, that all of these cases

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269. *Id.* at 149–50. As one clerk's memo put it, "In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time." *Id.* at 149.

270. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 193 (1964).

271. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

272. Baker v. Nelson, 409 U.S. 810 (1972), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

273. Fowler V. Harper & Arnold Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427, 441 n.68 (1954); Ulman & Spears, *supra* note 263, at 503; Comment, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488 (1949).

274. CHARLES ALAN WRIGHT ET AL., 16B FEDERAL PRACTICE AND PROCEDURE § 4014 (3d ed. 2016).

275. *Id.* at n.38.

276. Comment, *The Significance of Dismissals "For Want of A Substantial Federal Question": Original Sin in the Federal Courts*, 68 COLUM. L. REV. 785, 788–89 (1968) (collecting commentators); *see* BICKEL, *supra* note 25, at 126. *But see* Gunther, *supra* note 1, at 10–13; *cf.* Redrup v. New York, 386 U.S. 767, 771–72 (1967) (Harlan, J., dissenting) (equating a dismissal of certiorari as improvidently granted with a dismissal for want of a substantial federal question); Linehan v. Waterfront Comm'n, 347 U.S. 439, 439–41 (1954) (Douglas, J., dissenting); ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 277 (3d ed. 1962); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 12–14 (1930).

would have been decided the same way after full briefing and argument."[277]

If one accepts this view that at least a significant subset of dismissals for want of mandatory jurisdiction are a form of prudential limitation, the 1988 Act begins to look like an attempt to acknowledge and operationalize those limits in a different form. Indeed, the elimination of most forms of mandatory jurisdiction at the encouragement of a panel assembled by a Chief Justice, and the conversion of the Supreme Court into a body primarily driven by discretionary review, dramatically reduced the instances of these "curious" dismissals.[278] Despite the traditional narrative, which views the Exceptions Clause as a potential device to strip the Court of authority to hear important federal questions,[279] this episode helps to demonstrate that the Clause can also be used as a device for cooperation and dialogue.[280]

Inevitably, some readers will find this resolution unsatisfying. If the Supreme Court had mandatory jurisdiction over a case like *Naim v. Naim*, should they not have decided the issue rather than engaging in a political calculation about what the nation was ready for?[281] Indeed, the Court's dismissal of the appellant's claim in *Naim* managed to make its way into a recent symposium about candidates for the "Worst Supreme Court Case Ever."[282] After all, the case involved real parties whose rights were trampled as the Court waited for a better time.

To this, I remind that the goal of this analysis is not to defend prudential limits against a baseline of no limits. Rather, the comparison here is between prudential limits and constitutional limits. Two scenarios—one historical and the other hypothetical—help clarify this point. Under the historical scenario, the Court dismissed an appeal in

277. WRIGHT ET AL., *supra* note 274, § 4014.

278. Jonathan L. Entin, *Insubstantial Questions and Federal Jurisdiction: A Footnote to the Term-Limits Debate*, 2 NEV. L.J. 608, 610 (2002) (noting that "the Court's docket now consists almost exclusively of certiorari cases rather than appeals," but also noting that "there are enough summary dispositions of appeals to cause mischief if district and circuit judges" are not familiar with the importance of a dismissed Court appeal).

279. *See, e.g.,* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1044 (2007) (arguing that, broadly construed, the Exceptions Clause would be "a threat to judicial review"); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (urging that, if the Exceptions Clause gives Congress unlimited power over Supreme Court's appellate jurisdiction, then "the Constitution . . . authoriz[es] its own destruction").

280. Grove, *supra* note 257, at 996–97.

281. Richard Delgado, Naim v. Naim, 12 NEV. L.J. 525 (2012) (arguing that the case should have been decided on the merits).

282. *Id.*

a per curiam with low precedential value and then revisited the issue eleven years later by ruling that Virginia's miscegenation statute indeed violated the Federal Constitution.[283] Under the hypothetical scenario, the Court actually writes an opinion upholding the miscegenation statute on constitutional grounds, using reasoning about the importance of deference to democratic processes and state decisionmaking. Such a hypothetical opinion might look much like, for illustrative purposes only, the Chief Justice's dissent in *Obergefell v. Hodges*,[284] where he contended that the Court should leave laws in place that prohibit gay couples from marrying in part because of the need to "exercise humility and restraint in deciding cases."[285] Whatever one's views about whether the Court should have overturned Virginia's racist law at the first opportunity, this type of constitutionally imposed restraint may have well been worse than self-imposed, strategic restraint. As Professor Charles Black once observed, when a court formally upholds legislation, it has provided the law "legitimation" and "validation."[286] That, at least, is not among the Court's potential sins in *Naim*.

### *D. Instatement*

It should be said that not all congressional dialogue on questions of federal judicial power expands or even "hold serves" as to that power. Consider the dialogue between courts and Congress as to the proper scope of judicial immunity. In *Pulliam v. Allen*, the Court "conclude[d] that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity."[287] This decision was expressly based on the common law, not the Constitution itself. And the Court invited Congress to override the decision should it have a different view: "[I]t is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity."[288] Congress did precisely that in the 1996 Federal Courts Improvement Act,[289] which amended 42 U.S.C. § 1983.[290] Under that

283. Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

284. 135 S. Ct. 2584, 2624 (2015).

285. *Id.*; *see also id.* at 2626 (Scalia, J., dissenting) (calling the marriage decision a "threat to American democracy").

286. CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT (1960).

287. Pulliam v. Allen, 466 U.S. 522, 541–42 (1984).

288. *Id.* at 543.

289. Pub. L. No. 104-317, 110 Stat. 3847 (1996) (to be codified as amended in scattered sections of 18 U.S.C. & 28 U.S.C.).

290. Section 1983 provides a cause of action and set of remedies against state and local officials who violate federal rights.

amendment, a federal court may not award injunctive relief against state judges unless the state judge has violated declaratory relief or unless declaratory relief is "unavailable."[291]

It is not clear that the common law basis of the *Pulliam* decision facilitated Congress's adoption of the FCIA, however. Constitutionalizing a limit on judicial power, as we have seen, prevents Congress from vesting courts with certain types of power. But Congress is presumably free to vest courts with something less than the full range of power that the Constitution permits.[292] Suppose *Pulliam* had instead held that judicial immunity is a constitutional barrier to suit that does not extend to prospective relief. This presumably would not have barred Congress from adopting a statutory limit in § 1983 that prohibits forms of prospective relief against judges.[293] Constitutionalization's greatest impact comes when Congress attempts to expand rights and remedies, not when Congress limits them.

## IV. CONSTITUTIONALIZING PRUDENCE: A MAJORITARIAN VIEW

### *A. Countermajoritarian Invalidation*

The countermajoritian difficulty—that is, the challenge to democracy that attends invalidations of legislation—has long occupied an important place in scholarship. The topic has generated so much academic attention that it has been called an "obsession" more than once.[294] While the term "countermajoritarian difficulty" can be traced

291. Patricia Walther Griffin & Rachel M. Pelegrin, *A Look at Judicial Immunity and Its Applicability to Delaware and Pennsylvania Judges*, 6 WIDENER J. PUB. L. 385, 391 (1997).

292. *See* FALLON ET AL., *supra* note 40, at 300 (summarizing scholarship about the vexing question of precisely how extensively Congress may remove federal jurisdiction before it presents a constitutional problem). Two classic pieces of scholarship on this point are Akhil Amar's *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985), and the late Daniel Meltzer's *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990). Thoughtful, more recent works on the topic include Vicki C. Jackson, *Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445 (1998); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 237–38 (2007); and A. Benjamin Spencer, *The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis*, 46 GA. L. REV. 1 (2011). It is unlikely we have reached the end of this debate. Mark Tushnet & Jennifer Jaff, *Why the Debate over Congress' Power to Restrict the Jurisdiction of the Federal Courts Is Unending*, 72 GEO. L.J. 1311, 1326 (1984).

293. I say "presumably" because there may be constitutional limits on Congress's ability to deny remedies for violations of the Constitution. *See e.g.*, Amar, *supra* note 292. This was among the questions Henry Hart posed in one of the most celebrated articles in the field of Federal Courts. Hart, *supra* note 279, at 1366 ("The power of Congress to regulate jurisdiction gives it a pretty complete power over remedies, doesn't it?").

294. Friedman, *supra* note 166, at 157 (discussing the "obsession"); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1521 (1990)

to Bickel, scholars before and after him have attempted to answer this vexing question: What limits should courts impose on themselves to avoid unwise, unnecessary, or undemocratic instances of judicial review?

The irony is that constitutionalizing prudential rules on federal judicial power will lead to countermajoritarian invalidations of legislation, even in cases where the underlying merits have nothing to do with the judicial review. The example of sovereign immunity, discussed above, provides evidence. Because the Court has narrowly adopted a constitutionally based, rather than prudentially based, approach to sovereign immunity, a number of provisions in important legislation abrogating sovereign immunity have fallen.[295] While these decisions can and have been defended on federalism grounds, they did nothing to check judicial review. They aided it.

An entirely sensible counter to my critique is that sovereign immunity is so steeped in federalism concerns that it is not the most helpful of examples. The admittedly better question is this: When federal courts constitutionalize separation of powers based norms like standing, does *this* reduce countermajoritarian invalidations of legislative enactments? Two areas of standing doctrine lead to the inference that constitutionalizing rules sometimes actually encourages countermajoritarian invalidations of law. The first is the Court's line of jurisprudence governing Congress's ability to create statutory rights that, when violated, give rise to a judicially cognizable injury. The second is the Court's jurisprudence outlining who may represent a state's sovereign interests in federal court.

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(same); *see also* Katyal, *supra* note 202, at 1709 ("Contemporary constitutional law is preoccupied with the antidemocratic nature of judicial review."). As the late Daniel Meltzer succinctly and eloquently put it, "Our attitudes about judicial review incorporate an inescapable contradiction between the desire for judicial independence and the fear of unaccountable power." Daniel J. Meltzer, *The Judiciary's Bicentennial*, 56 U. CHI. L. REV. 423, 433 (1989); *cf.* Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1573 (1988) ("[T]he search for a normative justification for . . . judicial nonaccountability is fundamentally misguided. The structure of the judiciary must instead be understood as simply the reflection of the subjective preferences of our political community. It is no accident that these preferences leave us ambivalent about judicial nonaccountability.").

295. Smith, *supra* note 121, at 1969. If the evenly divided court had decided this past term to expand constitutional sovereign immunity to include some state-law claims brought in state court, Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. 1277 (2016), this would have resulted in the unprecedented invalidation of state jurisdictional law on this basis as well, an undemocratic prospect that has no apparent textual basis in the Eleventh Amendment or Article IV.

1. Statutory Standing

In Judge William Fletcher's magisterial article *The Structure of Standing,* he argued that Congress should have "essentially unlimited power" to define statutory injuries.[296] This view has accordingly been been called "Fletcherian standing."[297] Cases consistent with that approach include *Trafficante v. Metropolitan Life Insurance Co.*,[298] wherein the Supreme Court held that white plaintiffs who dwelled in a multi-unit housing complex could challenge the landlord's discrimination against blacks because Congress had created a right to live in an apartheid-free dwelling. More recently, in *Federal Election Commission v. Akins*,[299] the Court found that a denial of a statutory "right to information" constituted a sufficient injury to confer standing to citizens who filed federal suit against the F.E.C. to demand disclosures about campaign expenditures and contributions. Those plaintiffs relied on a broad cause of action in the Federal Election Campaign Act. The plaintiffs in neither *Trafficante* nor *Akins* suffered a traditional common law injury.

But there are other opinions that depart from the Fletcherian approach, cases in which the constitutionalized version of the "generalized grievances" doctrine invalidates a congressional cause of action.[300] Famously, in *Lujan v. Defenders of Wildlife,*[301] plaintiffs brought suit under a provision of the Endangered Species Act ("ESA") that requires federal agencies to consult with the Department of the Interior to ensure the agencies' actions would not jeopardize endangered species or their habitat. Relying on the ESA's cause of action—which allowed "any person" to obtain judicial review for violations of the Act—the *Lujan* plaintiffs challenged a Department of Interior rule that exempted agencies from the consultation requirement when those agencies' conduct took place abroad. In an opinion by Justice Scalia, the Court held that, notwithstanding Congress's broad cause of action, the Article III bar against generalized grievances

296. Fletcher, *supra* note 38, at 223–24. *But see* Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's* The Structure of Standing, 65 ALA. L. REV. 289, 332 (2013) (urging instead that courts "accord such congressional determinations a strong presumption of validity, but one that can be rebutted where other constitutional principles are jeopardized").

297. Howard M. Wasserman, *Fletcherian Standing, Merits, and* Spokeo, Inc. v. Robins, 68 VAND. L. REV. EN BANC 257 (2015).

298. 409 U.S. 205 (1972).

299. 524 U.S. 11 (1998).

300. Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992) ("But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.").

301. *Id.*

prevented a citizen from filing suit over a mere statutory "procedural injury" without more.[302]

*Lujan*'s tension with pro-democracy rhetoric has been thoroughly described by others, especially in the immediate aftermath of that decision.[303] Congress passed the ESA and made a policy choice to enforce its norms through private rights of action rather than some other means. The president signed the legislation. Whatever the merits of *Lujan* from an executive-prerogative perspective,[304] the decision nonetheless undermines that choice.

Constitutionalizing the generalized grievance prong did work in producing this result. As noted, roughly a decade earlier, in *Allen v. Wright*, the Court had described the bar against generalized grievances as prudential.[305] But *Lujan* elides that characterization, describing the bar as constitutional.[306] Because prudential rules are, to borrow Professor Ernie Young's terminology, "soft,"[307] in that they can be abrogated by Congress, and the Article III rule asserted in *Lujan* is "hard," in that Congress is treated as incapable of breaching it, the constitutionalization of a formerly prudential rule facilitates an as-applied invalidation of a federal law. According to the Court, even "at

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302. *Id.* at 571–72.

303. Nichol, *supra* note 153, at 1142–43; Pierce, *Judicially Imposed Limit*, *supra* note 153, at 1170–73 (arguing that the case invites the "agenda" of "reducing the permissible role of Congress in government policymaking"); *see also* Elliott, *supra* note 153, at 489–90:

> Contra the Scalia argument, then, one might say that a law enacted despite these significant hurdles is particularly valuable and deserving of the Court's solicitude, particularly when it is also subject to an effective minority veto in the executive branch when the President decides, e.g., to direct enforcement officers not to enforce the law or to encourage agencies to promulgate rules that do not fulfill the spirit of the law, or when agencies become too solicitous of their regulatory constituencies.

(footnote omitted).

304. Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 203 (2011); Elliott, *supra* note 153, at 493 ("Standing doctrine is used to beat back congressional efforts to use the courts against the executive branch."); Pushaw, *supra* note 296, at 293 ("Congress should not be permitted to undermine the Executive Branch's Article II power by transferring the execution of federal law, which inevitably involves discretionary determinations based on policy considerations and resource constraints, to unelected federal judges acting at the request of anyone with the desire and resources to litigate.").

305. Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

306. *Lujan*, 504 U.S. at 573–74 (1992):

> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

307. Young, *supra* note 230, at 20.

the invitation of Congress" it could not "ignor[e] the concrete injury requirement."[308]

This opinion cannot be viewed as an outlier in light of the Supreme Court's 2016 opinion in *Spokeo v. Robins*.[309] At issue in that case was whether the Federal Credit Reporting Act provided for more causes of action than Article III will bear. The Act mandates, among other things, that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy of" consumer reports.[310] The willful failure to comply with the Act "with respect to any [individual]" results in liability for "actual damages" or statutory damages of $100 to $1,000 per violation, costs of the action, attorney's fees, and potential punitive damages.[311]

Spokeo, a company that operates a searchable online database with profiles about millions of Americans, disseminated false information about Thomas Robins on his profile. The Ninth Circuit held that this was sufficient to constitute an injury-in-fact within the meaning of Article III. After all, Judge Diamond O'Scannlain wrote, Robins "allege[d] that Spokeo violated his statutory rights, not just the statutory rights of other people."[312] Further, "Robins's personal interests in the handling of his credit information are individualized rather than collective."[313] The Supreme Court held, however, that this reasoning was incomplete. Even if Robins's injury was "particularized," the Ninth Circuit failed to show that the injury was sufficiently "concrete" to satisfy the Constitution's injury-in-fact requirement. "Article III standing requires a concrete injury even in the context of a statutory violation," the Court explained.[314] The Court compared Robins's alleged injury to a procedural one: "Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."[315] Accordingly, the Court vacated the Ninth Circuit's disposition, and remanded for further analysis.

In many respects, *Spokeo* is a narrow opinion with hallmarks of a compromise. The opinion was decided months after Justice Scalia, the leading jurisdictional voice on the Right and the chief architect of hardened standing rules, passed away. It commanded six out of eight

308. *Lujan*, 504 U.S. at 576.

309. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545 (2016), *as revised* May 24, 2016.

310. 15 U.S.C. § 1681e(b) (2012).

311. 15 U.S.C. § 1681n(a) (2012).

312. Robins v. Spokeo, Inc., 742 F.3d 409, 413 (2014).

313. *Id.*

314. *Spokeo*, 136 S. Ct. at 1549.

315. *Id.*

votes, with Justice Ginsburg and Justice Sotomayor in dissent. Perhaps that is why the Court gave little guidance in defining the word "concrete," saying only that it means "real" and "not abstract," while cautioning that an injury need not be "tangible" and can include "risk" of harm.[316] And as the liberals who joined the majority opinion surely know, the Ninth Circuit is still free to supplement its earlier analysis with new language reasoning that falsehoods about a specific person amount to a concrete injury with a nexus to the common law tort of defamation. The Ninth Circuit could even simply repeat what Justice Ginsburg said in dissent: "Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market."[317]

Still, while narrow, *Spokeo* is significant. Unlike post-*Lujan* cases like *Federal Election Commission v. Akins*,[318] the opinion re-entrenches a departure from Fletcherian standing. Congress's creation of a cause of action was emphatically not enough to confer a sufficient statutory injury to meet Article III's rising concreteness requirement. Further, in at least four ways, the requirement described in *Spokeo* is more onerous than the one articulated in *Lujan*.

First, *Lujan* strongly suggested that, by adopting a damages remedy, Congress may create a concrete, monetary injury sufficient to clear the Article III bar. Because the ESA authorizes prospective relief alone, that *Lujan* Court emphasized Congress had not "created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff."[319] By contrast, this reasoning is notably absent in *Spokeo*, a case where Congress in fact *did* create a damages remedy for victorious plaintiffs. Rather than adopt a new bureaucratic apparatus and regime to police companies' reporting procedures, Congress provided incentivized judicial enforcement of this federal norm. And yet, the *Spokeo* Court vacated the appellate court's judgment when it could have affirmed in light of this monetary bounty. [320]

316. *Id.* at 1548–49; *cf.* Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283 (2013) (arguing that Article III standing is or should be present when someone suffers a loss with a positive expected value).

317. *Spokeo*, 136 S. Ct. at 1556.

318. 524 U.S. 11 (1998).

319. Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 (1992).

320. To be sure, when Justice Scalia used the term "cash bounty" he was likely referring to qui tam actions, in which a person can bring suit on behalf of the government even if he or she has no connection to the case whatsoever, such as a whistleblower who witnesses someone defrauding the government. *See* Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (discussing "the long tradition of *qui tam* actions in England and the American Colonies"). Justice Scalia ultimately endorsed such suits as consistent with standing. *Id.*

The second way that *Spokeo* subtly raises the Article III bar is with respect to temporal or physical proximity to harm. In *Lujan*, Justice Scalia distinguished those plaintiffs' claims from those where "plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement . . . for an environmental impact statement before a federal facility is constructed next door to them)."[321] This conception of concreteness fails to make its way in to the *Spokeo* decision. Robins did not challenge unreasonable procedures in a vacuum; he challenged procedures that led to false statements made about him in a manner that he and the world could see. Is this less "concrete" than the injury offered as satisfactory in *Lujan*; that is, a procedural barrier to a facility being built next door?

Third, Justice Kennedy and Justice Souter's concurring opinion in *Lujan* noted that the case involved "the articulation of new rights of action that do not have clear analogs in our common-law tradition."[322] By contrast, requiring that reporting agencies take reasonable steps to avoid falsehoods bears at least a passing resemblance to the common law tort of defamation.[323]

Fourth, if *Lujan* is based in part on the fact that it is a suit against the government generally, or the executive branch in particular, *Spokeo* applies a cribbed version of Congress's power to create rights beyond that context. The underlying statute and facts in *Spokeo* are shorn of that concern, and the Court nonetheless imposes a more onerous version of concreteness than the *Lujan* Court endorsed.

One counterpoint is that the Ninth Circuit and other lower courts are still free to say all of this. *Spokeo* did not expressly overrule the more generous aspects of *Lujan*. There are two responses to this point. First, there are still potential costs to treating an easy case about concreteness as a difficult case by vacating an imminently correct opinion. Lower courts will possibly demand more allegations and evidence than they did before for statutory violations, because *Spokeo*'s disposition signals that they should, and lower courts presumably do not want to be reversed. Vacating easy, correct opinions, I hypothesize, makes bad law—even if the lower court still gets it right in the end. Given how young *Spokeo* is, it is too early to test this claim empirically.

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321. *Lujan*, 504 U.S. at 572.

322. *Id.* at 580.

323. Brief for the United States as Amicus Curiae Supporting Respondent, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 5260469, at *7 ("Although Congress can create (and authorize private judicial enforcement of) new statutory rights that have no common-law analog, its power to act is particularly clear when such an analog exists. Common-law defamation provides a close analog to respondent's FCRA claim.").

But, and this is the second response, nothing about *Spokeo*'s newfound hardening of the "concreteness" requirement is likely to result in *fewer* countermajoritarian invalidations of congressional causes of action. At best, it does nothing on this score. And at worst, for the reasons described, it will result in more invalidations of statutes intended to expand access to federal courts. When the constitutionalization of prudential rules meets the hardening of constitutional rules, democracy is sometimes the casualty rather than the victor.

### 2. The State-Agent Rule

In *Hollingsworth v. Perry*, the Court held that Article III's bar against generalized grievances stood as an insuperable barrier to the State of California's ability to determine who could represent that state's sovereign interests in federal court. While the California Supreme Court unanimously concluded that a set of litigants who had funded an initiative had authority to defend that initiative as a matter of state law,[324] that ruling proved no match for the Court's robust and constitutionalized version of the "generalized grievances" proscription.

The underlying facts of *Perry* are likely familiar to many readers, but this background is central to understanding the federal jurisdictional question the Court ultimately resolved. After the California Supreme Court ruled that the state Constitution prohibited the state's ban on same-sex marriage, California voters enacted Proposition 8,[325] reversing marriage equality in the state.[326] A set of same-sex couples filed suit in federal court, contending that Proposition 8 violated the Fourteenth Amendment's guarantees of equal protection and due process.[327] State officials agreed with the plaintiffs, refusing to defend Proposition 8.[328] But the federal court permitted proponents of Proposition 8 to intervene and defend the proposition at trial.[329] Following the trial, the district court sided with the plaintiffs and state officials, issuing a groundbreaking ruling that held Proposition 8 unconstitutional.[330]

That is where things became tricky as a matter of federal jurisdiction. State officials declined to appeal the ruling that

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324. Perry v. Brown, 265 P.3d 1002, 1033 (2011).

325. Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 188 n.36 (2012).

326. *Id.*

327. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

328. *Id.* at 928.

329. *Id.*

330. *Id.* at 927.

invalidated Proposition 8.[331] They concluded that defending the law was inconsistent with their duty to uphold the Federal Constitution.[332] This left proponents with the task of defending the law. A central question on appeal, then, was whether the proponents were permitted to represent the state's interest in federal court. Because prior jurisprudence treated the question of who could represent a state's interest in federal court as a question of state law,[333] the Ninth Circuit understood this question to be a complex, unclear question of state law. As the Supreme Court had previously admonished, when a federal court confronts unclear questions of state law that could potentially obviate the need to reach a federal constitutional question, it should certify the state-law question to the state court.[334] The Ninth Circuit did.

A unanimous California Supreme Court held in a detailed forty-page opinion that California law permits proponents of initiatives to defend California law when state officials refuse to do so. Just as the California Legislature "would have authority to step in to assert the state's interest in the validity of a statute enacted by the Legislature if the state's executive officials have declined to defend the statute's validity in a court proceeding," the California Supreme Court held that "the people are no less entitled to have the state's interest in the validity of a voter-approved initiative asserted on their behalf when public officials decline to defend the measure."[335]

The Ninth Circuit, with the California Supreme Court's opinion in hand, held that the proponents did have standing, because California law equipped them with the ability to represent the state under these circumstances.[336] That the proponents did not suffer a personal injury, and only had a grievance that one might call "generalized," was beside the point. An attorney general need not show that she has been personally injured to represent the state's interest in state law. Nor must a governor or, in some cases, a state legislator. At the end of the day, a person or set of persons must represent the state's interests in court. And if state law assigned proponents of initiatives as appropriate designees to serve that function, that settled the matter. The Ninth Circuit went on to affirm that the withdrawal of previously conferred

331. Hollingsworth v. Perry, 133 S. Ct. 2652, 2660 (2013).

332. *Id.*

333. *See* Karcher v. May, 484 U.S. 72, 77–85 (1987).

334. Arizonans for Official English v. Arizona, 520 U.S. 43, 76–78 (1997).

335. Perry v. Brown, 265 P.3d 1002, 1028 (Cal. 2011).

336. Perry v. Brown, 671 F.3d 1052, 1071 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) ("It is their prerogative, as independent sovereigns, to decide for themselves who may assert their interests and under what circumstances, and to bestow that authority accordingly.").

benefits from an unpopular minority group had roots in animus—something the Equal Protection Clause does not countenance.[337]

In a 5-4 opinion, the Supreme Court disagreed with the Ninth Circuit's conclusion that the proponents could represent the state's interests in federal court.[338] Importantly, the Court concluded that the proponents were not "agents" of the state, which is required under Article III for someone to represent a state's sovereign interests in federal court.[339] "[T]he most basic features of an agency relationship are missing here[,]" the Court reasoned.[340] Citing a comment from the most recent Restatement of Agency, the Court observed that "[a]n essential element of agency is the principal's right to control the agent's actions."[341]

The Court expressed concern that the initiative's proponents "answer to no one; they decide for themselves, with no review, what arguments to make and how to make them."[342] This makes them different from state officials. Whereas state officials are "elected at regular intervals," the proponents are not elected at all.[343] Further, state officials owe a fiduciary duty to the state, whereas the initiative's proponents take no oath of office.[344] "They are free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities."[345] What is more, proponents may rack up attorney's fees without retribution from voters and taxpayers.[346]

*Perry* is a remarkable opinion. By this, I do not mean that *Perry* was the first time the Court confronted the question of who could represent a state's interests in federal court. Nor was it the first time the Court expressed doubts about proponents' ability to represent a state's interest in federal court. In *Karcher v. May*,[347] the Court concluded that state legislators lacked standing to defend a religiously inflected law in light of an Establishment Clause violation. And in

337. *Id.* at 1093–94.

338. *Hollingsworth*, 133 S. Ct. at 2668.

339. *Id.* at 2666.

340. *Id.*

341. *Id.* at 2666–67 (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f (AM. LAW INST. 2005)).

342. *Id.* at 2666.

343. *Id.*

344. *Id.*

345. *Id.* at 2667.

346. *Id.*

347. 484 U.S. 72 (1987).

*Arizonans for Official English*, the Court raised questions about this prospect. But *Perry* did something more.

Unlike *Perry*, neither *Karcher* nor *Arizonans for Official English* displaced the role of state law in determining who could defend a state law. In *Karcher*, the Court expressly relied on state law to determine whether or when the state legislators who lost their official position as presiding members of the state legislature had standing to represent the state's interests.[348] The Court determined that under state law, so long as the legislators had presiding roles in the New Jersey state legislature, they retained standing. "The New Jersey Supreme Court has granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment[,]" the Court observed.[349] And "[s]ince the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant."[350]

The Court affirmed this state-law centered approach in *Arizonans for Official English*. The Court relied on its previous "recogni[tion] that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests."[351] The proponents in the *Arizonans for Official English* lacked standing because they were "not elected representatives," and the Court was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State."[352] The question whether initiative proponents endured a sufficient injury to defend state law was a matter of constitutional law; the question whether proponents could represent the state's sovereign interests was described as a question of state law.

By contrast, *Perry* constitutionalized the question of who could represent the state's interests. State law could not compete with Article III's apparent requirement that to represent the state's interest, one must be an "agent" of the state within the meaning of the Restatement.[353] To be sure, the Court acknowledged that California had "a sovereign right to maintain an initiative process," and that the

348. *Id.* at 82.

349. *Id.*

350. *Id.*

351. Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997).

352. *Id.*

353. Hollingsworth v. Perry, 133 S. Ct. 2652, 2666 (2013).

initiative's proponents had a "right . . . to defend their initiatives in California courts, where Article III does not apply."[354] But "no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary."[355]

*Perry* deprives state legislatures and voters from determining when a party may represent its interests in federal court. And it is not clear what constitutional interests or norms are served by shutting state lawmakers out of the business of determining who can assert a state's interests in state court. The Court cites fears that proponents can run up bills, including attorney's fees, and that taxpayers and voters can do little to stop this phenomenon.[356] But why is this a matter of federal constitutional concern, and not democratic bodies?

The Court implies at the end of the opinion that democratic concerns about judicial restraint are driving the decision in *Perry*. "[T]he Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers."[357] Federal courts must "exercise power that is judicial in nature," the Court offered.[358] The bar against generalized grievances ensures "the proper—and properly limited—role of the courts in a democratic society," it further explained.[359] "States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse."[360]

This reasoning makes little sense. The net result of the Court's ruling was that state legislation, enacted through direct democracy, remained invalidated without any means for appellate review. And the same will be true in the future any time a federal district court invalidates a law, government officials decline to defend it, and state law authorizes someone not deemed an "agent" to defend its interests. The ways in which this furthers democracy are difficult to imagine.[361]

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354. *Id.* at 2667.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* (quoting Lance v. Coffman, 549 U.S. 437, 441 (2007)).

359. *Id.* (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006)).

360. *Id.*

361. It is true that Proposition 8 was ultimately declared unconstitutional, in part because it unjustifiably discriminated against a politically unpopular group. Indeed, I have argued that it took away a liberty interest without sufficient procedural protections. Smith, *supra* note 95, at 665. But *Perry* applies regardless of the underlying law. As the Court has recognized, some initiatives are designed to help facilitate a better-functioning system of representative government. *See* Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 135 S. Ct.

What is more, it is not clear what the Court means when it warns against giving "private parties . . . a ticket to the federal court house."[362] The proponents did not file suit; the plaintiffs did. The proponents did not choose the forum; the plaintiffs did. The proponents were seeking to appeal a federal district court order that invalidated a state law. In my view, *Perry* undermines some of the most basic guiding principles of federal courts jurisprudence: federalism, popular sovereignty, and judicial restraint.[363]

In sum, it is far from clear how it enhances democracy to constitutionalize the principal-agent rule. Because it makes it easier for one federal judge to invalidate legislation with no appellate checks, and because it makes it harder for state lawmakers to determine who can represent states' interests in federal court, *Perry* does the opposite.

### *B. Distortion*

A concern that some scholars have raised about unchecked countermajoritarianism is that it leads to distorted policy outcomes, or elected officials' debilitated sense of their constitutional responsibilities.[364] "Distortion" occurs when, due to a set of judicial decisions, democratically accountable actors elect not to make policy decisions that may come close to the constitutional line. "Debilitation" occurs when democratically accountable actors take their constitutional responsibilities less seriously because they believe that courts are the final arbiters of constitutional questions.[365] Scholars from James Bradley Thayer[366] to Mark Tushnet have raised these concerns.[367]

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2652, 2677 (2015) (arguing that the potential for voter initiatives may influence the actions of state legislatures). The outcome of *Perry* applies to those statutes too. *See* Erwin Chemerinsky, Op-Ed., *Prop. 8 Deserved a Defense: The State Shouldn't Abandon Measures Passed by Voters*, L.A. TIMES (June 28, 2013), http://articles.latimes.com/2013/jun/28/opinion/la-oe-chemerinsky-proposition-8-initiatives-20130628 [https://perma.cc/U6YE-AUZE] ("[T]he long-term implications of the ruling are disturbing. . . . I vehemently opposed Proposition 8, but I believe it deserved its defense in court.").

362. *Hollingsworth*, 133 S. Ct. at 2667.

363. By constitutionalizing the "principal-agent" rule of state standing, presumably the Court not only silenced state legislatures, but also simultaneously silenced federal politically accountable branches as well. Suppose Congress wanted to pass a law (let us call it the "Initiative Protection Act") that affirmed states' ability to determine who could represent them in federal court. The power of *Perry* is that this legislation is, presumptively, impermissible and invalid.

364. Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995).

365. *See id.* at 247 (explaining distortion and debilitation in the context of legislatures).

366. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

367. Tushnet, *supra* note 364.

In the context of congressional efforts to influence federal jurisdiction, the historical scenario explored below suggests that distortion is a potential problem. When Congress considers whether to expand federal jurisdiction, it sometimes takes seriously whether it is acting in a manner consistent with what a federal court will uphold. And this makes some intuitive sense. Expanding jurisdiction only works, ultimately, if courts accommodate those efforts.[368] And if Congress is attempting to undo a limit that a court has imposed, it would do well to signal to courts that it takes their views seriously, lest courts ultimately use one of the many tools of self-restraint they have to resist.[369]

A look at the jolty journey of taxpayer-standing law suggests that constitutionalizing prudence is unlikely to reduce distortion. In *Frothingham v. Mellon*,[370] the Court held that a federal taxpayer, without more, generally lacks standing to challenge the constitutionality of a federal statute. But forty-five years later, in *Flast v. Cohen*, the Court was called on to "decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment."[371] The Court held that a taxpayer may challenge an expenditure as a breach of the Establishment Clause.

In carving out this exception to the general bar against taxpayer suits, the Court explored whether the barrier erected in *Frothingham* "establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled."[372] The Court observed that the prevailing academic view is that the bar was prudential, not constitutional.[373] While the concluding line of *Frothingham* rested on the view that the Court should not "assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we

368. *See generally* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011) (discussing the expansion of the jurisdiction of federal courts).

369. *See generally* Part I.B (identifying prudential limits on federal judicial power).

370. 262 U.S. 447 (1923).

371. 392 U.S. 83, 85 (1968).

372. *Id.* at 92.

373. The Court noted in a footnote that "[t]he prevailing view of the commentators is that *Frothingham* announced only a nonconstitutional rule of self-restraint." *Id.* at 96 n.6 (citing Jaffe, *Private Actions*, *supra* note 153, at 302–03 (1961)); Paul Culp Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 386–91 (1955); Norman Dorsen, *The Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit*, 12 BUFF. L. REV. 35, 48–65 (1962). *But see Judicial Review: Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 465, 467–68 (1966) (statement of Prof. William D. Valente).

do not possess," the thrust of the Court's actual reasoning in that case "suggests that the Court's holding rests on something less than a constitutional foundation."[374]

The *Frothingham* Court's concern that a contrary rule would open the door to considerable litigation, for example, "suggests pure policy considerations." But the Court was skeptical that these policy considerations had continued vitality. Changed conditions—i.e., the heightened federal tax burden of citizens and the rise of procedural devices like class actions and joinder—warranted "a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits."[375]

There is evidence Congress viewed the *Frothingham* limitation as prudential as well—or at least those in Congress tasked with paying the most attention to these issues. In 1966, following a rise in suits challenging religiously oriented government expenditures, Congress considered a bill that would have authorized taxpayers to file suits in federal court challenging government expenditures on Establishment Clause grounds. The Senate Judiciary Committee held a series of hearings, seeking guidance from professors who studied federal jurisdiction. The conclusion, codified in the Senate Judiciary Committee Report, was that the bill was legal because the bar against taxpayer standing was a common law or prudential doctrine rooted in self-restraint.[376]

The committee noted that if *Frothingham* "was grounded on constitutional considerations, [the] legislation would be legally impermissible" and would not be "given force and effect by the Supreme Court."[377] But the consensus following the hearing was that "the *Frothingham* decision was founded on grounds other than purely constitutional ones."[378] In light of this prudential rule, the committee wished to "fill[ ] the procedural gap between the First Amendment's guarantees regarding the freedom of religion and the enjoyment of that freedom."[379] The bill made it out of committee, and the full Senate on a voice vote. It did not receive a vote in the House, but the Court's ruling in *Flast v. Cohen* obviated the need for legislative intervention.

It is clear from this episode that Congress only believed itself able to expand access to federal courts if the bar against taxpayer

374. *Flast*, 392 U.S. at 92–93.
375. *Id.*
376. S. REP. NO. 89-1403 (1966).
377. *Id.* at 6.
378. *Id.*
379. *Id.* at 7.

standing was prudential, and not constitutional. And it took seriously what the Court was likely to say on that question: holding hearings and making a record as to why it believed it had the authority to create a taxpayer-standing bill of this sort. The language in the report suggests that the bill passed the Senate Judiciary Committee and the Senate in large part *because* Congress believed that taxpayer standing constituted a prudential rule.

None of this proves unequivocally that distortion is a problem when it comes to constitutionalizing prudential rules. What it does help show, however, is that it is unlikely that constitutionalization *reduces* distortion. The Court has offered that constitutionalizing prudential rules eases democratic concerns. But here, the Senate believed it could expand access to courts for First Amendment violations in this way *only* if the bar against generalized grievances was viewed as prudential. Constitutionalizing prudential rules takes certain enforcement choices off the table.

Despite this, as noted in Part I, the Court recently constitutionalized taxpayer-standing doctrine, and cited democratic norms while doing so. More relaxed standing rules would compromise our "democratic form of government," the majority contended.[380] But if democratic distortion is a relevant metric, this shift in doctrine is unlikely to facilitate those democratic goals. As with the metrics of dialogue and countermajoritarian invalidation, it may well worsen the problem.

### *C. The Elysian Objection*

Any discussion of countermajoritarianism and democracy is incomplete without the voice of the late, great Dean John Hart Ely. In *Democracy and Distrust*, he endorsed the view that federal courts should generally defer to politically accountable channels and uphold legislation when the question of its constitutionality is a close one.[381] Ely added, however, that there were two settings where the unchecked deference undermines rather than fosters democracy. The first is when a statute clogs "the channels of political change" by subverting participation in the political process.[382] For example, a law that eliminates the right to vote would be unconstitutional, even though there is no unambiguous provision in the Constitution protecting that right. The second situation that warrants close judicial scrutiny, Ely

380. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 611 (2007).

381. ELY, *supra* note 95.

382. *Id.* at 103.

argued, is when a tyrannical majority discriminates against a discrete and insular political minority.[383] A historically politically powerless minority group is not well positioned, after all, to protect its own interests in the political process.

Applying this framework to this Article, one might ask the following question: Even if constitutionalizing prudential rules increases countermajoritarian invalidations of legislation, are the invalidated laws ones that clog the channels of political change or discriminate against unpopular, powerless political minorities? This seems unlikely. The federal laws discussed in this Article include the Family Medical Leave Act, Fair Labor Standards Act, Americans with Disabilities Act, Fair Housing Act, Fair Credit Reporting Act, and Endangered Species Act. It is not readily apparent that these laws—individually or as a class—single out politically unpopular minorities for maltreatment. Some might argue that laws like the FMLA, FLSA, ADA, and FHA actually aid historically politically powerless minorities like women, the disabled, the poor, and people of color.[384] And while one of the laws discussed in this Article, Proposition 8, did harm minorities, it bears repeating that the Supreme Court's jurisprudence is trans-substantively countermajoritarian, displacing laws that help and hurt minorities alike. Further, the causes of action in the federal laws discussed herein do not, on their face, prevent people from participating in the political process.

### *D. The Discretion Objection*

What of the argument, however, that prudential rules are less democratic than constitutional rules because prudential rules give unchecked power to politically unaccountable judges?[385] Even if constitutionalizing prudential limits comes at a cost to dialogue and furthers the countermajoritarian difficulty, is it nonetheless worth it if the alternative is equipping judges with unchecked, unaccountable power to make "power-grabbing" policy choices?

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383. *Id.*

384. Racial minorities and women are two groups that the Court has recognized have faced severe historical obstacles to achieving political influence. *See* Johnson v. California, 543 U.S. 499 (2005) (reviewing a challenge to race-based segregations in prison cell placement); Craig v. Boren, 429 U.S. 190 (1976) (acknowledging that gender-based classifications must serve important governmental objectives and be tailored to meet those interests). Recent scholarship has observed that the poor also face obstacles to political influence or power. Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323 (2016); Nicholas Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527 (2015).

385. *See generally* Gunther, *supra* note 1.

To this, I have two responses, developed further below. First, prudential rules on judicial power come with varying degrees of "rulification," to borrow Professor Fred Schauer's term.[386] That is, whatever their origins, many prudential doctrines are more rule-based than standard-based. Further, even the approaches that look more like standards often involve clear principles rather than unchecked discretion with endless policy inputs.[387] Prudential limits on judicial power are not inherently rudderless. Second, scholars have long argued, without effective rebuttal, that even Article III justiciability rules are influenced by policy choices,[388] the merits,[389] and the balancing of competing values.[390] The difference is that some approaches to prudence involve a transparent, rather than obscure, weighing of clearly stated principles.[391]

To the first point, many prudential doctrines involve rules that provide guidance as to the proper outcome. In the standing context, for example, the bar against third-party standing prevents a party from litigating the rights of others. As a prudential rule, it is subject to exceptions, but these exceptions are relatively well-defined; whether there is a close relationship to the real party-of-interest and whether the third-party is hindered from advocating for herself.[392] The same is true of the common law approach to sovereign immunity that some scholars and jurists have advanced. Under the prudential approach, a private party could not name a State as a party absent (1) consent or (2) abrogation by Congress.[393] But that leads to an elaboration of my second response to the discretion-objection: transparent balancing of clear principles is at least sometimes more democratic than covert

386. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803 (2005); *see also* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

387. For whatever it is worth, these prudential doctrines are generally not accompanied by "rules against rulification" either. That is, rules that prevent lower courts from converting a balancing test into a strict or conjunctive test. For a discussion of this jurisprudential feature, see Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644 (2014).

388. Pierce, *Standing*, *supra* note 153, at 1743.

389. Fletcher, *supra* note 38.

390. Brilmayer, *supra* note 156 (advocating for a transparent discussion of the principles that undergird Article III standing, and whether those principles are present in a given case).

391. Elliott, *supra* note 153, at 516 (arguing that converting standing into "[a] prudential abstention doctrine would permit the courts to adjust to the expressed views of the other branches on the appropriate balance of separation of powers (especially in cases that would currently fail under existing standing doctrine), while still giving the courts the power to decline to hear cases should the abstention factors counsel such a result").

392. *See* Powers v. Ohio, 499 U.S. 400, 413 (1991).

393. *See* Field, *supra* note 138.

balancing of unknown principles of fairness.[394] Further, one-size-fits-all constitutional rules sometimes lend themselves to covert balancing.

The constitutional, rule-based nature of Article III standing, for example, has not prevented that doctrine from becoming, in the words of Professor Richard Fallon, "fragmented."[395] In a recent article, Fallon argued that the formal Article III test for standing—injury, causation, and redressability—is often "empty" or "bootless."[396] More often, other background considerations are doing work in the opinion. For example, the underlying merits sometimes play a role.[397] Fallon also identified other factors, including the nature of the parties, the type of relief sought, and whether the case implicates national security concerns.

Consider the decision in *Clapper v. Amnesty International USA*.[398] In that case, American citizens challenged a provision of the Foreign Intelligence Surveillance Act that allowed federal officials to intercept communications that involve non-Americans reasonably thought to be outside of the United States. Reversing the Second Circuit, five Justices concluded that the plaintiffs lacked standing to challenge this provision because they could not show a "certainly impending" injury.[399] As Fallon noted, this high standard, which is hardly uniformly applied—and indeed was *not* applied in a standing case about prospective relief a mere year later—was likely driven by national security considerations.

Compare *Clapper* to prudential cases in which case-specific balancing occurs in a transparent way. In *Clapper*, the Court balances concerns about the proper role of a court on national security issues, but the formal constitutional test does not provide much room for transparent discussion about the precise role that national security should play.[400] A much different approach, however, can be found in *United States v. Windsor*, where the Court applies what it called the prudential doctrine of adverseness.[401] In that case, the fact that the

394. Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 6 (2003) (advocating a jurisprudence of regulatory takings characterized by clear principles—such as protection from politically oppressive majoritarianism—instead of broad notions of "fairness").

395. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1061 (2015).

396. *Id.* at 1063.

397. *Id.* at 1070–71; *see also* Fletcher, *supra* note 38, at 223.

398. 133 S. Ct. 1138 (2013).

399. *Id.* at 1141.

400. *See* Jonathan Remy Nash, *Standing Doctrine Notwithstanding*, 93 TEX. L. REV. SEE ALSO 189, 201–02 (2015) (noting that to the extent there are considerations beyond formal tests that influence the law of standing, the doctrine is not predictable unless the Court perhaps describes those rules or gives guidance as to which of these considerations "trump others").

401. United States v. Windsor, 133 S. Ct. 2675, 2680 (2013).

United States and the plaintiff agreed that the Defense of Marriage Act was unconstitutional raised the specter that the adverseness requirement was not satisfied. Nonetheless, the Bipartisan Legal Advisory Group's "sharp adversarial presentation of the issues satisfie[d] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree[d]."[402] Also, if the Court declined to decide the issue, the "[r]ights and privileges of hundreds of thousands of persons would be adversely affected."[403] These competing interests are embedded in the Court's reasoning. If courts are going to weigh considerations beyond what a strict unyielding test technically permits, isn't it at least sometimes better for them to be open about it?[404]

This is not to say that prudential rules are always a paragon of candor. In *Naim*, wherein the Court declined to decide the question of interracial marriage, the Court technically gave reasons—i.e., the record below was inadequate; the briefing was incomplete; and the federal question was insubstantial. As discussed, those reasons crumble under scrutiny. A more recent example of less than candid prudential restraint is *Elk Grove Unified School District v. Newdow*.[405] There, the Court concluded that federal courts could not engage a father's allegation that theistic language in the Pledge of Allegiance was unconstitutional, because doing so required resolving a threshold question of state law about whether the father had custody of his minor daughter. In light of available procedures like certification, this reasoning rings of pretext. Prudential rules, then, are not always more open and candid in every sense.

A full accounting of how to maximize prudential doctrines' values is beyond the scope of this project, and one I intend to engage in the future.[406] For now, examples of non-transparent prudence do not topple the central claim. Placing a constitutional label on a prudential doctrine does not make the doctrine more democratic. And it has sometimes made doctrines less democratic.

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402. *Id.* at 2688.

403. *Id.*

404. *See generally* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1255 (2009) ("[I]ndividual policy choices are democratically legitimate to the extent that they are supported by public-regarding explanations that could reasonably be accepted by free and equal citizens with fundamentally different interests and perspectives."). I say "sometimes" because Frederic Bloom has made the case that some jurisdictional lies—especially false judicial claims of jurisdictional inflexibility—may have benefits. *See* Bloom, *supra* note 9, at 974.

405. 542 U.S. 1 (2004).

406. *See generally* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016) (discussing the role that timing and candor play in facilitating dialogue from an international, comparative perspective).

### *E. The Majoritarian Objection*

If the Constitution is itself democratic, then doesn't it enhance democracy to at least *properly* house a jurisdictional doctrine in the Constitution? Relatedly, at a minimum, because judicial interpretation has historically often reflected the sentiments of the American public, is it fair to call judicial invalidation of legislation countermajoritarian at all? On the latter, point, Professor Barry Friedman has demonstrated that courts are often majoritarian with respect to major constitutional rulings on issues of profound public importance.[407]

I offer three responses. First, the key argument here is not that there is a total absence of jurisdictional limits to be found in the Constitution, when one considers traditional sources of constitutional interpretation such as text, history, or precedent. The argument is that *if* one's chief rationale behind placing a constitutional limit on a formerly self-imposed rule is democracy enhancement, this rationale, without more, falls flat.

Second, in light of the porous, blurred, and contested nature of the jurisdictional limits discussed herein, it would be surprising if they are all doctrines for which traditional modes of constitutional interpretation would always yield a clear answer. It would be even more surprising if every doctrine the Court has traditionally called self-imposed happened to also be in the Constitution itself.

Third, an important empirical question is whether technical jurisdictional rulings like *Lexmark* or even *Alden* generate sufficient awareness in the public to cause the Court to respond to the public's will on such questions. If the answer is no, this undermines the idea that the judiciary's attentiveness to the people's views should mitigate democratic concerns about the constitutionalization of these types of technical jurisdictional limits.

## V. CODIFYING PRUDENCE

In *Lexmark*, the Court treated the zone of interests test as statutory rather than constitutional or prudential. Does treating a formerly prudential rule as statutory facilitate democratic values? Using a similar methodology deployed in Part III, the answer appears to be that reading a jurisdictional limit into a statute can preserve opportunity for dialogue, especially when Congress's views are invited.

407. *See* Friedman, *supra* note 203, at 590; *see also* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14 (2009).

Further, there is no obvious countermajoritarian difficulty, as judicial codification does not invite new rounds of judicial review. The examples below further confirm, however, the democratic problems with constitutionalizing prudence.

### *A. Vacatur and Affirmance*

The tale of supplemental jurisdiction provides an example of the political branches noticing and responding to a judicial opinion that limited federal jurisdiction by way of statutory interpretation. Federal district courts have original jurisdiction over, among other suits, cases arising under federal law and cases sounding in diversity jurisdiction.[408] But these courts also have supplemental jurisdiction over certain state claims that arise out of the same case or controversy as a federal claim, or (in some instances) counterclaims that are brought by a defendant.[409] In the case law, one moment of entrenchment for this type of jurisdiction came in *United Mine Workers v. Gibbs*,[410] which held that pendent jurisdiction existed when a federal and state claim were so related "that the entire action before the court comprises but one constitutional 'case.' "[411] This test was met when the two claims "derive from a common nucleus of operative fact."[412]

The Court, however, narrowed the potential reach of *Gibbs* in two opinions: *Owen Equipment & Erection Co. v. Kroger* and *Finley v. United States*. In *Owen Equipment*, the Court held that because 28 U.S.C. § 1332(a)(1) requires complete diversity of citizenship, supplemental jurisdiction is improper when a third-party defendant and the plaintiff hail from the same state. Then, in *Finley*, in a 5-4 opinion by Justice Scalia, the Court held that even when the district court has federal question jurisdiction, the plaintiff may not bring supplemental state law claims against non-diverse defendants. But the Court reminded that

> [w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.[413]

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408. 28 U.S.C. § 1331 (2012) (federal question jurisdiction); 28 U.S.C. § 1332 (2012) (diversity jurisdiction).

409. Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 446 (1991).

410. 383 U.S. 715, 725 (1966).

411. *Id.* at 725.

412. *Id.*

413. Finley v. United States, 490 U.S. 545, 556 (1989).

Congress responded to the controversial *Finley* opinion—and the Court's express invitation therein—by enacting 28 U.S.C. § 1367, which now governs supplemental jurisdiction cases.[414] This response provides an example of Congress vacating one limit on federal judicial power and affirming another. On the one hand, overturning *Finley*, Congress formally reinstated supplemental jurisdiction in cases where the district court's original jurisdiction sounds in federal question jurisdiction.[415] On the other hand, consistent with *Kroger*, the Court restricted a plaintiff's ability to bring state-law claims against non-diverse, third-party defendants.[416]

Like prudential limits on power, then, interpreting a statue as imposing a limit on jurisdiction can inspire dialogue between the political branches and the courts. In *Finley*, the Court expressly spoke to Congress's ability to reverse the opinion if democratic deliberation inspired a different choice. And Congress did precisely that—reversing some limits and adopting others.

Congress could *not* have done this had *Finley* adopted a constitutional rather than a statutory or prudential rule. That is, suppose Justice Scalia had instead held that supplemental jurisdiction is categorically unconstitutional under Article III, under the theory that it vests federal courts with the ability to hear claims that themselves do not arise out of federal law, and where the parties are not diverse. Such a hypothetical presents helpful thought experiment as to the work that constitutionalization does in comparison to prudential rules and judicial codification. Under a constitutional ruling, Congress's views would have been silenced.

### *B. Instatement*

Congress can also respond to judicial codification by attempting to instate limits on federal jurisdiction. This is made plain by the battles

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414. Cami Rae Baker, *The Codification of Pendent and Ancillary Jurisdiction: Supplemental Jurisdiction*, 27 TULSA L.J. 247, 249–52 (1991). Richard Freer has described aspects of the controversy. Freer, *supra* note 409, at 446:

> Although required only to address pendent parties jurisdiction (one of those few remaining areas of uncertainty), the Supreme Court's broad language cast doubt on other long-settled and, frankly, more important areas of supplemental jurisdiction. While many observers properly worried about the continued viability of supplemental jurisdiction, there is reason to believe that the lower courts would have dealt with the case as it had the opinions of the 1970s, basically limiting it to its facts.

(footnotes omitted).

415. 28 U.S.C. § 1367(a) (2012).

416. 28 U.S.C. § 1367(b). Freer critiqued what he called the "[c]odification of *Kroger*" on the ground that *Kroger* itself was an "unprincipled, naked antidiversity case." Freer, *supra* note 409, at 460, 475.

between Congress and courts with respect to federal courts' power to hear the claims of indefinitely detained persons held at Guantanamo Bay in the years following the September 11 attacks. In *Rasul v. Bush,*[417] the Court held that the federal statutory provision governing federal habeas claims[418] applied to petitioners held at Guantanamo. Congress then passed the Detainee Treatment Act ("DTA"), which amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."[419] The new law also granted "exclusive" jurisdiction to the D.C. Circuit to review decisions of military tribunals.[420]

The Court then held, in *Hamdan v. Rumsfeld*,[421] that this provision did not apply to cases that were pending at the time Congress enacted DTA. And Congress again responded, this time enacting the Military Commissions Act ("MCA"), which stripped all federal courts of jurisdiction to hear habeas corpus applications of Guantanamo detainees. And the Court too responded again. In *Boumediene v. Bush*, the Court held that the writ of habeas corpus is a constitutional right that exists unless formally suspended.[422] The Court interpreted the MCA as something short of a formal suspension.[423] Dialogue, then, does not always lead to congressional attempts to expand jurisdiction.

This hardly means, however, that courts should constitutionalize *restrictions* on federal judicial power. To be sure, if the Court had issued an early opinion in *Rasul* stating that the petitioners at Guantanamo were entitled to the writ under the Constitution, that holding would have abated Congress's attempts to restrict access to federal courts in a potentially undemocratic manner.[424] But if the Court had held in *Rasul* that the petitioners were *not* entitled to the writ of habeas corpus under the Constitution, Congress would have had carte blanche to pass laws as or even more restrictive than the MCA or DTA. Thus, even this example lends credence to the view that

417. 542 U.S. 466, 473 (2004).

418. 28 U.S.C. § 2241 (2012).

419. Pub. L. No. 109–148, § 1005, 119 Stat. 2739, 2742 (2005).

420. *Id.*

421. 548 U.S. 557, 575–76 (2006).

422. Boumediene v. Bush, 553 U.S. 723, 724–26 (2008). The Court also held that the writ extended to persons held in Guantanamo Bay.

423. *Id.* at 788–92.

424. *See* Baher Azmy, Rasul v. Bush *and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369, 391 (2007) ("[The petitions] asserted that the detentions exceeded the lawful authority of the President and were an unconstitutional suspension of the Great Writ.").

constitutionalizing limits on judicial power does more to prevent congressional *expansions* of federal jurisdiction than congressional attempts to restrict access to courts.

### *C. Undemocratic Codification*

It must be said that inevitably, Congress will sometimes remain silent in the face of judicial codification of prudential rules, whether by choice or by inertia. And such jurisdictional restrictions accordingly remain in place. Consider, for example, the Supreme Court's controversial, expansive presumptions against the extraterritorial reach of federal statutes such as Title VII.[425] Because restrictions of this type limit access to courts, some readers may remain concerned about the democratic implications of the Court discovering new jurisdictional restrictions in federal laws. Further, to the extent these restrictions outpace the language or intent of Congress, one could additionally charge that this type of codification is concerning from an additional democratic valence as well.

These concerns should not be trivialized or ignored. But as a practical matter, it is not apparent that codification leaves Congress or victims in a *worse* position than prudential rules. That is, whether we think of the presumption against extraterritoriality, for example, as a common law prudential limit, or as an approach to statutory interpretation, the net result is that (1) access to justice is potentially compromised, but (2) Congress can legally reverse the presumption. The latter is not true of constitutional restrictions, further illustrating the particularly acute democratic concerns that arise as when a *constitutional* label is placed on a self-imposed judge-made doctrine.

## CONCLUSION

Judicial prudence is a curious feature of federal jurisdiction, characterized by at least two puzzling contradictions. For almost two hundred years, a basic tenet of jurisdiction has been that federal courts must generally exercise jurisdiction when they possess it. And yet, self-imposed limits on judicial power have, at least until recently, roared on undeterred by these pronouncements. The other contradiction concerns the proper place of self-imposed limits in a democracy; both proponents and opponents of prudential limits cloak their arguments in democratic

425. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) ("Aramco"); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 86 (1998) ("What was remarkable about *Aramco* was not just the fact that the Court again applied the presumption, but the apparent strength of the presumption it applied.").

values. For proponents, prudential limits on federal judicial power represent a chance to check politically unaccountable power. For opponents, prudential limits empower judges to make discretionary policy judgments that belong to democratically accountable bodies.

The Supreme Court has taken sides in this debate, signing on to the view that judicial prudence is undemocratic, and advancing a troubling way of handling the problem. The Court has not so much eradicated prudential rules as it has recast them as constitutional or statutory. The story of what this means for American democracy is still being written, and is more uncertain in light of the death of the incomparable Justice Scalia. But there are significant reasons to doubt that recategorizing prudential rules will do much to facilitate representative democracy. It is unlikely to inspire new dialogues or mitigate the potential distorting effects of unchecked judicial supremacy. Worse, *constitutionalizing* prudential limits sometimes dampens dialogue and encourages countermajoritarian distortion.

Lurking just beyond this deontological argument rests a more consequentialist one: constitutionalizing judicial prudence makes it more difficult for Congress to expand access to American courts, all while maintaining Congress's ability to restrict access. There is nothing democratic about that. When measured against newly constitutionalized limits on judicial power, American democracy is better served by self-imposed judicial restraint, guided by transparency and principle.

There are undoubtedly undemocratic ways for the Court to impose prudential rules. But there are also undemocratic methods of eliminating prudence. By converting doctrines of self-restraint into constitutional barriers, all while adopting undemocratic ways of understanding Article III and the Eleventh Amendment, this area of law is on an imprudent path.