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## **Lost in Transplantation: The Supreme Court's Post-Prudence Jurisprudence**

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# Lost in Transplantation: The Supreme Court’s Post-Prudence Jurisprudence

Adam N. Steinman\*

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## INTRODUCTION

Access to courts is crucial for making substantive rights that exist on paper real and enforceable in the real world.<sup>1</sup> And access to federal courts requires having “standing” to assert those rights.<sup>2</sup> For all practical purposes, standing is the key to the courthouse door.<sup>3</sup> Fred

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1. See, e.g., STEPHEN BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (Cambridge Univ. Press 2017); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288, 304 (2013) (arguing that “the distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits” but that recently the Supreme Court has “impaired both access to the federal courts for many citizens and the enforcement of various national policies”); Judith Resnik, *Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1836 (2016) (criticizing “judicial overrides of new federal statutory rights and judge-made constraints on remedies”).

2. See Resnik, *supra* note 1, at 1890–98 (criticizing some of the Court’s recent standing decisions); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 295–306 (1988) (criticizing several of the Court’s standing decisions from the 1970s and 1980s).

3. Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 553 (2012) (describing how “standing doctrine has barred the federal courthouse door” for cases pursuing both liberal and conservative causes). Stated more precisely, establishing standing is the key to one of *many* locks on the

Smith's article *Undemocratic Restraint*<sup>4</sup> identifies and critiques an important trend in the Supreme Court's decisions on standing: the transformation of concepts that had been viewed as judicially-created "prudential" limits on a party's standing to sue into concepts grounded in positive law, such as federal statutes or the Constitution.

A recent example of this is *Lexmark International, Inc. v. Static Control Components, Inc.*<sup>5</sup> The Court's unanimous decision in *Lexmark* declared that the "zone-of-interests" test should not be understood as a feature of "prudential standing."<sup>6</sup> Rather, "[w]hether a plaintiff comes within the 'zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."<sup>7</sup>

Other prudential doctrines have been transplanted to the Constitution itself. For example, the Supreme Court has rejected the view that its refusal to hear suits that are mere "generalized grievances" is based merely on "prudential" reasons.<sup>8</sup> Rather "such suits do not present constitutional 'cases' or 'controversies,'" and therefore fall outside the federal judiciary's jurisdiction under Article III.<sup>9</sup> And, although it has yet to garner a five-Justice majority, several Justices have asserted that "adverseness" between the parties is a constitutional requirement of Article III standing,<sup>10</sup> rather than merely a "prudential

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courthouse door. See Miller, *supra* note 1, at 309 (describing how "federal courts have erected a sequence of procedural stop signs during the past twenty-five years that has transformed the relatively uncluttered pretrial process envisioned by the original drafters of the Federal Rules into a morass of litigation friction points"); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 14–17 (2016) (describing how pleading and discovery standards can constrict access to courts and enforcement of substantive rights).

4. 70 VAND. L. REV. 845 (2017).

5. 134 S. Ct. 1377 (2014).

6. *Id.* at 1387 (noting that "we admittedly have placed that test under the 'prudential' rubric in the past" (citing *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004)) but stating that "it does not belong there").

7. *Id.* (citation omitted); see also *Bank of America Corp. v. Miami*, 137 S. Ct. 1296, 1302 (2017) ("In *Lexmark*, we said that the label 'prudential standing' was misleading, for the requirement at issue is in reality tied to a particular statute.").

8. *Id.* at 1387 n.3. The Court recognized that "we have at times grounded our reluctance to entertain such suits in the 'counsels of prudence.'" *Id.* (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982)).

9. *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. Defenders of Wildlife*, 504 U.S. 555, 573–574 (1992)).

10. See *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1716–17 (2017) (Thomas, J., concurring, joined by Roberts, C.J. & Alito, J.) ("The judicial Power of the United States extends only to Cases and Controversies. This requirement limits the jurisdiction of the federal courts to issues presented in an adversary context." (alteration in original)); *United States v. Windsor*, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting, joined by Roberts, C.J. & Thomas, J.) (calling the

consideration.”<sup>11</sup> Some other prudential doctrines—such as restrictions on third-party standing<sup>12</sup>—have been flagged for potential reassessment in the future.<sup>13</sup>

Judicially-created obstacles to enforcing substantive rights and obligations have long been critiqued as anti-democratic.<sup>14</sup> The recent moves that Smith describes, however, present a slightly more nuanced question. Does it enhance democratic values to transplant judicially-created doctrines of prudential standing to other “place[s] in the standing firmament?”<sup>15</sup> Smith’s Article comprehensively and persuasively shows that such transplantation does not enhance—and in many ways actively undermines—those values.<sup>16</sup>

This Essay looks at two doctrines that have been part of the recent transplantation trend and that have figured in Supreme Court decisions handed down in the weeks after Smith’s Article was published. Following Smith’s lead, this Essay distinguishes between what might be called constitutional and nonconstitutional transplantation. Nonconstitutional transplantation refers to framing formerly prudential concerns as questions of statutory interpretation.<sup>17</sup> As for this category, this Essay addresses the scope and content of the zone-of-interests test, particularly in light of the Supreme Court’s 2017 decision in *Bank of America Corp. v. Miami*.<sup>18</sup> Constitutional transplantation refers to recasting formerly prudential concerns as

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majority’s view that “the requirement of adverseness [is] a ‘prudential’ aspect of standing . . . incomprehensible”).

11. *Windsor*, 133 S. Ct. at 2685–87 (majority opinion) (holding that the requirement of “concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions” is a “prudential consideration” rather than a “jurisdictional requirement[] of Article III” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

12. *See Lexmark*, 134 S. Ct. at 1387 n.3 (noting that “limitations on third-party standing are harder to classify”).

13. *See id.* (“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.”).

14. *See, e.g., Smith, supra* note 4, at 849 (noting the argument that “such limits arguably undercut or subvert the role of the more politically accountable body—Congress”); *id.* at 850 (noting Justice Scalia’s argument that “prudential limits writ large are overly ‘judge-empowering’ at the expense of democratically accountable bodies”); Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

15. *Lexmark*, 134 S. Ct. at 1387 n.3.

16. *See Smith, supra* note 4, at 851; *see also, e.g., id.* at 891 (“[C]onstitutionalizing prudential rules on federal judicial power will lead to countermajoritarian invalidations of legislation.”); *id.* at 909 (“Placing a constitutional label on a prudential doctrine does not make the doctrine more democratic.”).

17. Smith calls this “Codifying Prudence.” *Smith, supra* note 4, at 910–914.

18. 137 S. Ct. 1296 (2017).

limitations on the “Judicial Power” inherent in Article III.<sup>19</sup> As for this category, this Essay discusses the adverseness requirement, which was the focus of three concurring Justices in the Court’s 2017 decision in *Microsoft Corp. v. Baker*.<sup>20</sup>

## I. NONCONSTITUTIONAL TRANSPLANTATION: THE ZONE-OF-INTERESTS TEST

To this point, the most significant example of nonconstitutional transplantation has been the Court’s treatment of the zone-of-interests test, as described above in the *Lexmark* case.<sup>21</sup> In and of itself, grounding the zone-of-interests inquiry in statutory interpretation rather than judicial prudence does not necessarily change *how* a court must assess whether a particular plaintiff’s interests “fall within the zone of interests protected by the law invoked.”<sup>22</sup> That is, courts might potentially take an equally broad or narrow approach to that issue regardless of whether it is done under the rubric of judicial prudence or under the rubric of “determin[ing], using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”<sup>23</sup>

The Court’s transplantation of the zone-of-interests test does, however, resolve what had been some uncertainty in the lower courts regarding whether that inquiry was jurisdictional.<sup>24</sup> The D.C. Circuit, for example, held prior to *Lexmark* that compliance with the prudential zone-of-interests test was a jurisdictional requirement, which could be raised at any time notwithstanding the defendant’s waiver of the issue.<sup>25</sup> Other Circuits had found the zone-of-interests test to be a nonjurisdictional inquiry.<sup>26</sup>

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19. Smith calls this “Constitutionalizing Prudence.” Smith, *supra* note 4, at 877–889.

20. 137 S. Ct. 1702, 1716–17 (2017) (Thomas, J., concurring, joined by Roberts, C.J. & Alito, J.).

21. See *supra* notes 5–7 and accompanying text (discussing *Lexmark*).

22. *Bank of America*, 137 S. Ct. at 1302 (quoting *Lexmark*, 134 S. Ct. at 1388).

23. *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. at 1387.

24. See CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, 13A FEDERAL PRACTICE & PROCEDURE § 3531.7 n.1 (noting prior to *Lexmark* “a deep and important circuit split on the question whether prudential standing goes to jurisdiction or only to the wise exercise of jurisdiction” (citing *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 938–39 (8th Cir. 2013))).

25. See *Grocery Mfrs. Ass’n v. E.P.A.*, 693 F.3d 169, 179 (D.C. Cir. 2012) (treating the zone-of-interests test as a “jurisdictional issue[]”); *id.* at 180 (Tatel, J., concurring) (“I . . . agree with those circuits that have held that prudential standing is non-jurisdictional . . . . This Circuit, however, has directly held to the contrary.” (citing *Steffan v. Perry*, 41 F.3d 677, 697 (D.C. Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994))).

26. See, e.g., *American Iron & Steel Institute v. OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999) (“We can pretermite the more difficult question regarding whether the Doctors’ members’

Now that it has been transplanted, the zone-of-interests test can no longer be viewed as a jurisdictional requirement.<sup>27</sup> This recognition is consistent with the Supreme Court's recent trend of rejecting attempts to treat certain merits-related issues as jurisdictional.<sup>28</sup> Indeed, the Court has candidly admitted that its past decisions had lacked precision in this regard. It has discouraged courts and litigants from relying on "drive-by jurisdictional rulings"<sup>29</sup> in prior decisions—that is, cases in which the Court made an "unrefined disposition"<sup>30</sup> on purported jurisdictional grounds without "explicitly considering" whether the dispositive issues instead should have been viewed as merits or nonjurisdictional claim-processing rules.<sup>31</sup>

While this clarification is an important one, there remain a number of questions regarding how, exactly, the newly transplanted zone-of-interests test is supposed to operate. In this regard, there is conflicting language not only within the *Lexmark* decision itself, but

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interests fall within the zone of interests protected by the OSH Act because prudential standing is flexible and not jurisdictional in nature."); *see also* *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006) (refusing to consider the defendant's zone-of-interests argument that the plaintiff's claim was barred by the zone-of-interests test because it "did not contend in its brief that Gilda's complaint should be barred by the zone of interests test" and "has thus waived that argument").

27. *Lexmark*, 134 S. Ct. at 1391 n.6 (noting that "the zone-of-interests test . . . does not implicate subject-matter jurisdiction"); *see also id.* at 1387 n.4 (arguing that the term "statutory standing" was "misleading, since the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case" (alteration in original) (emphasis in original)); Howard M. Wasserman, *Fletcherian Standing, Merits, and Spokeo, Inc. v. Robins*, 68 VAND. L. REV. EN BANC 257, 265–266 (2015) (reading *Lexmark* as establishing that the zone-of-interests test is not jurisdictional); Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 DUKE J. CONST. L. & PUB. POL'Y 149, 159 (2014) (same).

28. *See, e.g., Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 253–54 (2010) (rejecting the view that "the extraterritorial reach of § 10(b) [of the 1934 Securities Act] . . . raise[s] a question of subject-matter jurisdiction" because "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question"); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166, 170 (2010) (holding that the copyright-registration requirement codified in 17 U.S.C. § 411(a) is a nonjurisdictional "precondition to suit" and "does not restrict a federal court's subject-matter jurisdiction"); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) ("[T]he threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue."). One troubling exception to this trend was the Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), which ruled 5-4 that failure to timely file a notice of appeal was a "mandatory and jurisdictional" requirement that could not be cured even in the presence of unique, extraordinary circumstances. *See generally* 4B CHARLES A. WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE & PROCEDURE § 1168 (4th ed. 2015 & Supp. 2017) (discussing *Bowles*).

29. *E.g., Arbaugh*, 546 U.S. at 511 (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91 (1998)).

30. *Id.*

31. *Id.* (quoting *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000)).

also between *Lexmark* and the Supreme Court's 2017 decision in *Bank of America Corp. v. Miami*.<sup>32</sup>

One question is this. Is the zone-of-interests test an absolute requirement that *must* be satisfied for a given plaintiff to have a viable cause of action? Or does it merely create a rebuttable *presumption* that a plaintiff who falls outside a statute's zone of interests lacks a cause of action? Justice Scalia's *Lexmark* opinion began by describing the zone-of-interests test as presumptive rather than absolute: "we *presume* that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'"<sup>33</sup> But later in the opinion, Justice Scalia described the zone-of-interests test as "a requirement of general application."<sup>34</sup> And he explained that it was "perhaps more accurate, though not very different as a practical matter, to say that the limitation *always* applies and is *never* negated, but that our analysis of certain statutes will show that they protect a more-than-usually expansive range of interests."<sup>35</sup>

In its 2017 *Bank of America* decision, however, Justice Breyer's majority opinion emphasized that falling outside the zone of interests creates only a presumption that the plaintiff lacks a cause of action: "The question is whether the statute grants the plaintiff the cause of action that he asserts. In answering that question, we *presume* that a statute ordinarily provides a cause of action 'only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.'"<sup>36</sup> He made no reference to the view expressed in *Lexmark* that it was "perhaps more accurate" to understand the zone-of-interests "requirement" as one that can "never" be "negated."<sup>37</sup> Justice Breyer ultimately concluded that the City of Miami—which had sued Bank of America for violations of the Fair Housing Act that led to lost tax revenues and additional municipal expenses—did fall within the zone of interests of the Fair Housing Act's antidiscrimination provisions. Justice Breyer therefore did not need to confront what factors might be sufficient to rebut the presumption against a valid cause of action in cases where a plaintiff fell outside a statute's zone of interests.

In practice, this may be merely a semantic issue that is unlikely to affect the ultimate result in many cases. Given the inherent

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32. See 137 S. Ct. 1296 (2017).

33. *Lexmark*, 134 S. Ct. at 1388 (emphasis added).

34. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

35. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 164 (1997)) (citation omitted) (second emphasis added).

36. *Bank of America*, 137 S. Ct. at 1302.

37. See *supra* note 31 (quoting *Bennett v. Spear*, 520 U.S. 154, 164 (1997)).

malleability of the zone-of-interests test,<sup>38</sup> a judge who is inclined to permit a cause of action in a particular case would likely have enough leeway to determine that the particular plaintiff did fall within the statute's zone of interests—rather than finding that the plaintiff fell outside the statute's zone of interests but that other factors were sufficient to rebut a presumption against permitting a cause of action. In terms of doctrine, however, the analytical structure remains unclear.

A related but potentially distinct question is how strong of a showing a plaintiff must make to satisfy the zone-of-interests test. In *Bank of America*, Justice Breyer's majority opinion found that the City of Miami satisfied the zone-of-interests test because "the City's claims of injury it suffered as a result of the statutory violations are, at the least, *arguably* within the zone of interests that the [Fair Housing Act] protects."<sup>39</sup> The "arguably" qualifier suggests an approach to the zone-of-interests test that is more deferential to plaintiffs. It is much easier to present a theory that is "arguabl[e]" than one that is, say, "persuasive" or "correct" or "meritorious."

In the earlier *Lexmark* decision, however, Justice Scalia rebuked the notion that a plaintiff's claims need only be "arguably" within the statute's zone of interests. He wrote that even though earlier Supreme Court decisions had "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff," that "lenient approach" applies *only* with respect to judicial review of agency action under the Administrative Procedure Act—not to claims seeking relief based on other federal statutes.<sup>40</sup> Justice Breyer's reinvigoration of the "arguably" qualifier in *Bank of America* calls into question whether the view expressed by Justice Scalia in *Lexmark* remains operative.

Finally, it is uncertain whether the zone-of-interests test is *coterminous* with the overarching question of whether a particular plaintiff may sue, or whether it is one of *multiple* elements that inform the ultimate question of whether a particular plaintiff may sue. Justice Scalia's *Lexmark* decision initially seems to embrace the former view. He wrote that "[w]hether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."<sup>41</sup> He also wrote that

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38. See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1731 (1975) (noting the "vagueness" of "[t]he opaque 'zone of interests' test").

39. *Bank of America*, 137 S. Ct. at 1303 (citation omitted) (emphasis in original).

40. *Lexmark*, 134 S. Ct. at 1389 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)).

41. *Id.* at 1387 (alteration in original).



“the zone-of-interests analysis . . . asks whether this particular class of persons has a right to sue under this substantive statute.”<sup>42</sup>

Later in the opinion, however, Justice Scalia took the view that satisfying the zone-of-interests test is a necessary—but apparently not sufficient—requirement for a plaintiff to have a cause of action. He wrote that proximate causation, for example, imposed an additional limitation on a plaintiff’s ability to sue—independent of whether the zone-of-interest test is satisfied.<sup>43</sup> He explained that both “the zone-of-interests test” and “proximate causation” are “element[s] of a cause of action under the statute.”<sup>44</sup> And he rejected a proposed approach that would have treated the zone-of-interests test and proximate causation as “mere factors to be considered” in deciding whether a cause of action exists for a particular plaintiff’s claim, because “those requirements . . . must be met in every case.”<sup>45</sup> The 2017 *Bank of America* decision also treated the zone-of-interests test and proximate cause as distinct requirements for claims under the Fair Housing Act (FHA). The majority concluded that injuries incurred by the City of Miami—lost tax revenue and extra municipal expenses—“fall within the zone of interests that the FHA arguably protects,”<sup>46</sup> and therefore “satisfy the ‘cause-of-action’ (or ‘prudential standing’) requirement.”<sup>47</sup> Yet it remanded the case for lower courts to assess whether Bank of America’s alleged discriminatory conduct proximately caused the city’s injuries.<sup>48</sup>

To be clear, in both *Lexmark* and *Bank of America*, the zone-of-interests test and the proximate-cause requirement are each inferred by the judiciary rather than explicitly imposed by Congress.<sup>49</sup> Yet both ultimately answer the question of “whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”<sup>50</sup> Indeed, Justice Scalia’s *Lexmark* opinion described an earlier Supreme Court decision—*Associated General Contractors of California v. California*

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42. *Id.* (alteration in original).

43. *Id.* at 1388 (using both “zone of interests and proximate causality” to answer “a straightforward question of statutory interpretation: Does the cause of action in § 1125(a) extend to plaintiffs like Static Control?”).

44. *Id.* at 1391 n.6

45. *Id.* at 1392.

46. *Bank of America*, 137 S. Ct. at 1301.

47. *Id.* at 1303.

48. *Id.* at 1306 (concluding that “the Eleventh Circuit erred in holding that foreseeability is sufficient to establish proximate cause under the FHA” but declining “to draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City’s financial injuries fall”).

49. *Lexmark*, 134 S. Ct. at 1390 (“[W]e generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute.”); *accord Bank of America*, 137 S. Ct. at 1305 (quoting *Lexmark*).

50. *Lexmark*, 134 S. Ct. at 1387.

*State Council of Carpenters*<sup>51</sup>—as defining the “class of persons who could maintain a private damages action” as those persons “whose injuries were *proximately caused* by a defendant’s antitrust violations.”<sup>52</sup> The conceptual question is this: if the transplanted zone-of-interest test *itself* is simply the “determin[ation], using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim,”<sup>53</sup> then doesn’t that test necessarily include interpretive moves like presuming a proximate-cause requirement and assessing whether the injuries suffered by that “particular plaintiff[]” were proximately caused by the statutory violation?<sup>54</sup>

## II. CONSTITUTIONAL TRANSPLANTATION: THE ADVERSENESS REQUIREMENT

As Smith demonstrates in his Article, constitutional transplantation of prudential standing doctrines is especially problematic from a democratic perspective because it means that those doctrines can override even explicit congressional directives regarding which plaintiffs may pursue causes of action seeking to enforce federal substantive rights.<sup>55</sup> One prudential standing doctrine that may be on the cusp of such constitutional transplantation is the requirement of “concrete adverseness” between the parties, “which sharpens the presentation of issues.”<sup>56</sup> Although a majority of Justices stated as recently as 2013 that adversity between the litigants was a “prudential consideration” rather than a “jurisdictional requirement[] of Article

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51. 459 U.S. 519 (1983).

52. *Lexmark*, 134 S. Ct. at 1386 (emphasis added) (quoting *Associated Gen. Contractors*, 459 U.S. at 529, 532–33 (1983)).

53. *Id.* at 1387.

54. Consider *Lexmark* itself. The Court found that “to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales.” *Id.* at 1390. It then read the proximate cause requirement as permitting recovery for “economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising” such as injury “that occurs when deception of consumers causes them to withhold trade from the plaintiff.” *Id.* at 1391. As a functional matter, this seems no different than saying that the “legislatively conferred cause of action encompasses” a claim based on injuries to the plaintiff’s commercial interest in reputation or sales due to the deception of consumers that causes consumers to withhold trade from the plaintiff. That framing includes both the zone-of-interests inquiry and the proximate cause requirement, yet what is “encompass[ed]” in the “legislatively conferred cause of action” is ostensibly the entirety of the zone-of-interests test. See *Lexmark*, 134 S. Ct. at 1387. Indeed, as discussed *supra* notes 51–52 and accompanying text, the Court has sometimes understood a statute’s “zone of interests” to be those whose injuries were “proximately caused” by a statutory violation.

55. *E.g.*, Smith, *supra* note 4, at 891.

56. *Windsor*, 133 S. Ct. at 2687 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

III,”<sup>57</sup> several Justices have explicitly challenged this view<sup>58</sup>—most recently in the Court’s 2017 decision in *Microsoft Corp. v. Baker*.<sup>59</sup>

Whether Article III imposes an inflexible adversity requirement is a controversial question. Jim Pfander and Dan Birk, for example, have made a compelling case that Article III’s reference to “cases” (rather than just “controversies”) is best understood to include some nonadversarial proceedings.<sup>60</sup> My focus in this Essay, however, is not to debate the merits of transplanting the adversity requirement to the Constitution itself. Rather, it is to examine the particular way that the three concurring Justices in *Microsoft* deployed the adversity requirement.

The plaintiffs in *Microsoft* had sought certification of a class action relating to alleged defects in Microsoft’s Xbox 360 video game console.<sup>61</sup> The district court denied class certification, and the plaintiffs failed to receive permission to appeal the class-certification ruling immediately under Federal Rule of Civil Procedure 23(f).<sup>62</sup> Then, “[i]nstead of pursuing their individual claims to final judgment on the merits,” the plaintiffs “stipulated to a voluntary dismissal of their claims with prejudice, but reserved the right to revive their claims should the Court of Appeals reverse the District Court’s certification denial.”<sup>63</sup>

The Supreme Court unanimously concluded that appellate courts lacked jurisdiction to hear an appeal of the class-certification decision in this situation, but it split 5-3 on the rationale.<sup>64</sup> In an opinion written by Justice Ginsburg, the majority ruled on statutory grounds,

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57. *Id.* at 2685–87.

58. *See id.* at 2701 (Scalia, J., dissenting, joined by Roberts, C.J. & Thomas, J.).

59. 137 S. Ct. 1702, 1716–17 (2017) (Thomas, J., concurring, joined by Roberts, C.J. & Alito, J.).

60. *See* James E. Pfander & Daniel D. Birk, *Adverse Interests and Article III: A Reply*, 111 NW. U. L. REV. 1067, 1067 (2017) (“Article III ‘Controversies’ have been thought to require a dispute between adverse parties, but . . . several categories of federal law ‘Cases’ require no such dispute.”); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1355 (2015) (“[F]ederal courts may constitutionally exercise not *one* but *two* kinds of judicial power: power to resolve disputes between adverse parties and power to entertain applications from parties seeking to assert, register, or claim a legal interest under federal law.”). *But cf.* Ann Woolhandler, *Adverse Interests and Article III*, 111 NW. U. L. REV. 1025, 1031 (2017) (“This Article takes the position that Pfander and Birk, while having significantly contributed to scholars’ appreciation of the many *ex parte* matters handled by the federal courts, have not made the case for reconsidering adversity requirements for Article III cases.”).

61. *See Baker v. Microsoft Corp.*, 797 F.3d 607, 609 (9th Cir. 2015) (“This case involves an alleged design defect in the Xbox console that gouges game discs.”).

62. *See Microsoft*, 137 S. Ct. at 1706.

63. *Id.* at 1706–07.

64. Justice Gorsuch—who was not yet on the Court at the time of oral argument—took no part in the case. *Id.* at 1706.

holding that the voluntary dismissal “does not qualify as a ‘final decision’ within the compass of [28 U.S.C.] § 1291.”<sup>65</sup> But a concurring opinion by Justice Thomas (joined by Chief Justice Roberts and Justice Alito) rejected the majority’s statutory argument. The concurring Justices concluded that there was indeed a “final decision” for purposes of § 1291, because the district court’s order “dismissed all of the plaintiffs’ claims with prejudice and left nothing for the District Court to do but execute the judgment.”<sup>66</sup>

Instead, the concurring Justices found that “the Court of Appeals lacked jurisdiction under Article III of the Constitution.”<sup>67</sup> They reasoned that Article III’s reference to “‘Cases’ and ‘Controversies’ . . . limits the jurisdiction of the federal courts to issues presented ‘in an adversary context’ in which the parties maintain an ‘actual’ and ‘concrete’ interest.”<sup>68</sup> For the concurring Justices, no adversarial case or controversy existed because “[w]hen the plaintiffs asked the District Court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief from Microsoft”; therefore the parties “were no longer adverse to each other on any claims.”<sup>69</sup>

This understanding of the adversity requirement is difficult to justify. There is no question that Microsoft and the plaintiffs were “advers[e]” as to the “issue[]” of whether the district court should have certified the class action. And it is well established that once a final decision is reached, § 1291 gives the court of appeals jurisdiction to review all orders leading to that final decision.<sup>70</sup> So if one accepts Justice Thomas’s conclusion that there had indeed been a “final decision” for purposes of § 1291, there would seem to be no jurisdictional obstacle to reviewing the pre-dismissal class-certification decision, as to which the parties were unquestionably adverse.

There may be legitimate questions as to whether a plaintiff who voluntarily dismisses his or her individual claims ought to be deemed to have waived or forfeited the right to pursue certain appellate remedies. That may have been a third basis for refusing to allow the plaintiffs’ appeal in *Microsoft*, distinct from both the majority’s statutory argument and the concurrence’s constitutional argument. But

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65. *Id.* at 1707.

66. *Id.* at 1716 (Thomas, J., concurring, joined by Roberts, C.J. & Alito, J.).

67. *Id.*

68. *Id.* at 1716–17 (alteration in original).

69. *Id.* at 1717.

70. *See, e.g.,* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 710 (1996) (“The general rule is that a party is entitled to a single appeal, to be deferred until final judgment has been entered, *in which claims of district court error at any stage of the litigation may be ventilated.*” (emphasis added) (citation omitted)).

it is hard to see why Article III compels such an approach to waiver or forfeiture by treating voluntary dismissal as eliminating adversity between the parties.

This is precisely the sort of mischief that can arise from transplanting the adverseness requirement to the Constitution itself. Consider Federal Rule of Criminal Procedure 11(a)(2), which explicitly (a) authorizes a criminal defendant to enter a conditional plea of guilty that reserves “the right to have an appellate court review an adverse determination of a specified pretrial motion,”<sup>71</sup> and (b) provides that “[a] defendant who prevails on appeal may then withdraw the plea.”<sup>72</sup> Justice Thomas’s logic in *Microsoft* suggests that this rule is unconstitutional. The guilty plea—like a voluntary dismissal—would seem to extinguish “adversity” and thereby deprive the appellate court of jurisdiction to hear the appeal.

Admittedly, no such rule currently exists for civil cases. One could imagine, however, either Congress or the federal rulemakers adopting a similar rule that would allow civil plaintiffs to voluntarily dismiss or settle claims but retain the right to seek review of specified pretrial rulings, including class certification. To view adversity as a constitutional requirement—and to apply that requirement as Justice Thomas does in *Microsoft*—would mean that no such rule could pass constitutional muster.

#### CONCLUSION

As Fred Smith convincingly shows in *Undemocratic Restraint*, the Supreme Court’s project of transplanting prudential standing limitations to statutory or constitutional hosts does little to improve democratic values. It may, in fact, weaken them. Transplantation has also failed to bring clarity to numerous unresolved questions regarding the operation of doctrines such as the zone-of-interests test and the adversity requirement. Supreme Court decisions issued shortly after *Undemocratic Restraint* was published indicate that such questions are likely to persist.

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71. FED. R. CRIM. P. 11(a)(2).

72. *Id.*