

THE PARADOX OF EXCLUSIVE STATE-COURT JURISDICTION OVER FEDERAL CLAIMS

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Say you buy groceries with a credit card. When you look at the receipt, you notice that the store has included on it your entire credit-card number. You start to worry about the potential for credit-card fraud after you throw it away. Then you remember hearing a television commercial offering to bring lawsuits on behalf of people who have received such receipts. So you give them a call and ask whether you have a claim, and if so, where you should bring suit.

What you learn would likely surprise and confuse you in just about every way. First, the good news: not only did Congress pass a law outlawing receipts with full credit-card numbers,¹ it authorized you to sue the grocery store directly.² If you win, you will be entitled to statutory damages of between \$100 and \$1000, plus your attorney's fees.³ And your case is very strong. If it were to reach the merits, you would be all but certain to win. For that reason, the attorney is willing to represent you on a contingency basis, perhaps even as part of a class action.

Now the bad news: you are barred from bringing your suit in federal court by standing doctrine. And it gets worse: it is unclear whether you can even sue in *state* court. In some states, you can, but in other states, you cannot. Because of where you live (and thus where you bought your groceries), it may be impossible for you ever to recover the money to which the law entitles you. In short, Congress said you could sue, federal courts said you couldn't, and state courts are divided.

This is a paradox. The classic model assumes that federal law should be decided primarily in federal court, or at least that federal courts have an important role to play in the adjudication of federal claims. So how can there be a federal right, duly created by Congress, the remedy for which lies exclusively in (some) state courts? This article unravels that paradox, which applies to a large and growing number of federal statutory claims.

The paradox derives from three related but distinct features of our federated court systems. First, the Supreme Court recently adopted a sharpened concreteness requirement for proving the injury-in-fact prong of Article III standing, which bars a persistent and predictable subset of federal claims from

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¹ See Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952, codified as amended in scattered sections of 41 U.S.C.

² See 41 U.S.C. § 1681c(g)(1) (“[N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt.”).

³ See 41 U.S.C. § 1681n(a).

being brought in federal court. Second, state courts are presumed to have jurisdiction to entertain federal claims and indeed have an affirmative duty to hear them to the extent they hear analogous state-law claims. Third, unbound by the strictures of Article III's standing requirements, state courts have fashioned their own standing regimes, many of which welcome claims that do not depend on any showing of concrete injury to a plaintiff. Taken together, those three seemingly disparate aspects of the separation of powers and judicial federalism produce an outcome that is at best bizarre and at worst harmful to the integrity of federal law.⁴

The paradox teaches two lessons, one narrow and one broad. Narrowly, the paradox illustrates the unintended consequences of the Supreme Court's development of the concreteness prong of the Article III injury requirement, elaborated most recently in *Spokeo v. Robins*.⁵ Many commentators have criticized the Court's decision in that case, largely on the grounds that it unjustly denies plaintiffs a forum for suit and was driven by ideological opposition to the plaintiffs' bar. But proper understanding of the paradox demonstrates that many plaintiffs, and certainly most plaintiffs' *lawyers*, will have no problem finding a forum in which to bring class actions asserting federal claims. The more significant reason to be wary of *Spokeo* and its progeny is that they work a massive transfer of federal claims from federal to state courts, where federal law will develop largely without the participation of federal courts.

The broader lesson is that each possible solution to the paradox bumps up against some important principle of our federal judicial system: legislative supremacy, the distinct sovereignty of the states, the limitation of the judiciary to deciding actual controversies, the appropriate allocation of claims as between state and federal courts, and the supervisory power of the Supreme Court over questions of federal law. The central lesson of this article is thus not that there is only one correct resolution to the paradox, though it does offer a least-worst

⁴ Some of the constituent parts of this phenomenon were apparent before *Spokeo*. See, e.g., Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257 (2011); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 303-06 (2005) Paul J. Katz, Note, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315 (2005); William Grantham, *Restoring Citizen Suits After Lujan v. Defenders of Wildlife: The Use of Cooperative Federalism To Induce Non-Article III Standing in State Courts*, 21 VT. L. REV. 977 (1997); Elmendorf, *supra* note __; Brian A. Stern, Note, *An Argument Against Imposing the Federal Case or Controversy Requirement on State Courts*, 69 N.Y.U. L. REV. 77 (1994); William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263 (1990); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145 (1984). Each of those articles predates *Spokeo v. Robins*, discussed in Part I.A., *infra*. Cf. Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 434 (2018) (noting in passing the heightened nature of the paradox in the wake of *Spokeo*). However, its full scope was not apparent until recent changes in the law of Article III standing took shape. See Michael T. Morley, *Spokeo: The Quasi-Hohfeldian Plaintiff and the Nonfederal Federal Question*, 25 GEO. MASON L. REV. 577 (2018) (noting *Spokeo's* role); cf. Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442, 449 (1991) ("Congress has *never* given the last word on any claim of federal statutory right to state courts.").

⁵ 136 S. Ct. 1540 (2016).

solution—treating statutory violations as concrete injuries but retaining the requirement that such injuries be particularized. Rather, the point is to illustrate the unintended consequences and hidden tradeoffs of novel jurisdictional limits given the interlocking nature of our judicial federalism.⁶

This article has three parts. Part I describes the nature of the paradox by examining the interaction of the three distinct areas of doctrine that conspire to create it. First, it traces the Supreme Court’s new test for concrete injury under Article III, which was given bite for the first time in *Spokeo* but is already back before the Court.⁷ The concreteness requirement serves to bar certain types of federal statutory claims from being litigated in federal court. In particular, a large and growing number of statutes promoting diverse consumer-protection goals such as data privacy, identity theft, and accurate credit reports are increasingly held to be unenforceable in federal court. What these statutes have in common is that they provide a particularized cause of action backed by the promise of statutory damages and attorney’s fees for harms that are necessarily inchoate. Despite satisfying every element of these statutory causes of action, plaintiffs cannot show that their statutorily defined injuries are sufficiently concrete to invoke the subject-matter jurisdiction of federal courts. Second, this Part turns to the presumption of concurrent jurisdiction of state courts to entertain federal claims and the concomitant obligation of state courts not to use procedural or jurisdictional rules to bar such claims from being brought before them. When federal claims are barred from federal court, state courts are their only refuge. Third, this Part examines the diversity of state standing doctrines, which renders state courts differentially receptive to federal claims barred from federal court on standing grounds. It shows that although some states follow federal standing doctrine exactly, others explicitly depart from it. The result is a kaleidoscope of state-court jurisdictional rules⁸ that makes the availability of a forum for the redress of many federal claims contingent on geography.

Part II illustrates and analyzes the costs of the paradox, which fall equally on plaintiffs, defendants, and federalism alike. For plaintiffs, the availability of state courts as sole fora for certain categories of federal causes of action⁹

⁶ See HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* xi (1953) (“One of the consequences of our federalism is a legal system that derives from both the Nation and the States as separate sources of authority and is administered by state and federal judiciary, functioning in far more subtle combination than is readily perceived.”); see also *id.* (noting the “[t]he frequently neglected problems posed in the administration of federal law by state courts”).

⁷ Order, No. 17-961 (Nov. 6, 2018).

⁸ See generally Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (analyzing and praising the variation in state courts’ justiciability rules); Wyatt Sassman, *A Survey of Constitutional Standing in State Court*, 8 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 349 (2015) (conducting 50-state survey).

⁹ This phenomenon includes, but (as noted) is not limited to, statutory claims where federal law makes available statutory damages and attorneys’ fees. Some of the statutes that include such provisions are the Cable Privacy Act, 47 U.S.C. § 605(e); the Fair and Accurate Credit Transactions Act of 2003

depends on accidents of where plaintiffs and defendants reside and have jurisdictional contacts. For defendants, who are typically the ones who argue for dismissal on the basis of standing,¹⁰ the prevailing state of affairs is ironic because defendants generally prefer to litigate in federal court¹¹ but have relegated themselves to state court.¹² Most importantly, there are negative consequences for federal law and the federal judiciary. Chief among those is the possibility of disuniformity in federal law, a problem the Supreme Court alone cannot solve. Moreover, to the extent the guiding principle for claim allocation in the federal system is that federal law should be primarily decided by federal courts (and state law by state courts), the present state of affairs flips that presumption on its head.¹³

Part III evaluates the paradox's potential resolutions. That task is complicated by the fact that a fully satisfactory fix must be harmonized with its collateral consequences on all other aspects of judicial federalism. Yet no solution is without tradeoffs, and thus none is perfect. The paradox's resolution therefore becomes a mirror into one's commitments as between the values of federalism, separation of powers, and the role of the Supreme Court in the federal system.

(the statute at issue in *Spokeo*); the Fair Debt Collection Practices Act of 1978, 15 U.S.C. § 1692(k); the Stored Communications Act of 1986, 18 U.S.C. § 2707(c); the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3)(B); the Truth in Lending Act of 1968, 15 U.S.C. § 1640(a)(2)(A); and the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2104(a)(3). For an overview of the use of private enforcement in effectuating Congressional purpose, see generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).

¹⁰ Of course, in theory standing is jurisdictional, meaning courts have an independent obligation to consider the issue *sua sponte*. See, e.g., *Adarand Constr., Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (“We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below.”). In practice, courts rarely examine standing *sua sponte* without a party raising the issue first.

¹¹ See Victor E. Flango, *Attorneys’ Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41 (1991).

¹² See Robert J. Herrington, *Think Twice Before Seeking Dismissal for Lack of “Standing,”* Am. Bar Ass’n Practice Points (Jan. 17, 2017), <https://www.americanbar.org/groups/litigation/committees/class-actions/practice/2017/think-twice-before-seeking-dismissal-for-lack-of-standing/> (noting that “a defendant can incur the expense of removing a case to federal court and demonstrating that the plaintiff lacks standing, only to have all that work be for naught, with the case ending up back in state court and possibly being responsible for the plaintiff’s attorney fees as well.”).

¹³ See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1236 (2004) (“One is likely to find little disagreement with the proposition that *ceteris paribus* it is better for a sovereign’s own courts to resolve novel or unsettled questions regarding that sovereign’s laws.”).

I. THE PATH TO EXCLUSIVE STATE-COURT JURISDICTION OVER FEDERAL CLAIMS

A. *Lujan, Spokeo and the New Understanding of Concrete Injury*

Generally, to sue in federal court, a plaintiff must plead and later prove three elements of Article III standing: (1) that she has suffered certain types of injuries, (2) caused by the defendant, that (3) the court can remedy. Without such a showing, federal courts lack jurisdiction to hear the case, and they must dismiss it or send it back to state court. This requirement—a judicial gloss on Article III’s restriction of the federal judicial power to “cases” and “controversies”—is a gatekeeper.¹⁴ When standing is liberalized, plaintiffs face fewer obstacles to suit. When it is restricted, defendants can more easily dismiss suits against them.

In this way a series of slow but steady changes to standing doctrine have conspired, over the last fifty years, to restrict access to federal courts.¹⁵ Most,

¹⁴ There is a broad consensus that standing doctrine is a consequence of developments in formation of the modern administrative state. The historiography of these developments is split into two camps. The earlier view was that conservative judges created standing doctrine to curtail the administrative state. See Raoul Berger, *Standing To Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 290–99 (2008); Jonathan Levy, *In Response to Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On*, 80 MINN. L. REV. 123, 129–34 (1995). The revisionist view, first proposed by Steven Winter and Cass Sunstein, holds that liberal judges invented standing to insulate the administrative state. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436–38 (1988); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

Either way, there is rough agreement among commentators in both camps that standing doctrine was an invention of modern judges, not the founders. See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (asserting that the Supreme Court “fabricat[ed] the doctrine of standing” in the twentieth century); RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 216–17 (1993); but see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (“We do not claim that history compels acceptance of the modern Supreme Court’s vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on. . . . We do, however, argue that history does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution’s meaning.”).

Those who disagree tend nevertheless to confess that *they* are motivated to study the topic of standing because of the growth of the administrative state. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 887 (1983) (“An even more important development has been the interpretation of the Administrative Procedure Act to create liberalized judicial review provisions where none existed before. . . . [T]hat development . . . has been of enormous consequence.”); Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1663 (2007) (arguing that standing doctrine promotes efficient alienation of constitutional rights where “many people’s rights are affected by a single government policy”).

¹⁵ See generally STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* 130, 130-91 (2017) (cataloging empirically the fact that, “[w]hen acting under Article III . . . the Court has been fair more successful than

but not all, of the doctrinal changes to this requirement involve the “injury” prong of that three-part test for standing. In grappling with what constitutes an “injury” for purposes of Article III, the Supreme Court has continuously added additional doctrinal requirements. The injury must be: “actual,” “imminent,” “particularized,” non-“hypothetical,” non-“conjectural,” and—most relevant for present purposes—“concrete.” As litigants have pressed the boundaries of what constitutes standing, the justices have generally held that claimed injuries were insufficient.

Scholarly criticism of this restrictive turn in the law of standing has been voluminous, though it has not succeeded in moving the Court. The traditional critiques of standing doctrine are that it is by turns conceptually incoherent¹⁶ and nakedly partisan.¹⁷ Like the caselaw, the criticism has mostly focused on the injury requirement. Indeed, many scholars questioned the very existence of an injury requirement.

Despite such criticism, the Court has continued to push the injury requirement down its restrictive path, typically in cases divided sharply along partisan lines. The newest developments—and the ones that contribute most directly to our paradox—concern the requirement that the plaintiff’s injury be “concrete” rather than simply “procedural.” As we will see, although the rhetoric of concreteness is not new, its contours as a doctrinal requirement distinct from the requirement of particularization are.

... Congress ... in changing the law that governs private enforcement.”). For an explanation of why statutes providing for private enforcement may have provoked a judicial backlash in the form of restrictive standing rules, see Margaret H. Lemos, *Special Incentives To Sue*, 95 MINN. L. REV. 782 (2011) (theorizing that fee shifting induces judicial backlash).

¹⁶ In 1966, testifying before a Senate subcommittee on constitutional rights, Harvard Professor Paul Freund called the concept of standing “among the most amorphous in the entire domain of public law.” *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 89th Cong., 2d Sess. 498 (1966) (statement of Prof. Paul A. Freund); cf. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988) (noting that it is “almost de rigueur for articles on standing to quote Professor Freund’s testimony to Congress”). Similarly, Justice Harlan accused the majority in *Flast v. Cohen* of “reduc[ing] constitutional standing to a word game played by secret rules.” 392 U.S. 83, 129 (1968) (Harlan, J., dissenting); see also Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invest the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 594 (2010) (calling standing doctrine “the Rorschach test of federal courts”); Christopher T. Burt, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275, 285 (1995) (observing that the Supreme Court’s procedural-injury standard is “vague and provides little guidance for prospective plaintiffs and the lower courts”). The Supreme Court itself has confessed that the area generally resists conceptual coherence. See *Ass’n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 151 (1970).

¹⁷ See, e.g., Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742-43 (1999) (“I have concluded that I would be doing them a grave disservice if I took that traditional legal approach in teaching the law of standing. [My students] can predict judicial decisions in this area with much greater accuracy if they ignore doctrine and rely entirely on a simple description of the law of standing that is rooted in political science: judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges.”).

Critical to this story, concreteness is effectively a restriction on types of *injuries* rather than types of *plaintiffs*. The requirements that injuries be imminent, non-hypothetical, and particularized all go to the particular connection between the injury claimed, the plaintiff claiming it, and the time at which she claims it. An insufficiently imminent injury can be sufficient later, once it has become more proximate. A hypothetical injury can be sufficient if a plaintiff can be found who actually suffered it. In the same way, the concept of particularization implies that there exists some plaintiff who feels the injury most acutely, and, in turn, that such a person would have standing to sue. By contrast, because it goes to the nature of the injury itself, rather than the plaintiff's nexus to it, concreteness potentially applies to *any* plaintiff claiming certain types of injuries. In other words, if a certain type of injury is deemed to be non-concrete, *no one* can sue in federal court to redress it.

To understand the significance of the concreteness requirement, we turn now to the two cases that gave it birth and bite, respectively: *Lujan* and *Spokeo*.

1. *Lujan* and the Seeds of Uncertainty

Lujan is the most important Article III standing case ever decided.¹⁸ Since it was issued in 1992, it has been cited in judicial opinions more than 20,000 times.¹⁹ Most of that import and attention is due to *Lujan*'s concise articulation of the three requirements for Article III standing noted above, injury, causation, and redressability:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.²⁰

Yet *Lujan*'s formulation subtly expanded the doctrinal test for standing. In particular, past cases had not used the “concrete” and “particularized” language

¹⁸ See Peter M. Shane & Christopher J. Walker, *Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 n.2 (2014) (reporting *Lujan* as the second-most-cited administrative law case ever decided, behind only *Chevron*); Chris Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 9, 2014), <http://yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/> (providing full data).

¹⁹ See Westlaw (21,620 as of Jan. 31, 2019). By contrast, despite the benefit of an additional 30 years, multiple additional legal issues, and dozens of additional pages of language to quote, *Baker v. Carr*, 369 U.S. 168 (1962), has only been cited in judicial opinions roughly 5,000 times. See *id.*

²⁰ *Lujan*, 504 U.S. at 560-61 (internal quotation marks, alterations, and citations omitted).

in the way *Lujan* did. This somewhat revisionist doctrinal distillation proved extremely influential,²¹ but it also left substantial uncertainty about the test’s application to subsequent cases, because *Lujan* enunciated but failed to define specifically the requirement that a plaintiff allege and later prove an injury that is concrete as opposed to particularized. Prior cases had spoken directly to the requirement of particularization, as *Lujan*’s narrow holding did as well. But neither *Lujan* nor the precedent on which it relied gave doctrinal content to the seemingly separate requirement of concreteness. That absence meant *Lujan* engendered significant uncertainty about its application to other types of statutorily defined injuries.

The factual background and statutory context of *Lujan* helps explain this uncertainty in greater detail. The Endangered Species Act²² requires federal agencies to consult with the Secretary of the Interior to ensure that any action those agencies take does not threaten endangered species or their habitats.²³ In 1986, the Reagan administration issued regulations interpreting the law’s consultation requirement to apply only to government action in the United States or on the high seas.²⁴ In response, several environmental and wildlife-conservation nonprofits sued to block the change pursuant to the so-called “citizen-suit” provision of the ESA, under which “any person may commence a civil suit . . . to enjoin . . . any [agency] . . . alleged to be in violation of any provision” of the ESA.²⁵ They alleged that the failure to consult accelerated the extinction of endangered and threatened species, which in turn injured them because they could not enjoy the observation of those species. The chronic question throughout the case was whether the nonprofits or their members had suffered an Article III injury such that federal courts had jurisdiction.

The Supreme Court (per Justice Scalia) rejected each of the plaintiffs’ alleged injuries. The Court began by observing that the loss of enjoyment or use from damage to endangered species or their habitats qualified as sufficient injury for Article III purposes.²⁶ But the Court disagreed that the plaintiffs themselves *particularly* felt such a loss. Plaintiffs’ members averred to have previously visited Egypt and Sri Lanka and observed endangered wildlife in those places—wildlife that was allegedly now threatened by engineering

²¹ See Richard M. Re, *Standing’s Lujan-ification*, RE’S JUDICATA (Feb. 1, 2015, 7:12 AM) (observing that *Lujan*’s doctrinal recitation “was a statement meant to be quoted and cited—and it has been” and reporting 7,400 Westlaw citations to *Lujan*’s doctrinal headnote alone); see also *infra* Part I.C (arguing that *Lujan*’s doctrinalization of standing law sparked the phenomenon of “reactive divergence,” the process by which states differentially adopt or reject federal standing rules in direct reaction to Supreme Court caselaw).

²² 87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.*

²³ *Id.* § 1536(a)(2).

²⁴ *Lujan*, 504 U.S. at 559.

²⁵ 16 U.S.C. § 1540(g).

²⁶ *Lujan*, 504 U.S. at 562-63 (“[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.” (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972))).

projects carried out in part with U.S. assistance.²⁷ Each swore to have intentions of returning to those places, but neither had specific plans to do so.²⁸ That lack of specific intention to return meant that, for the Court, the plaintiffs' claimed injury was not particularized. In other words, the plaintiffs failed to show that they themselves, as opposed to the public at large, were likely to be harmed by damage to the endangered species or their habitat. That fact was fatal to their case for standing.²⁹

Lujan's influence can be traced to the algorithmic precision of its doctrinal restatement of standing precedent. The case summarized a confused and conflicting set of cases as if they embodied Newtonian laws of federal jurisdiction, but such streamlining is necessarily revisionist, and not all of *Lujan's* doctrinal steps had equal pedigree. In particular, the textual formulation of the injury-in-fact prong was entirely novel. The phrase "concrete and particularized" had never appeared in a prior Supreme Court opinion. Although earlier cases had required particularization and spoken of "concrete injury," those cases had neither enunciated concreteness and particularization as distinct requirements nor treated them as separate aspects of the injury-in-fact analysis.³⁰ Despite this subtle revisionism, the simplicity of *Lujan's* doctrinalization³¹ of standing precedent proved revolutionary.

Lujan's restatement of the injury prong gives rise to the holding that is most important for purposes of the present paradox: just because a plaintiff has a statutory right, she does not necessarily also have Article III standing. Indeed, if such a right did confer standing automatically, the case would have been an easy win for the plaintiffs, because the Endangered Species Act authorizes "any person" to sue to enforce its terms.³² The Court's contrary holding that the

²⁷ *Lujan*, 504 U.S. at 563.

²⁸ *Id.* at 563-64.

²⁹ The Court also rejected two other theories of standing: "ecosystem nexus" and "animal nexus." Both of those theories were yet less particularized than the intent-to-return theory the Court also rejected. *See id.* at 565-67. Finally, a plurality of the Court would have held that the plaintiffs also failed to meet the redressability prong of the standing inquiry. *See id.* at 568-71. Justices Kennedy and Souter declined to join the portion of the majority opinion that would have held that plaintiffs failed to show redressability, leaving that conclusion without a majority. *See id.* at 580 (Kennedy, J., concurring).

³⁰ In formulating the injury-in-fact test, the Court cited three cases: *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); and *Sierra Club v. Morton*, 405 U.S. 727, 740-41 (1972). None of those cases spoke of concreteness as anything but an aspect of particularization. *Allen* spoke of concreteness only in the context of particularization and redressability. *See* 468 U.S. at 756-57. *Warth* used the word "concrete" or its derivations only in describing the redressability prong and in characterizing the type of factual allegations that could prove particularization. *See* 422 U.S. at 504, 508. Finally, *Sierra Club* used the word "concrete" only in a footnote characterizing de Tocqueville's description of judicial review. 405 U.S. at 740 n.16.

³¹ *See* Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 508 (2014) (defining "doctrinalization" as a process that "involves the creation of a structured set of categories and rules").

³² Indeed, that was the logic of the Court of Appeals below. *See* *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 121 (8th Cir. 1990) ("[W]e are persuaded that the Act is a statute imposing statutory duties which create correlative procedural rights in a given plaintiff, the invasion of which is sufficient

citizen-suit provision was not enough relied on the premise that, regardless any statutory cause of action, a plaintiff must also have a particularized and concrete injury.³³

Yet because the Court ultimately found that the plaintiffs' theory of standing failed because their claimed injuries were not particular, the concreteness prong remained vague. There were therefore two lingering questions about the concreteness requirement after *Lujan*, one broad and one narrow. First, and more generally, it was unclear what sorts of injuries or interests would count as sufficiently concrete to prove standing.³⁴ Second, and more specifically, could Congress create a concrete injury by specifying an award for a successful suit, as with a statutory-damages claim?³⁵

2. *Spokeo* and an Uncertain Future

In *Lujan*'s wake, it was unclear whether concreteness and particularization were separate elements of injury-in-fact. That ambiguity is important because it left open the question whether particularized legal injuries solely created by statute, such as many statutory-damages claims, nevertheless satisfy Article III. That question lingered for over a decade before *Spokeo* was decided.³⁶ And in some ways, *Spokeo* offers only a partial answer, because it was based on an incomplete record and therefore purported to be tentative. But as we will see,

to satisfy the requirement of injury in fact in article III." (internal quotation marks omitted)); *see also* 16 U.S.C. § 1540(g) (citizen-suit provision).

³³ *See Lujan*, 504 U.S. at 571-76.

³⁴ *See id.* at 577 ("If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3.').

³⁵ The Court explicitly distinguished cases in which the plaintiff's concrete interest derives from the promise of statutory recovery: "[This is not] the unusual case in which Congress has 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." *Id.* at 573-74. However, this language was likely intended to distinguish *qui tam* whistleblower suits, such as those under the False Claims Act. 31 U.S.C. §§ 3739 *et seq.* That statute authorizes a successful plaintiff suing on behalf of the federal government to recover for her own account a percentage of the recovery obtained for the government. *See* 31 U.S.C. § 3730(d) (specifying recovery percentages).

The Court later specified, also in an opinion by Justice Scalia, that *qui tam* whistleblowers have Article III standing on the theory that the government has partially assigned to such whistleblowers its own damages claim arising out of the fraud against it. *See* *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). In so holding, the Court noted in dicta that "an interest that is merely a 'byproduct' of the suit itself"—such as the right to recover attorneys' fees or costs—"cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773.

³⁶ In part, that was because opportunities to address it disappeared mysteriously. After briefing and oral argument in a case presenting this issue in October Term 2011, the Supreme Court dismissed the case as improvidently granted on the last day of the term. *See* *First Am. Fin. Corp. v. Edwards*, 567 U.S. 756, 757 (2012) (*per curiam*). Perhaps the case's decision was a victim of the day's news, as it was dismissed on the same day the Affordable Care Act was upheld in *National Federation of Independent Businesses v. Sebelius*. 567 U.S. 519, 519 (2012).

the logic of its holding implied a sweeping answer: concreteness is doctrinally distinct from particularization and cannot be conferred by statute.

Spokeo involved a statutory cause of action with a provision for statutory damages, which made it an ideal case to resolve *Lujan*'s remaining ambiguity. In particular, the Fair Credit Reporting Act of 1970, as amended by the Fair and Accurate Credit Transactions Act of 2003,³⁷ requires “consumer reporting agencies” to follow reasonable procedures to ensure the accuracy of the information contained in credit reports they provide to third parties. To enforce its various requirements, FCRA creates a private cause of action, imposes statutory damages of up to \$1000 for each willful violation of the act,³⁸ and authorizes awards of punitive damages³⁹ and attorney’s fees⁴⁰ to successful plaintiffs.

The defendant in the case, Spokeo, is a people-search website that allows users to search for individuals by name, email address, or phone number. Search results can include information about an individual’s age, address, marital status, occupation, household value, wealth, and “economic health.”⁴¹

The plaintiff, Thomas Robins, learned that the information Spokeo maintained about him was factually inaccurate. Although Spokeo correctly listed his address and even siblings’ names, it included inaccurate information about his age, marital status, employment, education, and children.⁴² It also included a photograph of someone else.⁴³ Robins complaint alleged that he was “concerned” that such “inaccuracies” would “affect his ability to obtain credit, employment, insurance, and the like.”⁴⁴ He alleged to be particularly concerned about his prospects for finding a job, as he was out of work at the time and seeking employment.⁴⁵ He also ultimately claimed that the incorrect information about him had “caused actual harm to [his] employment prospects,” causing him to lose money and suffer from “anxiety, stress, concern, and/or worry” about those prospects.⁴⁶

Robins sued Spokeo on behalf of a putative class, invoking the district court’s subject-matter jurisdiction over claims arising under federal law.⁴⁷

³⁷ 15 U.S.C. §§ 1681 *et seq.*

³⁸ 15 U.S.C. § 1681n(a)(1)(A).

³⁹ 15 U.S.C. § 1681n(a)(2).

⁴⁰ 15 U.S.C. § 1681n(c).

⁴¹ While such information is provided at no cost, Spokeo sells more detailed reports to paying subscribers.

⁴² Compl. ¶¶ 20–21.

⁴³ *Id.* ¶ 21.

⁴⁴ *Id.* ¶ 23.

⁴⁵ *Id.* ¶ 24.

⁴⁶ First Am. Compl. ¶¶ 35–37.

⁴⁷ 28 U.S.C. § 1331. In addition to FCRA claims, Robins also pressed a claim under California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*

Spokeo moved to dismiss on the grounds that, as relevant here,⁴⁸ Robins lacked Article III standing to sue in federal court because he failed to plead a concrete injury that was actual and imminent. The district court dismissed the complaint on the grounds that his alleged injuries were insufficient to meet Article III's standing requirement, concluding that a "[m]ere violation of the Fair Credit Reporting Act does not confer Article III standing . . . where no injury in fact is properly pled."⁴⁹

Robins appealed, and the Ninth Circuit reversed, per Judge O'Scannlain, a conservative stalwart and Reagan appointee.⁵⁰ Despite the fair inference that Judge O'Scannlain is no friend to liberalized standing, his panel opinion reasoned that a violation of a statutory right "is usually a sufficient injury in fact to confer standing," and that, so long as the statutory right is sufficiently particularized, Congress can create a statutory right that, when violated, gives rise to an Article III injury-in-fact.⁵¹

The Supreme Court granted certiorari and, after briefing and argument, vacated and remanded. The Court, per Justice Alito, held that the Ninth Circuit's analysis properly asked whether Robins's injury was *particularized* but failed to ask whether it was *concrete*. Calling the Ninth Circuit's analysis "incomplete," the Court remanded for further proceedings below.⁵² By requiring separate analysis of the concreteness prong, *Spokeo* did the doctrinal work necessary to entrench the distinction between *Lujan*'s two prongs of the injury-in-fact requirement. Despite the ostensibly limited scope of the Court's decretal disposition of the case, as we will see, that doctrinal distinction would have substantial effect in the lower courts.

Not only did the Court emphasize that concreteness is distinct from particularization, but it also held that statutory injuries are not per se concrete: "Congress'[s] role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a

⁴⁸ Spokeo also argued that Robins failed to state a claim with respect to the FCRA claims because Spokeo is not a "credit reporting agency" as that term is defined by statute. The district court did not reach that argument.

⁴⁹ *Robins v. Spokeo*, No. CV10-05306 ODW (AGRx), 2011 WL 11562151 (Sept. 19, 2011).

⁵⁰ *Robins v. Spokeo*, 742 F.3d 409 (9th Cir. 2014); see The Federalist Society, *Hon. Diarmuid F. O'Scannlain*, <https://fedsoc.org/contributors/diarmuid-o-scannlain> (last visited Feb. 14, 2019).

⁵¹ *Id.* at 412-14. The court disclaimed any consideration of Robins's claim that his diminished employment prospects or associated anxiety constituted a separate injury-in-fact sufficient to confer standing. *Id.* at 414 n.3.

⁵² Notwithstanding the Court's characterization, it is not obvious that the Ninth Circuit *did* overlook the concreteness requirement: it noted that Article III "does not prohibit Congress from 'elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'" *Robins*, 742 F.3d at 413 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)). The court also held that "the interests protected by the statutory rights at issue are sufficiently *concrete* and particularized that Congress can elevate them" in that way. *Id.* (emphasis added). It is likely that the somewhat cramped reading of the decision below was an accommodation to conflicting views among the members of the six-member majority, which included both Justices Breyer and Kagan.

statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.”⁵³ *Spokeo* thus also clarified that Congress alone cannot of specifying a concrete injury for purposes of Article III legislatively, though it left unclear exactly what “role” Congress has in “identifying and elevating intangible harms.”

Spokeo stands in tension with some earlier cases that appeared to hold that invasion of a personal statutory right was sufficient for purposes of Article III.⁵⁴ Indeed, Robins relied heavily on such cases in his argument to the Supreme Court. The majority opinion apparently reasoned that such cases were distinguishable on the grounds that they involved alleged intangible harms that were sufficiently similar to harms cognizable at common law as to constitute concrete injuries.⁵⁵ The Court’s failure to grapple explicitly with the seemingly inconsistent prior caselaw left substantial ambiguity about the scope of its holding and the path of the law going forward.⁵⁶

That ambiguity is spreading to other types of statutory claims in lower federal courts, including at the Supreme Court’s invitation.⁵⁷ In the recent case of *Frank v. Gaos*, the Supreme Court ordered a second round of briefing on the question of concrete injury in light of *Spokeo*, despite the fact that the issue of standing was not addressed below.⁵⁸ After considering eight supplemental briefs from the parties and amici, the Court issued a brief opinion vacating the judgment below for further proceedings to address the “wide variety of legal and factual issues not addressed in the merits briefing . . . or at oral argument,” including “[r]esolution of the standing question.”⁵⁹ And in another case set to

⁵³ 136 S. Ct. at 1549.

⁵⁴ See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (“A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered an injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act’s provisions.”); *Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 449 (1989) (“Refusal to permit appellants to scrutinize the ABA Committee’s activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.”); *Federal Elec. Comm’n v. Akins*, 524 U.S. 11, 19-20 (1998).

⁵⁵ See *Spokeo*, 136 S. Ct. at 1549 (“Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”).

⁵⁶ In dissent, Justice Ginsburg reasoned that such caselaw can be understood as requiring examination of “Congress’[s] connection of procedural requirements to the prevention of a substantive harm.” *Spokeo*, 136 S. Ct. at 1555 (Ginsburg, J., dissenting). If so, however, the FCRA claims at issue in the case would seem to qualify: “Just as the right to truthful information at stake in *Havens* . . . was closely tied to the Fair Housing Act’s goal of eradicating racial discrimination in housing, so the right here at stake is closely tied to the FCRA’s goal of protecting consumers against dissemination of inaccurate credit information about them.” *Id.* at 1555 n.3.

⁵⁷ See *infra* Part II.A (discussing the spread of FACTA claims through state courts).

⁵⁸ Order, *Frank v. Gaos*, No. 17-961 (Nov. 6, 2018). The question presented upon grant of certiorari concerned the propriety of *cy pres* awards in class action settlements.

⁵⁹ *Frank v. Gaos*, No. 17-961, 586 U.S. ____ (Mar. 20, 2019), slip op. at 6.

be argued in October Term 2019, the Court asked the parties *sua sponte* to brief the question of Article III standing of certain ERISA claimants.⁶⁰

B. *Federal Claims in State Courts*

Yet despite these Article III obstacles to federal claims being heard in federal court, many of the sorts of claims implicated by *Spokeo* are nevertheless viable—in state court. Indeed, in the wake of *Spokeo*, FCRA claims increasingly are being brought in state courts. Although the Ninth Circuit held on remand that the plaintiff in *Spokeo* adequately pleaded standing,⁶¹ lawyers for other plaintiffs bringing similar claims have already begun suing in state court.⁶² Indeed, the law firm that represented the plaintiff in *Spokeo* has warned that the case will simply shift future litigation to state court rather than blocking it outright.⁶³

That shift in forum is made possible by a central feature of our federal court system: plaintiffs are generally free to bring federal claims in state court.⁶⁴ The basic logic of this arrangement is apparent from the Supremacy Clause, which makes “the laws of the United States . . . the supreme law of the land” and mandates that “judges in every state shall be bound thereby.”⁶⁵ Because federal law binds state judges, they must apply it in cases that present it. Put differently, the Supremacy Clause makes federal law a part of the law of every state, meaning that state courts must apply it just as they would their own laws. Indeed, the constitution was drafted under the assumption that Congress did not need to create *any* lower federal courts—under the bargain known as the Madisonian Compromise⁶⁶—a fact that underscores the importance of state courts as adjudicators of federal claims under the constitutional system.

Other than when Congress specifies exclusive federal jurisdiction, the only limit on plaintiffs’ ability to bring federal claims in state court are the states’

⁶⁰ See Order, *Thole v. U.S. Bank, N.A.*, No. 17-1712 (U.S. June 28, 2019).

⁶¹ See *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017), *cert. denied* 138 S. Ct. 931 (2018).

⁶² See, e.g., Alison Frankel, *Spokeo Backlash: Dismissed in Federal Court, Class Actions Move to States*, Reuters, May 16, 2017, <https://www.reuters.com/article/us-otc-spokeo-idUSKCN18C2DK>. In an interesting bit of petard-hoisting, defendants like Spokeo sued in state court are now barred from removing similar suits to federal court—on pain of paying costs and attorneys’ fees, see 28 U.S.C. § 1447(c)—by the lack of standing they pressed in *Spokeo*.

⁶³ See Roger Perlstadt & Jay Edelson, *Learning the Limits (and Irony) of Spokeo*, Law360, Dec. 12, 2016, <https://www.law360.com/articles/871191/learning-the-limits-and-irony-of-spokeo>.

⁶⁴ Of course, federal jurisdiction is exclusive in some areas, such as antitrust, patents, admiralty, and bankruptcy.

⁶⁵ U.S. Const. Art. IV, para. 2, cl. 1.

⁶⁶ The Madisonian Compromise is also shorthand for the idea, somewhat contested, that state courts have the power, and perhaps an affirmative duty, to hear federal causes of action. Compare Martin H. Redish & John Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976) (arguing that the Madisonian Compromise requires state courts to entertain federal causes of action), with Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (arguing that the simple account of the Madisonian Compromise is incorrect).

own justiciability rules—for example, standing doctrine under state law. And there are important limits on states’ ability to use those kinds of jurisdictional rules to discriminate between state and federal claims: state courts must allow a federal claim where they would allow an analogous state-law claim.⁶⁷

Subject to that proviso, states are free to fashion their own jurisdictional rules, which may or may not allow certain types of plaintiffs or claims. The Supreme Court held in the 1989 case of *ASARCO v. Kadish*—to which we will return⁶⁸—that when it comes to plaintiff standing to sue, state courts are free to “cho[o]se a different path” by taking “no account of federal standing rules.”⁶⁹ “That result properly follows from the allocation of authority in the federal system. . . . [T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law.”⁷⁰

Because *ASARCO* was decided in the midst of the revolution in federal standing doctrine that culminated in *Lujan*, the fact that it reaffirmed that those rules did not apply to state courts is important and enduring.⁷¹ Indeed, *ASARCO* has been relied upon by 22 states’ highest courts for the proposition that Article III rules do not apply to them.⁷² *ASARCO* thus represents the important principle that the limits of Article III jurisdiction have no binding force on state courts—unless they choose to follow those limits of their own accord.

C. *The Diversity of State-Court Standing Law*

Despite the fact that federal standing rules do not apply to state courts, state standing law is crafted in the shadow of its federal counterpart. This is surprising. Left to their own devices, we might expect states to develop unique justiciability traditions.⁷³ Yet standing doctrine is less variant than one might

⁶⁷ See *Testa v. Katt*, 330 U.S. 386, 393 (1947).

⁶⁸ See Part II.C, *infra*.

⁶⁹ 490 U.S. 605, 617 (1989).

⁷⁰ *Id.*

⁷¹ See *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (noting that “[t]here would be nothing irrational about a system that granted standing” in a wider range of cases than the federal system does).

⁷² The states are Alabama, Arizona, Colorado, Hawai’i, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, and Washington, plus the Supreme Court of Guam.

⁷³ State standing law therefore offers an answer to the question: if standing law were different, how different would it be? Cf. BEN LINDBERGH & SAM MILLER, *THE ONLY RULE IS IT HAS TO WORK* 272 (2017) (theorizing that, if baseball were different, it would be only slightly different, “because baseball’s time-tested equilibrium is difficult to disrupt”); *Effectively Wild, Episode 396: Your Emails, Answered*, *BASEBALL PROSPECTUS* (Feb. 28, 2014) (downloaded using Overcast), available at <https://blogs.fangraphs.com/effectively-wild-episode-396/> (answering question from listener Vinit, “If baseball were different, how different would it be? Would it only be slightly different or VERY different?”).

think, given that it can be anything a state wants it to be. This is because federal cases—especially Supreme Court cases—exert significant influence on state doctrine. It’s not obvious why this should be. After all, if state courts are not constrained by Article III, then one would think that, under their own constitutions and constitutional doctrines, states would develop meaningfully different standing rules that bear little or no resemblance to federal standing doctrine.

Instead, state courts regularly grapple with, incorporate, or reject federal standing caselaw when deciding standing cases. Sometimes they do so because litigants urge them to incorporate federal doctrine into state law; other times they do so *sua sponte* in an attempt to provide theoretical grounding to a complex and seemingly arbitrary set of holdings. Regardless of their impetus or motivation for doing so, state courts react to federal standing cases in such a way that the doctrinal lines drawn in federal cases are inscribed in state law—either affirmatively or negatively. In that way, this phenomenon is a cousin of constitutional borrowing⁷⁴ or the general effect of federal law on state law.⁷⁵ But because state courts do not simply borrow doctrine, but instead sometimes explicitly reject it, the results look much different. Let us call the pattern of federal caselaw’s influence on state standing doctrine *reactive divergence*.

State courts’ reaction to *Lujan* illustrates the pattern well. As discussed in Part I.A, *Lujan* was influential in large part because its concise restatement of doctrine was so easily recited, and therefore easily borrowed.⁷⁶ Because it was easily borrowed, *Lujan* sparked a nationwide reexamination of state-court standing doctrine that reshaped the receptiveness of state courts to claims by plaintiffs who would be barred from federal court for lack of standing.

⁷⁴ See, e.g., Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT’L J. CONST. L. 196 (2003); Matthew D. Adler, *Can Constitutional Borrowing Be Justified? A Comment on Tushnet*, 1 U. PA. J. CONST. L. 350 (1998).

⁷⁵ See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016) (documenting the general tendency of state actors to follow federal law across the domains of procedure, employment discrimination, and gay rights).

⁷⁶ See Richard M. Re, *Standing’s Lujan-ification*, RE’S JUDICATA (Feb. 1, 2015, 7:12 AM) (observing that *Lujan*’s doctrinal recitation “was a statement meant to be quoted and cited—and it has been” and reporting 7,400 Westlaw citations to *Lujan*’s doctrinal headnote alone).

This reactive divergence results in a kaleidoscope of state standing rules. Figure 1 shows that kaleidoscope through the lens of *Lujan*.⁷⁷ Each state has been categorized along two dimensions: whether it adopted *Lujan* and whether its standing doctrine is constitutional or prudential in nature.

This categorization permits some general observations. First, roughly half

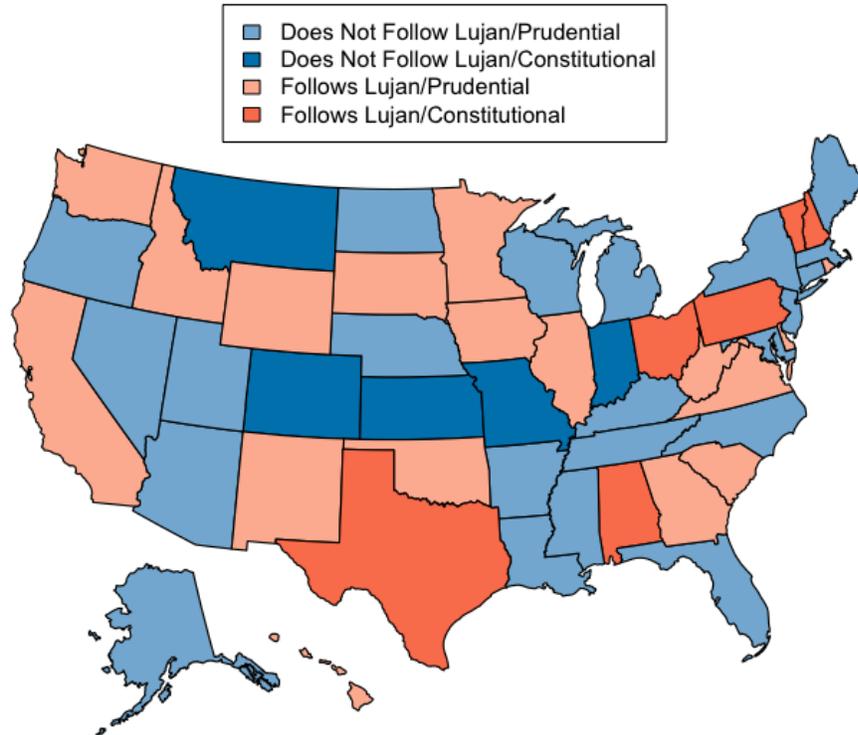


Figure 1: State-Court Adoption of Lujan

(25) of states, including the District of Columbia, expressly follow *Lujan* at least in part. The rest (26) do not. Second, there is no obvious connection between a state's politics and its adoption of *Lujan*: liberal states such as Vermont and California⁷⁸ rely on *Lujan* at least in part, and therefore bar certain suits from their courts; conservative states such as Mississippi and Montana do not, permitting suits that some more liberal states do not. Finally, the variation in whether states' standing doctrines are constitutionally grounded or merely prudential—that is, judge-made—demonstrates that, at least for state courts, the decision whether to adopt *Lujan* was largely orthogonal to constitutional

⁷⁷ In coding states for purposes of this chart and analysis, I relied substantially on Wyatt Sassman's detailed and impressive survey of state standing law. *See generally* Sassman, *supra* note ____.

⁷⁸ *See infra* note ____.

analysis. Many states adopted *Lujan* as a matter of judge-made policy; other states, whose standing rules derive from constitutional text, rejected *Lujan*.

Helpful as this typology might be in surveying state standing law, it risks obscuring more than it reveals. Some caveats are therefore in order. First, the map of state standing rules is not static. States are constantly revising their standing doctrine, arguing about whether it is constitutional or prudential (or both), and reacting to new federal precedent. This is a snapshot of state standing doctrine at one particular moment in time.

Further, it is often difficult to get a definitive sense of state standing doctrine at all. Cases can be contradictory, ambiguous, or simply wrong. The resulting uncertainty is multiplied by the relative paucity of state standing cases compared to federal ones—and that’s before we divide those cases into 51 discrete buckets. For that reason, specifying the contours of standing doctrine even in a highly populous state like California is fraught. Indeed, commentators are divided even on the fundamental question whether California *even has* a standing doctrine.⁷⁹ For plaintiffs deciding whether and where to bring suit, that uncertainty has a real cost.

Even where it is possible to identify with confidence the contours of a state’s standing doctrine, there is considerable variation among states that do not strictly follow federal law. For example, many states that follow *Lujan* do so with significant exceptions for taxpayer and citizen standing.⁸⁰ And among those states that do not follow *Lujan*, some have developed doctrine unique to their state, while others follow abrogated Supreme Court precedent. Other states employ a mix of approaches, including by reference to specific provisions of their state constitutions in addition to federal precedent.⁸¹ For this reason, categorizing state standing doctrine on the basis of only a handful of variables is necessarily reductive.

⁷⁹ Compare Joshua Paul Thompson & Damien M. Schiff, *California Standing Doctrine: The Enigma Explained*, <https://ssrn.com/abstract=1803552> (“Our research and analysis in this paper will reveal that, strictly speaking, there is no doctrine of standing [in California state courts].”) with Anne Abramowitz, Note, *A Remedy for Every Right: What Federal Courts Can Learn from California’s Taxpayer Standing*, 98 CAL. L. REV. 1595, 1610 (2010) (arguing that California’s taxpayer standing doctrine evinces a more liberal, but nevertheless real, case-or-controversy requirement); and Sassman, *supra* note ___, at 357-58 (noting that California courts have adopted the *Lujan* test in part because some California statutes limit causes of action “to those who ‘ha[ve] been injured in fact under the standing requirements of the United States Constitution” (quoting *Kwikset Corp. v. Super. Court*, 246 P.3d 877, 885 (Cal. 2011))).

⁸⁰ See generally Hershkoff, *supra* note ___, at __.

⁸¹ For example, Hawaii generally follows *Lujan* but applies a “less rigorous standing requirement . . . in environmental cases” because of the state constitution’s environmental-rights provision. See *Sierra Club v. Dep’t of Transp.*, 167 P.3d 292, 314-15 (Haw. 2007); Haw. Const., art. XI, § 9 (“Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”).

Taken alone, the diversity of state-court jurisdictional rules is generally praised.⁸² But when considered in conjunction with the structural features of judicial federalism discussed in Parts I.A and I.B, that diversity looks problematic. As we saw in Part I.A, the requirement of a concrete injury bars whole classes of federal claims from being brought in federal courts. The general obligation of state courts to entertain federal claims on par with state claims discussed in Part I.B, meanwhile, opens state courts to those same federal claims. Taken alone, that inversion of promulgating sovereign and adjudicating sovereign is bizarre, to be sure. But at least it would be uniform. Reactive divergence then exacerbates the paradox of exclusive state-court jurisdiction over certain federal claims by rendering the availability of a forum for adjudication of federal claims dependent on the vagaries of state law, personal jurisdiction, and the situs of injury.

D. *The Paradox in Action: The FACTA Wars*

To see how the paradox affects litigated cases, consider a series of recent cases involving the electronics retailer P.C. Richard & Son. The first in a series of related suits was a putative class action filed in New York federal court asserting claims under the Fair and Accurate Credit Transactions Act of 2003⁸³ alleging that the retailer had included too much of their credit-card information on retail receipts. P.C. Richard & Son moved to dismiss for lack of standing,

⁸² See, e.g., Wyatt Sasser, *A Survey of Constitutional Standing in State Court*, 8 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 349 (2015); Schapiro, *Toward a Theory of Interactive Federalism*, *supra* note __, at 305 (noting that “[s]tate courts can participate in the implementation of federal rights that might otherwise not be enforced”); Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1854 (2001); Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003 (2001). *But see* William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263 (1990) (“In this article, I propose a more thoroughgoing reform: State courts should be required to adhere to article III ‘case or controversy’ requirements whenever they adjudicate questions of federal law.”); James W. Doggett, Note, *“Trickle Down” Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 COLUM. L. REV. 839, 842 (2008) (“[S]tate courts should give a hard look at how their constitutions differ from the Federal Constitution before following federal precedent.”).

For defenses of state courts generally declining to follow federal precedent in questions of state constitutional law, see also generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174-78 (2018) (arguing against “lockstepping,” “the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts’ interpretation of the Federal Constitution”); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339 (2011) (noting the same phenomenon decried by Judge Sutton); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (“[I]o the extent that . . . a state constitutional discourse exists, its terms and conventions are often borrowed wholesale from federal constitutional discourse, as though the language of federal constitutional law were some sort of *lingua franca* of constitutional argument generally.”).

⁸³ 117 Stat. 1952; *see also* 41 U.S.C. § 1681n(a) (creating cause of action).

relying principally on *Spokeo* and its progeny.⁸⁴ Based on that precedent, the federal court dismissed the claims without prejudice for lack of standing.⁸⁵

Having lost in their home forum, the same plaintiffs refiled their claims in New Jersey state court, where liberal standing rules prevail.⁸⁶ The only material change to the complaint was the addition of a New Jersey resident as a plaintiff.⁸⁷ In their new suit, the plaintiffs claimed injury from an “increased risk of identity theft and credit and or debit card fraud.”⁸⁸

Now that they were suing outside their home forum, the plaintiffs’ residence was key. Though they presumably cleared the standing hurdle, the New York plaintiffs ran into a different problem in New Jersey: personal jurisdiction. The New Jersey court held that the New York plaintiffs’ claims did not arise out of P.C. Richard & Son’s contacts with New Jersey. As a result, the New Jersey court dismissed the claims for lack of personal jurisdiction over the New York–resident defendant.⁸⁹

The viability of plaintiffs’ claims thus turned almost entirely on where they shopped: if they had visited a P.C. Richard & Son store in New Jersey, their claims might well have succeeded, or at least survived a motion to dismiss. That viability also turned on their residence: if they had been New Jersey residents, their arguments in support of personal jurisdiction would have been stronger, if not necessarily successful. But instead, as New Yorkers who shopped in New York but sued in New Jersey, the plaintiffs were without a forum competent to adjudicate their statutory rights. Recent developments in the law of personal jurisdiction further tighten the bind.

This case illustrates how the pattern of reactive divergence is playing out all over again in the wake of *Spokeo*. The statute at issue in the case, FACTA, is one of the flashpoints in that process, for two reasons. First, FACTA creates the kind of cause of action that is at the heart of the paradox at issue: statutory-damages claims that do not require demonstration of concrete injury as an

⁸⁴ See *O’Shea v. P.C. Richard & Son, LLC*, No. 15-cv-9069 (KPF), 2017 WL 3327602, at *3-7 (S.D.N.Y. Aug. 3, 2017).

⁸⁵ See *id.* at *8.

⁸⁶ It is not entirely clear from the record in these cases why the New York plaintiffs did not try their luck in New York state court, which has also rejected lockstep compliance with federal standing doctrine. But perhaps the plaintiffs were encouraged to sue in New Jersey by that state’s highest court’s almost enthusiastic liberalization of standing doctrine. See, e.g., *Jen Elec. Inc. v. Cty. of Essex*, 964 A.2d 790, 801-02 (N.J. 2009) (“New Jersey courts have always employed liberal rules of standing . . .” (internal quotation marks omitted); *Crescent Park Tenants Ass’n*, 275 A.2d 433, 434 (N.J. 1971) (“New Jersey cases have historically taken a much more liberal approach on the issue of standing than have the federal cases.”).

⁸⁷ *Baskin v. P.C. Richard & Son, LLC*, No. OCN-L-911-18 (N.J. Super. Jan. 17, 2019) (hereinafter, “*Baskin*”), available at <https://images.law.com/contrib/content/uploads/documents/399/21211/pc-1.pdf>.

⁸⁸ See *Baskin*, supra note ___, at 2.

⁸⁹ *Baskin*, supra note ___, at 14.

element of the cause of action.⁹⁰ At the same time, FACTA claims are by definition particularized because they require that one actually receive a prohibited receipt. But because they lack concreteness, FACTA claims relying on pure procedural injury have been widely dismissed or remanded by federal courts in the wake of *Spokeo*.⁹¹ That leaves them mostly shut out of federal court.⁹²

Second, FACTA does not say that the claims it authorizes may only be brought in federal court—*i.e.*, it lacks an exclusive-jurisdiction provision. As a result, under the presumption in favor of concurrent jurisdiction discussed in Part I.B, state courts have equal competence to adjudicate FACTA claims.⁹³ Indeed, as we have seen, state courts not only are permitted to entertain FACTA claims but also are *required* to do so, subject to their own jurisdictional rules.⁹⁴

⁹⁰ See 41 U.S.C. § 1681n(a) (listing elements).

⁹¹ For cases dismissing, see, e.g., *Katz v. Donna Karan Co.*, 872 F.3d 114, 117, 120-21 (2d Cir. 2017); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016); *Hendrick v. Aramark Corp.*, 263 F. Supp. 3d 514, 520 (E.D. Pa. 2017); *Stelmachers v. Verifone Sys., Inc.*, No. 14-04912, 2016 WL 6835084, at *3 (N.D. Cal. Nov. 21, 2016); *Kamal v. J. Crew Grp., Inc.*, No. 15-0190, 2016 WL 6133827, at *3-4 (D.N.J. Oct. 20, 2016); For cases remanding, see, e.g., *Collier v. SP Plus Corp.*, 889 F.3d 894, 897 (7th Cir. 2018); *Katz v. Six Flags Great Adventure, LLC*, No. 18-116 (FLW) (DEA), 2018 WL 3831337, at *9 (D.N.J. Aug. 13, 2018); *Mocek v. Allsaints USA Ltd.*, No. 16 C 8484, 220 F. Supp. 3d 910, 915 (N.D. Ill. 2016). Whether to dismiss or remand turns on how the case got to federal court in the first place: if it was removed by the defendant, remand is appropriate. See 28 U.S.C. 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.” (emphasis added)). If the case was originally filed in federal court, dismissal is required. See Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”). The only difference for the parties is typically whether the plaintiff has to take affirmative action to re-file in state court.

⁹² The denial of standing in FACTA cases has not been uniform. See, e.g., *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1211 (11th Cir. 2018) (“When the violation of a statute creates a concrete injury, as it does here, plaintiffs do not need to allege ‘additional harm beyond the one Congress has identified.’” (quoting *Spokeo*, 136 S. Ct. at 1549)).

⁹³ See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Yellow Fr. Sys., Inc. v. Donnelly*, 494 U.S. 820, 822 (1990); *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 477-78 (1981); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962); *Testa v. Katt*, 330 U.S. 386 (1947); *Robb v. Connolly*, 111 U.S. 624 (1884); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) (“[T]he state court has jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.”); see also THE FEDERALIST NO. 82, at 386 (Alexander Hamilton) (Hallowell: Glazier, Masters & Smith ed., 1837) (“When . . . we consider the state governments and the national governments, as they truly are, in light of kindred systems, and as parts of one whole, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.”).

⁹⁴ See, e.g., *Howlett v. Rose*, 496 U.S. 356, 356 (1990); *Testa*, 330 U.S. at 394; *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 233-34 (1934); *Mondou v. New York, New Haven, & H. R.R.*, 223 U.S. 1, 59 (1912). For scholarly discussion of the extent of this duty, see Martin H. Redish & Steven G. Sklaver, *Federal Power To Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 INDIANA L. REV. 71 (1998); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145 (1984); Martin H. Redish & John Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976); Terrance Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1956 SUP. CT. REV. 187, 206-07.

Typically, cases arising under federal law can be and are removed to federal court.⁹⁵ But as we saw in Part I.A, standing doctrine throws a roadblock in that path, as removed cases must also satisfy Article III’s injury requirement. That leaves most FACTA plaintiffs and defendants locked out of federal court together.⁹⁶

Enterprising plaintiffs’ lawyers have already begun testing the fences of state-court standing rules as applied to FACTA in the wake of *Spokeo*. And again, the pattern of reactive divergence is emerging. In North Carolina, the defense bar won a significant victory when a state trial court dismissed FACTA claims for failure to allege injury in fact, citing *Spokeo*, notwithstanding North Carolina’s more liberal standing doctrine.⁹⁷ Meanwhile, in Illinois, an intermediate state appellate court rejected FedEx’s urging in a FACTA case to adopt *Spokeo*—a significant victory for the plaintiffs’ bar.⁹⁸ But just weeks earlier a different panel of the same court reached the exact opposite conclusion,⁹⁹ presaging further appellate review.

II. THE PARADOX AND ITS COSTS

This Part examines the costs of relegating certain federal claims to the exclusive jurisdiction of the courts of some, but not all, states. In particular, it undertakes an interest analysis of the potential costs to litigants, as well as to federal law and the federal judiciary, of relegating a discrete slice of federal claims to the exclusive jurisdiction of (some) state courts.

Though we don’t yet know how the post-*Spokeo* map of state standing doctrine will be shaded, we have already seen different states reach different conclusions. That means many types of FACTA claims and related statutory-damages suits can only be brought in state courts, and only in certain states. The only federal review, if any, is by the Supreme Court—and even then, only

⁹⁵ See generally *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (holding that a suit “arises under the law that creates the cause of action”); U.S. Const. art. III, § 2 (extending judicial power of United States “to all cases . . . arising under . . . the laws of the United States”); 28 U.S.C. § 1331 (granting original jurisdiction to federal district courts over “all civil actions arising under the Constitution, laws, or treaties of the United States”).

⁹⁶ But see *supra* note ____.

⁹⁷ See *Miles v. The Company Store*, No. 16-cvs-2346, slip op. at 2-3 (N.C. Super. Nov. 16, 2017) (“This court agrees that the injury alleged here does not meet the concreteness requirement to establish an injury in fact in order to support standing.”), available at <https://www.law360.com/articles/987191/attachments/0>.

⁹⁸ See *Duncan v. FedEx Office & Print Servs., Inc.*, ___ N.E.3d ___, 2019 WL 346593 (Jan. 25, 2019) (“We find that Duncan has standing to bring her FACTA claim under Illinois law. In enacting FACTA, Congress elevated intangible harms associated with the printing of more than the last five digits of a person’s card number to the status of legally cognizable injuries.”).

⁹⁹ See *Paci v. Costco Wholesale Corp.*, 2018 IL App (1st) 180164-U (Dec. 26, 2018) (unpublished) (“Plaintiff only alleged a mere technical violation of FACTA, which is insufficient to constitute a distinct and palpable injury.”) (citing *Spokeo*).

if the plaintiff wins in the Court of Appeals.¹⁰⁰ The perverse result is that state courts have the final say in a considerable swath of lawsuits brought pursuant to federal law. The theoretical oddity of that state of affairs should already be apparent. What about the practical consequences? To answer that question, we turn to an analysis of the various stakeholders' interests.¹⁰¹

A. Plaintiffs

For plaintiffs and prospective plaintiffs, the paradox has three main costs. First, and worst of all, many plaintiffs lack *any* forum competent to adjudicate their otherwise meritorious claims. For those plaintiffs who are (a) injured in states that mirror federal standing rules (b) by defendants who reside in such states, there is *no* court capable of granting the relief to which Congress has entitled them. Here the calculus is not one of forum choice or parity but rather of raw access to justice. For most residents of say, North Carolina,¹⁰² FACTA's prohibition on including full credit-card numbers on receipts might as well have never been enacted.

Second, most obviously, and at the very least, they are deprived of access to the federal forum. Scholars disagree about the relative competence of state versus federal courts¹⁰³—a comparison that varies widely depending on the state in question. But when it comes to adjudicating the sorts of federal statutory claims at issue here, federal judges have more experience and knowledge than their state counterparts. Even those who believe the best approach is one that allows litigants to choose their jointly preferable forum for litigating federal claims¹⁰⁴ must admit that foreclosing the federal forum altogether entails certain costs.

The final cost imposed on plaintiffs derives from the arbitrariness and uncertainty of making the availability of a remedy for federal statutory

¹⁰⁰ See *infra* Part II.C.

¹⁰¹ See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1235 (2004) (“[I]nterest analysis is common in federal jurisdiction law and scholarship.”) (collecting cases and articles).

¹⁰² See *supra* note ___ and accompanying text (describing ruling by North Carolina state court adopting *Spokeo* as a matter of state law in a FACTA case).

¹⁰³ There is an extensive literature on the degree of parity between state and federal courts at adjudicating federal constitutional claims. Compare, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts are superior fora for vindicating civil rights); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 230 (1985) (arguing that the Framers intended federal courts as the primary guarantors of federal constitutional rights), with William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999) (arguing the opposite in the context of gay-rights litigation); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (defending state courts as protectors of federal constitutional rights). For yet a third perspective, see Erwin Chemerinsky, *Parity Reconsidered: Defining A Role for the Federal Judiciary*, 36 U.C.L.A. L. REV. 233, 236 (1988) (arguing that the parity debate “is an empirical question for which there is no empirical answer” and advocating for a litigant-choice approach to forum selection in federal constitutional cases).

¹⁰⁴ See generally Chemerinsky, *supra* note ___.

grievances turn on state justiciability rules. Most potential plaintiffs have no idea whether they live in a state that has rejected *Lujan* and *Spokeo* in favor of older, more liberal tests. (Do you?¹⁰⁵) Most people don't have the concreteness prong of the injury-in-fact requirement on the brain when they check their credit report, get a receipt from a store, or answer a robocall. But whether they can hold credit-reporting agencies, retailers, or phone scammers to account turns on exactly that. The fact that federal law is contingent on relatively obscure features of state jurisdiction also has the potential to blunt the regulatory power of federal law.

Recall the P.C. Richard & Son example given in Part II.A: two New York plaintiffs sued in New York federal court, where they were thrown out on standing grounds. When they sued instead in neighboring New Jersey, their claims were dismissed for lack of personal jurisdiction. Even if they had sued in New York state court, there is no guarantee that such courts would have rejected *Spokeo*; as we have seen, many state courts have adopted it, including those who had previously rejected *Lujan*. To find a forum to adjudicate their claims, plaintiffs must parlay an injury in the right state with successful litigation of the *Spokeo* issue—two variables that are highly uncertain. The uncertainty alone can be a powerful disincentive to pursuing one's remedies. In any event, the fact that relief under supposedly nationwide federal law would turn on such contingent facts undermines two of the animating purposes of federal regulatory regimes: uniformity and predictability.

B. *Defendants*

For defendants, the cost is simple: loss of access to their preferred forum. As a general rule, corporate defendants prefer to litigate in federal court. In cases alleging claims under federal law, the defendant has the right to remove the case to federal district court so long as the federal courts have original jurisdiction over the action.¹⁰⁶ That is the primary reason why most federal claims are litigated in federal court: so long as *either* the plaintiffs *or* the defendants prefer to litigate in federal court, that's where the case will be litigated. By robbing the federal district courts of subject-matter jurisdiction over cases involving purely procedural statutory violations, *Spokeo* prohibits defendants from removing such cases, including by subjecting them to substantial fees if they do so.

If anyone prefers to litigate in federal court, it is surely class-action defendants. For example, the defense bar lobbied Congress to pass the Class Action Fairness Act of 2005, which made it substantially easier for class-action

¹⁰⁵ See Figure 1, *supra* (mapping current state law).

¹⁰⁶ See 28 U.S.C. § 1441(a).

defendants to remove state-law class actions on the basis of minimal diversity.¹⁰⁷ And more directly, if you ask defense attorneys where they would like to litigate, they will say federal court, while plaintiffs' attorneys generally prefer state court.¹⁰⁸ For that reason, a typical pattern in cases with federal claims or diverse parties is that the plaintiff chooses to file in state court, and then the defendant removes the case to federal court. And defendants are generally right to do so: one study found that defendants were more than *twice* as likely to win in removed cases than in unremoved cases in both state and federal courts.¹⁰⁹

There is a great irony in the fact that defendants are barred from removing many federal consumer class actions by *Spokeo*. It was *defendants* who litigated the issue of Article III standing so vigorously in *Spokeo* and related cases. In the Supreme Court, there were 10 certiorari-stage briefs supporting *Spokeo*, including from the Chamber of Commerce, two of the three major credit-reporting agencies, and a consortium of tech giants including eBay, Facebook, Google, Yahoo!. The merits stage added another seven amici supporting *Spokeo*. By contrast, *Robins* was supported at the merits stage exclusively by privacy groups and plaintiffs-side organizations like Public Citizen, Public Knowledge, NRDC, EPIC, the Lawyers' Committee for Civil Rights Under Law, and the American Association for Justice.

But now defendants are like the dog that caught the car: successful, but surprised and disappointed by the results. Consider the case of the former stock brokerage Scottrade, which was faced with multiple federal class-action suits arising out of a hack of its customer data in 2013. Scottrade sought transfer and consolidation before a single Missouri federal district court.¹¹⁰ That gambit demonstrates one advantage for defendants of litigating such cases in federal court: ease of centralization and reduced litigation costs. After consolidation, Scottrade sought dismissal pursuant to Rule 12(b)(1) for lack of standing.¹¹¹ Relying in part on *Spokeo*, which was decided less than two months earlier, the district court granted the motion and dismissed the cases with prejudice.¹¹² When the plaintiffs in one of the consolidated cases appealed, the Eighth

¹⁰⁷ See, e.g., Emery G. Lee III & Thomas E. Willing, Federal Judicial Center, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* at 2 (2008) (analyzing the impact of CAFA on class actions in federal courts).

¹⁰⁸ See Victor E. Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41, 95 & tbl. 23 (1991) (reporting that roughly 43% of defense-side attorneys across state and federal court cases preferred to litigate in state court compared to roughly 61% for plaintiff-side attorneys).

¹⁰⁹ See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581-82 (1998) (hypothesizing that the explanation for the difference could either be selection of weak cases for removal or because removal "shift[s] the biases, inconveniences, court quality, and procedural law in [defendants'] favor").

¹¹⁰ See *Duqum v. Scottrade, Inc.*, No. 4:15-CV-1537-SPM, 2016 WL 3683001, at *1 (E.D. Mo. July 12, 2016).

¹¹¹ See *id.* at *2.

¹¹² See *id.* at *8.

Circuit unanimously affirmed, also relying substantially on *Spokeo*.¹¹³ Scottrade’s lawyers likely celebrated.

But their celebration was premature. Two different subsets of the losing plaintiffs—those from Florida and California—refiled identical claims in state court, represented by the same plaintiffs’ attorneys who had separately appealed to the Eighth Circuit.¹¹⁴ Scottrade’s first move, like that of most defendants, was to remove those state class actions to federal court and seek dismissal on *res judicata* grounds, arguing that the standing issue was already litigated to binding judgment. But there was a problem: Scottrade had previously argued that federal district courts lacked jurisdiction to entertain the plaintiffs’ claims. Using Scottrade’s own argument against it, then, the plaintiffs argued for remand rather than dismissal.

The results for Scottrade were decidedly mixed. The Florida federal court transferred the case back to Missouri,¹¹⁵ which dismissed it on *res judicata* grounds.¹¹⁶ But the California federal court agreed with the Missouri court that the plaintiffs lacked standing. And rather than dismissing—as the Missouri court had and as Scottrade wanted—the court held that the appropriate remedy was remand, not dismissal.¹¹⁷ Scottrade was thus forced to litigate the issue all over again in state court. When asked about the result by *Reuters*, Scottrade’s lead lawyer replied, “This is one of those times you can say, ‘Hey defendants! Be careful what you ask for.’”¹¹⁸

Defendants’ may not even be able to enjoy the biggest benefit of their efforts to restrict federal standing: the de facto elimination of private statutory causes of action in many states. Because the paradox creates a kaleidoscope of differentially effective federal regulatory regimes filtered through state jurisdiction, defendants may have no choice but to continue mostly to comply with federal standards backed by the threat of *Spokeo*-like suits rather than face the compliance costs entailed by 50 different jurisdictions.

C. Federal Law and Federal Courts

The potential costs to the federal judiciary and its ability to superintend the development of federal law are grave. However, as with defendants, a certain amount of sleeping in one’s own bed is called for. After all, it was federal courts that crafted the law of Article III standing as it exists today. But there is

¹¹³ See *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 719 (8th Cir. 2017).

¹¹⁴ See, e.g., Alison Frankel, *Spokeo Backlash: Dismissed in Federal Court, Class Actions Move to States*, *Reuters*, May 16, 2017, <https://www.reuters.com/article/us-otc-spokeo-idUSKCN18C2DK>.

¹¹⁵ See *Martin v. Scottrade, Inc.*, No. 8:17-cv-1042 T-24 AAS, 2017 WL 6624136, at *6 (M.D. Fla. Dec. 28, 2017).

¹¹⁶ See *Martin v. Scottrade, Inc.*, No. 4:17 CV 2948 RWS, 2018 WL 1806696, at *3 (E.D. Mo. Apr. 17, 2018).

¹¹⁷ See *Order Remanding Case, Hine v. Scottrade, Inc.*, No. 16cv2787 JM (JLB) (S.D. Cal. Jan. 13, 2017).

¹¹⁸ Frankel, *supra* note __.

reason to think that the consequences of those decisions were unforeseen and unfortunate. In particular, the current state of affairs gives *state* courts the last word on the interpretation of *federal* law in a distinct, persistent, and identifiable class of cases. And though one might be tempted to identify eventual Supreme Court review as a saving grace, the asymmetric availability of that relief compounds rather than ameliorates the problematic prevailing law.

1. Federal Law in Federal Courts

Start with the oddity of a rule that relegates federal claims exclusively to state court. In some ways, the question of how to allocate cases between federal and state courts is familiar, even if the answer—federal claims in state court only—is bizarre. Indeed, the question of case or claim allocation constitutes a primary debate in federal-courts scholarship.¹¹⁹ And, as here, that debate is primarily one of line-drawing.¹²⁰ But in the scholarship as in the caselaw, the two lines being drawn most frequently are the lines between (1) where to allocate *cases* that have both federal- and state-law *claims*¹²¹ and (2) the degree to which there should be cross-jurisdiction over state and federal claims to promote “cross-fertilization.”¹²² However, regardless of one’s views on the wisdom of various methods of case allocation or the phenomenon of cross-fertilization, no scholar, judge, or lawyer would advocate that the best course is *exclusive* cross-jurisdictional allocation—the assignment of federal cases exclusively to state court or vice-versa. Rather, the debates focus entirely on whether federal cases should be heard by state courts simultaneously or never.

The notion that law should be shaped at least *primarily* by the courts of the sovereign that promulgates it is orthodoxy, with good reason.¹²³ The idea that

¹¹⁹ See, e.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

¹²⁰ See Bator, *supra* note __, at 622 (“[State and federal courts] will continue to be partners in the task of defining and enforcing federal constitutional principles. The question remains as to where to draw the lines, but line-drawing is the correct enterprise.”).

¹²¹ See, e.g., Friedman, *supra* note __, at 1216-26 (cataloguing but ultimately resisting the tendency in such scholarship to adopt either-or views with respect to allocation of cases between state and federal courts).

¹²² See, e.g., Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1411, 1467 (1999) (advocating the adjudication of state constitutional issues by federal courts as a means to facilitate development of the law); Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 337-39 (1994) (cataloguing advantages of cross-jurisdictional decisionmaking); Ann Althouse, *How To Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1505-06 n.116; William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367, 386 (1980) (“Contrary to the conventional view, we find that the federal courts in diversity cases appear to make a significant contribution to the continuing development of the common law.” (citation omitted)).

¹²³ See Friedman, *supra* note __, at 1236 (“One is likely to find little disagreement with the proposition that *ceteris paribus* it is better for a sovereign’s own courts to resolve novel or unsettled

federal courts should not decide novel issues of state law is so sacred that it is typically proffered without citation.¹²⁴ The converse—that state courts should not be tasked with issuing new interpretations of federal law—is similarly self-evident.¹²⁵ Those scholars who advocate for cross-jurisdictional models do so because cross-fertilization *contributes* to the development of the other sovereign’s law, not because it should usurp it altogether.¹²⁶ But as we have seen, the current state of the law threatens to assign a discrete class of federal claims exclusively to state court, stymieing both the benefits of the federal sovereign’s control over its own law and the possibility of cross-fertilization in one go.

The observation that relegating federal claims exclusively to state court is bad for the development of federal law does not depend on a claim that state courts would, on average, reach substantively bad decisions. So long as state courts potentially reach *different* conclusions about how to interpret federal law, the damage will have been done, and the real victim will be the uniformity of federal law. Indeed, Alexander Hamilton described the notion that state courts might have exclusive final jurisdiction over federal claims as “a hydra in government, from which nothing but contradiction and confusion can proceed.”¹²⁷ Relying on that same passage, Chief Justice Marshall noted that “the necessity of uniformity . . . suggest[s] the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases” involving federal law.¹²⁸ Thus, to the extent such uniformity is a primary goal not just of

questions regarding that sovereign’s laws.”); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1774 (1992) (“It makes practical sense for a sovereign’s courts to have primary responsibility for adjudication of that sovereign’s law.”); Philip Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1960) (“I start with the principle that the federal courts are the primary experts on national law just as the State courts are the final expositors of the laws of their respective jurisdictions.”). For judicial opinions expressing the same sentiment, see, for example, *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 415-16 (1964) (noting that abstention doctrines’ “recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law”).

¹²⁴ See Friedman, *supra* note __, at 1237 n.64 (collecting examples of the proposition given without supporting authority by scholars and the Supreme Court).

¹²⁵ See, e.g., LARRY YACKLE, *RECLAIMING THE FEDERAL COURTS* 91 (1994); Kurland, *supra* note __, at 487 (“I start with the principle that the federal courts are the primary experts on national law just as the State courts are the final expositors of the laws of their respective jurisdictions.”).

¹²⁶ See, e.g., Schapiro, *supra* note __, at 1417 (“Federal adjudication of state constitutional claims contributes to the development of state constitutional law, while at the same time avoiding a federal constitutional ruling that would end any chance for further dialogue on important constitutional matters.”); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 324-27 (1977) (“[F]ederal courts, through diversity jurisdiction, are seen to be contributing to the development of state law.”); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046-68 (1977) (describing a “model of federal-state interaction . . . premised upon conflict and indetermina[cy]” that “obtains whenever jurisdictional rules link state and federal tribunals and create areas of overlap in which neither system can claim total sovereignty”).

¹²⁷ THE FEDERALIST NO. 80 (Hamilton).

¹²⁸ *Cohens v. Virginia*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415-16 (1821).

federal courts but also of federal law itself, the present paradox strikes at the very legitimacy of Article III courts.¹²⁹

2. Uniformity and the Limits of Supreme Court Review

Even if one is skeptical of the intrinsic value of uniformity, disuniformity carries instrumental costs.¹³⁰ For example, companies and individuals subject to competing interpretations of federal law will incur considerable costs to comply with conflicting regulations. They will also face substantial legal and compliance costs from the unpredictability that would attend 51 different interpretations of federal statutes. Those costs would be magnified by the incentives for both plaintiffs and defendants to shop for favorable forums and to race to preclusive judgments. Finally, there is a certain unfairness associated with unequal treatment of similarly situated litigants solely because of jurisdictional rules over which they have no control.

Nor can the possibility of eventual Supreme Court review solve the problem, for two reasons. *First*, Supreme Court review is sharply limited as a mechanism for fostering uniformity. Even if certiorari were a perfect tool for disciplining the application of federal law by lower courts, the sharp decline in the number of cases heard by the Supreme Court each term imposes structural limits on the amount of uniformity that court can impose.¹³¹

¹²⁹ On the centrality of the uniformity goal to the work of federal courts as expressed by the Supreme Court, see, for example, *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 826 (1986) (noting that the Judiciary Act of 1875 created federal-question jurisdiction out of recognition of “the importance, and even necessity of *uniformity* of decisions throughout the whole United States” (quoting *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816)) (emphasis in original)); *Grable & Sons Metal Products Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005) (noting the “hope of uniformity that a federal forum offers on federal issues”); *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) (“Our principal responsibility under current practice, however, and a primary basis for the Constitution’s allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, § 2, cls. 1 and 2, is to ensure the integrity and uniformity of federal law.”).

Scholars sing the same tune. See Bator, *supra* note __, at 635 (noting the need for federal appellate review of state court judgments on questions of federal law because “[p]rovision must be made for uniform and authoritative pronouncements of federal law”); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38 (1994) (“Both the Constitution’s framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process.” (footnotes omitted)); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 83–85 (asserting the centrality of the goal of “uniformity in the interpretation and application of federal law” to the existence of federal courts); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1155 (1990) (describing uniformity of federal law as “a generally undisputed goal”); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1364 (2006) (identifying the Supreme Court’s two principal objectives as: “(i) to resolve important questions of law and (ii) to maintain uniformity in federal law”). *But see generally* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (questioning the value of uniform interpretation of federal statutory law).

¹³⁰ See Caminker, *supra* note __, at 38 (listing “uniformity values”).

¹³¹ See S. Ct. DB.

But alas, sustained attention from the Supreme Court often does more to foster future disagreement than it does to resolve it. Just to give one example, the Supreme Court has given definitive interpretations of the Armed Career Criminal Act’s residual clause¹³²—just fourteen words!—in 2007, 2008, 2009, 2011, and 2015.¹³³ Each of those cases resolved a split among the circuits but was soon followed by another split. After striking the entire residual clause down as unconstitutional in 2015, the Supreme Court was soon met not only with a host of cases involving other clauses of the ACCA but also a case involving analogous language from the Immigration and Nationality Act, the latter of which had to be argued twice before a decision could be reached.¹³⁴ Given the substantial limits of the Supreme Court’s ability to impose uniformity of federal law even when it has the good-faith assistance of lower federal courts, there is little hope for its ability to do so when it must supervise the interpretations of federal law issued by the courts of fifty separate sovereigns.

Second, in these kinds of cases Supreme Court review is only available half of the time, sharply limiting the Court’s ability to ensure uniformity. This asymmetry is created by the fact that the Supreme Court is limited by Article III’s justiciability requirements even as it hears appeals in cases arising in state courts, which are not bound by Article III. The question is whether, when cases involving plaintiffs who would not satisfy Article III’s standing requirements had they filed in federal court appear on the Supreme Court’s appellate docket, the Supreme Court can hear the case.

The Supreme Court’s uneasy answer—that it can hear the case *only* if the non-Article III plaintiff won in state court below—arose in a pair of seemingly contradictory cases decided nearly forty years apart: *Doremus v. Board of Education*¹³⁵ and *ASARCO Inc. v. Kadish*.¹³⁶ In *Doremus*, plaintiffs suing as taxpayers sought a declaratory judgment that a New Jersey law requiring the reading of a Bible passage at the beginning of the public-school day violated the Establishment Clause.¹³⁷ After losing in New Jersey courts, the plaintiffs sought appellate review by the Supreme Court.¹³⁸ The Court held that it lacked subject-matter jurisdiction in virtue of the plaintiffs’ lack of standing. Justice Jackson’s opinion for the Court acknowledged the unusual result that “a state court may

¹³² 18 U.S.C. § 924(e)(2)(B) (“otherwise involves conduct that presents a serious potential risk of physical injury to another”).

¹³³ See *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Sykes v. United States*, 564 U.S. 1 (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007).

¹³⁴ See *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Stokeling v. United States*, No. 17-5554 (Jan. 15, 2019); *United States v. Stütt*, No. 17-765 (Dec. 10, 2018) (consolidated with *United States v. Sims*, No. 17-766).

¹³⁵ 342 U.S. 429 (1952).

¹³⁶ 490 U.S. 605 (1989).

¹³⁷ *Id.* at 430.

¹³⁸ See *id.* at 434.

... render an opinion on a federal constitutional question even under such circumstances that” a federal court could not.¹³⁹ *Doremus* thus apparently established the rule that the Supreme Court may only review state-court judgments where the plaintiff has Article III standing. The result was a class of judgments concerning federal law that could *never* be heard by federal courts, a holding that flew in the face of popular understandings of judicial federalism.¹⁴⁰

ASARCO differed from *Doremus* in only one material way: in *ASARCO*, the plaintiffs won in state court and therefore it was the *defendants* who petitioned for certiorari.¹⁴¹ As in *Doremus*, the *ASARCO* plaintiffs lacked standing in federal court but had standing in Arizona state court. The only distinguishing feature between the cases was which party won below. Based on that precedent, and because traditional standing analysis focuses on the plaintiff’s rather than the petitioner’s injury, it seemed clear that the Court lacked subject-matter jurisdiction. Indeed, the United States as *amicus curiae*¹⁴² argued that the Court lacked jurisdiction and must dismiss the case.¹⁴³

The Supreme Court recognized its jurisdictional bind. If they had sued in federal court, none of the plaintiffs would have had standing.¹⁴⁴ But if the Court denied them standing, no federal review of the federal claims at issue would *ever* be possible. Rather than accept those premises, the Supreme Court instead found a novel injury to support its own jurisdiction to hear the case. The relevant injury for Article III purposes on a petition for certiorari, it reasoned, was not the one the *plaintiff* alleged. Rather, the Court held, it was the adverse judgment below suffered by the petitioner-*defendant*.¹⁴⁵ Because the judgment against the defendants rested on an allegedly “erroneous interpretation of federal statutes” and inflicted concrete injury upon them, the Court’s exercise

¹³⁹ *Id.* at 434. The statement’s characterization of the opinion below as “advisory” is odd because the judgment below was hardly advisory as between the parties to the suit.

¹⁴⁰ See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 234 (1985) (“State courts may thus exercise concurrent jurisdiction over cases falling within the national judicial power—indeed, in some cases, they may be obliged to do so—but their decisions cannot be final and unreviewable.” (footnote omitted)). *But see* Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 146-148 (1982) (arguing that the possibility of exclusive and unreviewable state-court jurisdiction over federal claims is contemplated by Article III).

¹⁴¹ The petitioners-defendants also argued that the respondents-plaintiffs would have had standing had they sued originally in federal court, but the argument supporting that point was weak, and the Court rejected it out of hand. *See id.* at 616-17.

¹⁴² The United States initially expressed that view at the certiorari stage, in response to the Court’s call for its views. *See* Br. For the United States as Amicus Curiae, *ASARCO Inc. v. Kadish*, No. 87-1661, 1988 WL 1025553, at *1 (U.S. Sept. 7, 1988).

¹⁴³ *Id.* at 612; *see also* Br. For the United States as Amicus Curiae, No. 87-1661, *ASARCO Inc. v. Kadish*, 1988 WL 1025553, at *1 (U.S. Sept. 7, 1988); Br. For the United States as Amicus Curiae Supporting Respondents, *ASARCO Inc. v. Kadish*, No. 87-1661, at *14-20 (U.S. Jan. 13, 1989).

¹⁴⁴ *ASARCO*, 490 U.S. at 613-17.

¹⁴⁵ 490 U.S. at 618.

of jurisdiction was proper.¹⁴⁶ In essence, the Court treated the petition for certiorari as the invocation of federal jurisdiction, and thus tested the *petitioner's* injury against Article III.¹⁴⁷

Doremus and *ASARCO* therefore establish asymmetric appellate jurisdiction over state judgments regarding federal law. In cases where the plaintiff lacks Article III standing, Supreme Court review is available *only* if the plaintiff won in the state court below.¹⁴⁸ If the plaintiff loses—i.e., if the state court limits the scope of federal law—the Supreme Court lacks jurisdiction and must decline the case.¹⁴⁹ By contrast, if the plaintiff won before the state court—i.e., if the state court construed federal law liberally—the Supreme Court may grant certiorari and review the judgment on the fiction that the defendant-petitioner has suffered an Article III injury at the hands of the state court.¹⁵⁰ That asymmetry ensures that whatever limited supervision the Supreme Court has over largely unconstrained state courts' interpretations of federal law will be not only weak but also structurally biased against expansive readings of federal law.¹⁵¹ Making matters worse, the jurisdictional thicket that

¹⁴⁶ Chief Justice Rehnquist, joined by Justice Scalia, relying on *Doremus*, dissented from the holding that the Supreme Court had jurisdiction in *ASARCO*. 490 U.S. at 634. In particular, Rehnquist dismissed concerns that, if *Doremus* were expanded, “state courts will remain free to decide important questions of federal statutory and constitutional law without the possibility of review in this Court.” *Id.* at 636. That possibility, he concluded, was “unremarkable” and would not “lead to a legal landscape in which we would no longer have the opportunity to review many important decisions or questions of federal law.” *Id.* at 636-37. Rehnquist concluded by accusing the majority of “bend[ing] Article III jurisdiction out of shape to avoid a largely imaginary problem.” *Id.* at 637.

¹⁴⁷ See *id.* at 619. *ASARCO* is not the only example of the Supreme Court treating a petition for certiorari as if it were a new lawsuit for purposes of assessing Article III jurisdiction. For similar reasoning, see also *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) (holding that the Supreme Court has jurisdiction to vacate a lower-court judgment in a case that is admittedly moot) and its progeny. Nor is it alone among cases that bend jurisdictional rules to ensure Supreme Court review of state-court judgments concerning federal law. See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (finding jurisdiction to hear a case against a state, notwithstanding Eleventh Amendment sovereign immunity, on a petition to certiorari, on the grounds that “[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts”).

¹⁴⁸ See Hall, *supra* note __, at 1272-78 (tracing the development of this asymmetry); see also Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 304 (2005) (“Thus, if a non-Article III plaintiff receives an adverse judgment on a matter of federal law, no Supreme Court review is available. In this situation, the state court’s interpretation of federal law is final and unreviewable.”).

¹⁴⁹ See *Doremus*, 342 U.S. at 434.

¹⁵⁰ See *ASARCO*, 490 U.S. at 618.

¹⁵¹ It is also contrary to original practice under the Constitution. The Judiciary Act of 1789 limited Supreme Court appellate jurisdiction only over state court judgments *denying* a federal claim of right. See Judiciary Act of 1789, Ch. 20, § 25, 1 Stat. 73, 85-87; cf. also Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257 (2011) (arguing that the Supreme Court should return to the original understanding of its appellate jurisdiction as extending to all state-court judgments adverse to a federal claim of right).

inheres in the tension between these cases makes it unlikely the Supreme Court will soon resolve this asymmetry.

3. Article III as a Backdoor Limit on Congress's Regulatory Authority

Finally, even if Supreme Court review were effective and available in all cases, the paradox would still pose a formidable problem for the traditional understanding of the relationship between Congress and the federal courts. Because it deprives Congress of a federal forum for adjudication of statutory claims, Article III standing doctrine has been criticized on the ground that it is a backdoor limitation on Congress's Article I power to legislate.¹⁵² But that criticism has always been subject to the rejoinder that in many cases state courts remain competent to adjudicate federal claims even outside Article III's jurisdictional limitations. Only by understanding how state courts often voluntarily adopt federal standing doctrine can we appreciate the full brunt of this criticism of the restrictive turn in Article III standing doctrine.

In sum, the costs of the paradox of exclusive state-court jurisdiction over certain federal claims are significant, growing, and fall not only on both plaintiffs and defendants, but also on federal law itself. Those costs provide a clear benchmark—and a high degree of difficulty—for any potential solution to the problem.

III. CONCRETE STEPS TO RESOLVE THE PARADOX

Any way out of the paradox at the heart of this article must balance alleviating the costs identified in the preceding section against the knock-on consequences for other aspects of the federal system. This Part evaluates four possible ways to solve the problem identified in Part II.

A. *Require State Courts to Apply Article III Standing When Adjudicating Federal Claims*

The first, most obvious, and most popular proposal in the scholarly literature is to have state courts follow Article III standing doctrine, at least

¹⁵² See Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170-71 (1993) (calling *Lujan* “an insupportable judicial contraction of the legislative power to make judicially enforceable policy decisions”); see also *id.* at 1199 (“The majority opinion in *Defenders* transposes a doctrine of judicial restraint into a judicially enforced doctrine of congressional restraint.”); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1226 (1992) (“[T]he conclusion that Article III limits congressional power can hardly be regarded as remarkable.”); see also *id.* (“If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, the Act of Congress is unconstitutional.”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233 (1988) (arguing that standing doctrine operates to “limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against”).

when adjudicating federal claims.¹⁵³ Proponents of this approach include Paul Freund, Judge William Fletcher, and Michael Morley, though each advocated for it decades apart.¹⁵⁴ Their proposal has one clear advantage: it eliminates the phenomenon of federal claims that can only be brought in state courts. By creating parity in standing law across federal and state courts, plaintiffs and defendants would theoretically be indifferent about where they litigated the issue of standing. Further, because the standards would be identical, a judgment concerning standing in federal court would be preclusive in state court, and vice versa. The proposal cuts the paradox's Gordian knot cleanly.

Yet the devil in such a proposal is in the details, particularly in *how* to compel a state court change its jurisdiction to accommodate shrinking federal jurisdiction. Consider the possible sources for a rule that states should be bound by Article III standing rules when adjudicating federal claims: Article III itself, statutory text or interpretation, federal common law, or state law. Each of those possibilities is dubious as a matter of existing law and infringes one of the structural values identified above.

1. Article III

The first possible source for a rule requiring state courts to apply federal standing doctrine when adjudicating federal claims is Article III itself. Judge Fletcher's article comes closest to this view. Though he does not focus on the precise source of authority to impose the case-or-controversy requirement on state courts, he advocates for "the Supreme Court to recognize the values served by the 'case or controversy' doctrine, and by Supreme Court review of state court decisio[ns] on questions of federal law, [and to] require the adoption" of such doctrine by state courts.¹⁵⁵

Judge Fletcher's argument is based in history and policy. He begins with the historical claim that there was a long period—from the founding through the end of the nineteenth century—during which there was no practical

¹⁵³ See William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263 (1990) ("In this article, I propose a more thoroughgoing reform: State courts should be required to adhere to article III 'case or controversy' requirements whenever they adjudicate questions of federal law."); Paul Freund, *The Supreme Court, 1951 Term-Foreword: The Year of the Steel Case*, 66 HARV. L. REV. 89, 95 (1952); SUPREME COURT AND SUPREME LAW 35 (Edmond Cahn ed., 1955) (remarks of Professor Paul Freund); William P. Murphy, *Supreme Court Review of Abstract State Court Decisions on Federal Law: A Justiciability Analysis*, 25 ST. LOUIS U. L.J. 473 (1981); Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 Tex. L. Rev. 273, 311-13 (1980); Paul J. Katz, Note, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1317 (2005) ("[S]tate courts should abide by federal standing requirements to enforce federal causes of action consistently with federal courts."). *But see* Elmendorf, *supra* note __, at __ (arguing against such a proposal); Brian A. Stern, Note, *An Argument Against Imposing the Federal Case or Controversy Requirement on State Courts*, 69 N.Y.U. L. REV. 77 (1994) (same).

¹⁵⁴ Judge Fletcher and Professor Freund were spurred to the suggestion by the decisions in *ASARCO* and *Doremus*, respectively.

¹⁵⁵ *Id.* at 303.

difference in federal and state standing law.¹⁵⁶ Then, around the turn of the twentieth century, he identifies a change characterized by cases like *Doremus*, reflecting a gap between state and federal standing.¹⁵⁷ More recently, however, he claims that there was a convergence between federal and state practice, which culminated in *ASARCO*, which restored partial Supreme Court review of state court judgments even where the plaintiff lacked Article III standing.¹⁵⁸ In light of that historical background, Judge Fletcher argues for applying Article III standing for three reasons: (1) to ensure quality of decision through adversariness; (2) to restore the Supreme Court's role as final adjudicator of questions of federal law; and (3) because doing so would treat state and federal courts "as genuine partners in the business of adjudicating federal law."¹⁵⁹ Though he admits his proposal entails certain costs—most notably the undermining of state court autonomy—he generally dismisses the idea that imposing Article III on state courts is any worse than imposing substantive federal law on state courts as a rule of decision via the Supremacy Clause.

If we take Judge Fletcher to suggest that the text and history of Article III compel state courts to adopt the Supreme Court's interpretation of the case-or-controversy language, we must confront that text and history. As discussed in Part I.B, the text of Article III by its terms applies only to the judicial power "of the United States"—i.e., federal courts. Article III only vests that judicial power in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."¹⁶⁰ It is difficult to understand how the limitations on that judicial power embodied in the case-or-controversy requirement could be imposed on constitutional actors in whom such power has not been vested. Any argument that Article III applies to states as a constitutional matter must confront those textual hurdles but seems overmatched to do so.

Moving beyond text to structural considerations reveals further difficulty. Most importantly, no other part of Article III applies to state courts. State judges are not guaranteed life tenure during periods of good behavior, nor does Article III's jury-guarantee—as opposed to those contained in the Sixth and Seventh Amendments—apply in state courts. Indeed, the Supreme Court has generally rejected attempts to require federal law to carry with it to state courts the requirements of Article III.¹⁶¹ Judge Fletcher anticipates this problem and

¹⁵⁶ See *id.* at 267-69.

¹⁵⁷ See *id.* at 275-79.

¹⁵⁸ See *id.* at 281-82.

¹⁵⁹ See *id.* at 282-84.

¹⁶⁰ See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. ___, 12 (forthcoming 2020), <https://ssrn.com/abstract=3194945> ("State courts exercise the judicial power of their respective states, and this is perfectly square with the text of Article III, which regulates only 'the judicial power of the United States.'" (internal quotation marks omitted) (emphasis in original)).

¹⁶¹ See *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 221 (1916) (rejecting, before incorporation of Seventh Amendment's jury-guarantee, argument that a FELA action in state court

argues that imposing Article III on state courts is no worse than imposing the Supremacy Clause on them or depriving them of jurisdiction through legislative specification of exclusive federal jurisdiction.¹⁶² Yet while it is possible to imagine a different Constitutional structure and history imposing Article III on the states, there is no proof of such application under the existing scheme of judicial federalism.

2. Statutory Text or Interpretation

Statutory text and interpretation offer no additional support for the idea that state courts should be bound by federal standing doctrine when adjudicating federal claims. This approach would necessarily involve reading federal standing doctrine as an element of all federal causes of action.¹⁶³ Indeed, least one state court has already, albeit perhaps erroneously, taken this approach.¹⁶⁴ Yet as a textual matter no federal statutes require proof of Article III standing as an element of the cause of action on the merits. Moreover, as discussed in Part I.B, where Congress is silent on the issue, the presumption is in favor of concurrent jurisdiction, and Congress has long legislated against that background presumption.¹⁶⁵ So for the vast majority of statutory claims, there is every reason to believe Congress *intended* to allow suit in state courts with liberal standing regimes. In any event, there is little reason to believe that Congress intended to include federal standing doctrine as an element of statutory causes of action, or that Congress’s legislative power is so limited.¹⁶⁶

must be tried to a jury, on grounds that state “courts in enforcing the Federal right are [not] to be treated as Federal courts and be subjected *pro hac vice* to the limitations of the Seventh Amendment”).

¹⁶² See Fletcher, *supra* note __, at 286-87 (“Preventing the state courts from deciding disputes is less offensive to state sovereignty than requiring them to decide disputes that they would otherwise decline to hear. For example, we do not consider it an interference with state court autonomy when federal statutes confer exclusive rather than concurrent jurisdiction on the federal courts, thereby forbidding the state courts to decide cases coming within the exclusive grant of jurisdiction on the federal courts.”).

¹⁶³ Such a shift would subtly alter how the issue would be litigated in state court, as it could be raised by defendant in a motion to dismiss for failure to state a claim (or the analogous procedure) rather than in a motion to dismiss for lack of subject-matter jurisdiction. But the differences—most notably the possibility of waiver—would be minor.

¹⁶⁴ See Navigators Ins. Co. v. Sterling Infosystems, Inc., 2016 NY Slip Op 08941 (App. Div. 1st Dep’t Dec. 29, 2016) (treating standing as a requirement “[t]o make out a claim under the FCRA”).

¹⁶⁵ See, e.g., Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 822 (1990); Robb v. Connolly, 111 U.S. 624 (1884); Clafin v. Houseman, 93 U.S. 130, 136 (1876) (“[T]he state court has jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.”)

¹⁶⁶ Some commentators believe existing federal standing law does just that. See Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170-71 (1993) (calling *Lujan* “an insupportable judicial contraction of the legislative power to make judicially enforceable policy decisions”); see also *id.* at 1199 (“The majority opinion in *Defenders* transposes a doctrine of judicial restraint into a judicially enforced doctrine of congressional restraint.”). That critique, however, gives short shrift to the role of state courts. But if we extended federal standing doctrine to the states, the criticism would obtain entirely.

Against this view, Michael Morley has recently argued that, notwithstanding the lack of statutory text requiring federal standing doctrine in state courts, federal courts should nevertheless read federal statutes creating actions involving statutory damages to include federal standing doctrine as an element of the cause of action.¹⁶⁷ His argument has two prongs. First, he argues that because the exercise of jurisdiction by Article III courts over *Spokeo*-type claims would pose a constitutional problem, the constitutional-avoidance canon counsels in favor of limiting statutory-damages claims on the merits to plaintiffs who would have Article III standing. Second, he argues that the broad grant of federal-question jurisdiction contained in 28 U.S.C. § 1331 should be read to create a presumption against interpreting any federal law as authorizing a cause of action outside the district courts' jurisdiction.

Neither argument has merit. The constitutional-avoidance argument depends on the incorrect assumption that the creation of a federal cause of action that lies outside the jurisdiction of the federal district courts is itself unconstitutional. But it is not the creation of the cause of action that would be the constitutional problem; rather, it is the federal court's proceeding to judgment that must be avoided. If federal courts dismiss *Spokeo*-type claims, there is no constitutional problem. And absent a constitutional problem, there is no reason to frustrate the clear Congressional intent to remedy the underlying harm targeted by the creation of the statutory right. Yet closing state courts to *Spokeo*-type claims does just that.

The argument that general federal-question jurisdiction creates a presumption that Article III standing doctrine should apply as an element of federal statutory causes of action is even less persuasive, for reasons of both constitutional history and precedent. As a matter of history, the argument seems implausible because the grant of federal-question jurisdiction came slowly, and in parts. For example, with limited exceptions, there was no general federal question jurisdiction before 1875.¹⁶⁸ Even then, it was subject to a substantial amount-in-controversy requirement, which was jurisdictional and not eliminated until 1980.¹⁶⁹ Before then, it was clear that wide swaths of federal claims were intended by Congress to be heard in state court. So when, as a matter of history, did Professor Morley's proposed presumption take effect? Surely not in 1789, when the entire edifice of federal statutory law depended on state courts for enforcement. Nor could it plausibly be in 1875, when small-dollar federal claims were intended to be state-court actions. Perhaps it arose in 1980, upon the elimination of the federal-question amount-in-controversy requirement, but if so, should courts nevertheless apply the presumption to

¹⁶⁷ Morley, *supra* note __, at 579 (“[C]ourts should not interpret federal laws authorizing statutory damages as creating causes of action for quasi-Hohfeldian plaintiffs in any court, absent a clear statement in the statutory text or legislative history to the contrary.”).

¹⁶⁸ See Act of March 3, 1875, § 1, 18 Stat. 470.

¹⁶⁹ See *id.*

statutes that were enacted *before* 1980, such as FCRA, the statute at issue in *Spokeo*, which was enacted in 1970?

Moreover, as a matter of constitutional precedent, the idea of a presumption against state jurisdiction over federal claims is not only novel but also inconsistent with the strong presumption in favor of concurrent state jurisdiction. Since at least 1876, the Supreme Court has consistently held that only express statutory text or direct conflict between federal and state jurisdiction can unseat the presumption that state courts can hear federal claims.¹⁷⁰ Professor Morley’s proposed presumption would therefore be both a counter presumption and an exception to the longstanding view that state courts may hear federal claims. Absent some change in the law, legal provision, or indication from the Supreme Court or Congress, there is little basis to invent new presumptions that upset the balance of judicial federalism.¹⁷¹

3. Federal Common Law

Nor can federal common law form a basis for constraining state-court standing. Not only does federal common law lack the legitimacy of a textual statutory license for applying federal standing doctrine in state courts, but also the limited enclave of federal common law lacks the sweep to do the job. The so-called “reverse *Erie* doctrine” is the notion that certain procedural rules, such as the right to a jury trial under the Federal Employers Liability Act, are part and parcel of the federal statutory right and therefore state courts must apply them when adjudicating that right.¹⁷² And while some have suggested that federal standing law qualifies for reverse-*Erie* treatment,¹⁷³ the case is very weak.¹⁷⁴ The reverse-*Erie* doctrine requires clear statutory intent to require a given procedure; absent such intent, the state court should follow its own rules so long as they do not discriminate against the federal right.¹⁷⁵ Here we see no clear statutory intent and no burdening of the federal right. Indeed, applying federal standing doctrine to federal questions would itself burden the federal right.

¹⁷⁰ *Claflin*, *supra* note __, at 136.

¹⁷¹ Morley’s proposal also appears to collapse the distinction between jurisdiction and procedure in arbitrary ways, raising questions about his intervention’s practical effects. For example: If the canon of constitutional avoidance causes us to read Article III standing into the elements of a statutory cause of action, can the element then be waived if it is not duly raised in defense? Must a state court raise the issue *sua sponte*, as a federal court must?

¹⁷² *See, e.g.*, *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952) (“[T]o deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence ‘is to take away a goodly portion of the relief which Congress has afforded them.’” (quoting *Bailey v. Cent. Vt. R. Co.*, 319 U.S. 350, 354 (1943)); *see also* ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 218-19 (5th ed. 2007) (“If the federal law expressly specifies the procedures to be used with regard to a particular cause of action, then, of course, states must follow it.”).

¹⁷³ *See* *Katz*, *supra* note __, at 1340-49.

¹⁷⁴ *See* *Hall*, *supra* note __, at 1288-89 (rejecting this notion).

¹⁷⁵ *See* CHEMERINSKY, *supra* note __, at 219.

4. State Law

Finally, we could seek to persuade state courts to follow federal standing doctrine as a matter of state law. Indeed, many defendants do just that.¹⁷⁶ But state courts are embedded in different systems of separated powers governed by different constitutional texts and different structural considerations.¹⁷⁷ Many state courts might rightly wonder why they must change their jurisdiction to accommodate increasingly restrictive federal jurisdiction. So long as some state courts decline the invitation to apply federal standing doctrine as a matter of state law—as the pattern of reactive divergence traced in Part II suggests they will—a merely prudential appeal will be necessarily incomplete.

One final point about restricting state-court standing to eliminate the gap between the availability of the federal and state forum bears mentioning. Doing so ensures that despite clear congressional intent to the contrary, plaintiffs who suffer statutory violations will lack any competent venue to redress such violations. For that reason, any solution that eliminates the state forum threatens to transform Article III from a self-enforced limitation on the power of the judiciary into a limitation on the legislative power of Congress enforced by the judicial branch.¹⁷⁸ And for all the reasons discussed above, including most notably the text and structure of Article III, that solution is deeply problematic.

B. *Permit Supreme Court Review of all State Judgments Involving Federal Questions*

If we hold the existence of liberal state standing rules constant and instead change other variables, we resolve less of the paradox but also do less harm to other structural principles. For example, Matthew Hall has suggested that we restore the original appellate jurisdiction of the Supreme Court to include “*all* state court judgments regarding a claimed federal right.”¹⁷⁹ In other words, reverse *Doremus* and do away with standing as a limitation on the Supreme Court’s appellate jurisdiction while retaining it for lower federal courts. Such a resolution would solve the asymmetry of Supreme Court review of state-court judgments involving federal law.¹⁸⁰ To the extent that the vice of the paradox at issue is a lack of uniformity of federal law (as opposed to the other costs catalogued in Part II.B), and to the extent that Supreme Court review is an effective means to ensure such uniformity, this solution would seem to do the trick.

¹⁷⁶ See, e.g., *supra* Part III.A; see also *supra* Part II.B.

¹⁷⁷ See Hershkoff, *supra* note __, at 1882–98 (noting the differences in state separation-of-powers systems over time and among states, particularly as compared to the federal government).

¹⁷⁸ See Pierce, *supra* note __.

¹⁷⁹ Hall, *supra* note __, at 1291.

¹⁸⁰ See *supra* Part II.A (discussing this asymmetry).

But *Spokeo* changed the calculus.¹⁸¹ In particular, creating symmetrical Supreme Court review would do nothing to remedy the problem that arose only in the wake of *Spokeo*: exclusive state-court jurisdiction over a distinct and persistent class of federal *claims*. Before *Spokeo*, the problem of certain plaintiffs limited to suing in state court posed minimal risk to the uniformity of federal law because federal courts, including lower federal courts, could issue definitive interpretations of such law in cases brought by plaintiffs who had standing.¹⁸² Because *Spokeo* creates a class of *claims*, not *plaintiffs*, that are barred from federal court, federal district and circuit courts would never have an opportunity to opine on the elements of, say, a credit-card-receipt FACTA claim.

As a result, restoring the symmetry of Supreme Court appellate review of state court judgments concerning federal law works as a solution only inasmuch as the Supreme Court takes enough cases to ensure uniformity. Yet for all the reasons discussed above, there are sharp limits on the Supreme Court's ability to discipline even lower *federal* courts into uniform application of federal law.¹⁸³ There is little reason to think they would fare better in disciplining state courts.

C. *Treat All Violations of Statutory Rights as Article III Injuries*

In light of this doctrinal rat's nest, it might be tempting to abrogate federal standing doctrine root and branch, or at least to allow Congress to specify that any procedural statutory violation would automatically confer Article III standing. Many law professors have taken that view.¹⁸⁴ But as the Supreme Court has gone further down the road of developing the Article III injury requirement, the costs of doing so have become clearer and more acute. First, doing so would mean overruling almost three decades of precedent—precedent that has been cited, relied upon, and developed not only by federal courts but also by state courts.¹⁸⁵ For that reason, liberalizing federal standing law at this

¹⁸¹ Professor Hall's article predates *Spokeo*—as do all other extant proposed solutions.

¹⁸² Whether state courts should be bound by federal-court interpretations of federal law is a matter of state law. The substantial majority of states have held that state courts are not bound by federal-court interpretations of federal law. *See* Hall v. Penn. Bd. of Probation & Parole, 851 A.2d 859, 860 (Pa. 2004) (collecting cases). Connecticut and Maine give deference to such interpretations issued by courts in their respective Circuits. *See id.* “Mississippi and New Hampshire hold that they are constrained by the interpretations of federal law forwarded by the Fifth and First Circuits, respectively.” *Id.* But even state courts that are not strictly bound by lower federal courts' interpretations of federal law will find such interpretations persuasive and tend to follow them.

¹⁸³ *See supra* notes ___-___ and accompanying text.

¹⁸⁴ *See, e.g.,* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 54 (1984) (arguing for the permissibility of Congressional grants of standing); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973) (arguing that Congress can authorize federal courts to interpret the constitution regardless of whether private interests are at stake); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1154-60 (1993) (arguing that Article III does not limit Congress's power to confer standing).

¹⁸⁵ *See supra* Parts II.B-C (illustrating how state courts have adopted *Lujan* and its progeny).

point risks creating the opposite paradox: state law claims that can only be brought in federal court.

Second, and more substantially, allowing unlimited citizen suits in *federal* court would implicate the separation-of-powers concerns that are at the core of Article III standing.¹⁸⁶ And although the exact linkages between Article III standing and the separation of powers are murky,¹⁸⁷ some wolves come as wolves.¹⁸⁸ Permitting generalized citizen suits to challenge the legality of any government action would threaten to create a judicial veto over every statute, repeal, regulation, regulation, or alleged dereliction of duty.¹⁸⁹ Particularly when combined with the tendency of the federal district courts to issue so-called “nationwide” or universal injunctions against the government, that possibility threatens to accelerate the judicialization of American politics and overwhelm federal courts with perpetual quasi-legislative functions.

There is thus a strong reason to retain at least as much of standing doctrine as can be said to promote a properly narrow role for the judiciary. But that core, which prevents the problem of the generalized judicial veto over governmental action, is the particularization requirement. In *Lujan*, the problem with the plaintiffs’ case for standing was that they could not prove they had any intent to return to the endangered-species habitats at issue. They might as well have been anyone. And while such a lack of particularization necessarily *implied* a lack of concrete injury, it was the particularization requirement that was doing the work. So too in *Warth v. Seldin*, *Valley Forge Christian College v. Americans United*, *Los Angeles v. Lyons*, *Allen v. Wright*, and *Clapper v. Amnesty International*. For that reason, the particularization requirement—or some version of it—is necessary to promote the separation-of-powers values at the core of federal standing law.¹⁹⁰

¹⁸⁶ *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)); see also *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (“The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.” (quoting *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013))).

¹⁸⁷ For example, while Heather Elliott has identified “at least three” ways in which standing enforces the separation of powers, F. Andrew Hessick has identified four different (and additional) separation-of-powers purposes served by standing doctrine. See Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 468 (2008); F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 684-85 (2017).

¹⁸⁸ Cf. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (“Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.”).

¹⁸⁹ See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

¹⁹⁰ See, e.g., William Baude, *Standing in the Shadow of Congress*, 2016 S. CT. REV. 197, 230–31 (2017) (proposing two readings of Justice Thomas’s concurrence in *Spokeo*, the more permissive reading of which would focus on particularization and reduce it to “personalization”).

D. *Eliminate Concreteness as a Separate Dimension of Article III Injury*

If particularization has its uses, what about concreteness? As have seen, *Spokeo*'s doctrinal emphasis on concreteness was new. After all, not even the conservative Judge O'Scannlain, writing for the Ninth Circuit panel in *Spokeo*, conceived of concreteness as imposing additional requirements beyond that of an alleged statutory violation. And the wave of lower-court dismissals of federal statutory class actions in the wake of *Spokeo* strongly implies that the case moved the law of standing substantially.¹⁹¹

We have also seen how concreteness is key driver of the paradox. Whereas pre-*Spokeo* standing law combined with the phenomenon of reactive divergence creates a class of *plaintiffs* shut out of federal court, *Spokeo* creates a class of federal *claims* shut out of federal court and relegated to the exclusive jurisdiction of state courts—if anywhere. Before *Spokeo*, the potential cost was felt by individual plaintiffs. Now it is felt by the soundness and uniformity of entire sections of the United States Code.

Eliminating the concreteness requirement, or at least deeming it satisfied by procedural statutory violations—while retaining the particularization requirement—is the only way to untie the Gordian knot. First, as noted, it retains the separation-of-powers protections that have animated standing doctrine's development. Second, it ensures that every statutory violation can be vindicated by at least one plaintiff: the one who feels the harm most sharply. Third, it respects the principle of legislative supremacy, allowing Congress to specify federal injuries that can be redressed in any court of general jurisdiction, including federal courts. Fourth, it respects the separate sovereignty of states and their judiciaries, allowing them to set their own jurisdictional rules. And it achieves all those goals without requiring any novel interpretation of Article III's text or history.

Will Baude has noted the merits of this approach purely for its benefits for litigation in federal court, ascribing it to a more “permissive” reading of Justice Thomas's concurrence in *Spokeo*.¹⁹² Justice Thomas reasoned that, to the extent the FCRA created “a private duty owed personally to Robins to protect *his* information,” that would be enough for purposes of Article III.¹⁹³ Baude also focused on the similarity of that approach to Judge O'Scannlain's approach for the Ninth Circuit.¹⁹⁴

Yet Baude's attempt to read *Spokeo* permissively seems inconsistent with the Court's disposition in the case: vacatur and remand for consideration of the concreteness prong of Article III injury. For that reason, Baude elides the necessity of overruling, silently or otherwise, the holding in *Spokeo* in order to

¹⁹¹ See *supra* notes ___-___ and accompanying text.

¹⁹² See Baude, *supra* note ___, at 231.

¹⁹³ 136 S. Ct. at 1554 (emphasis in original).

¹⁹⁴ Baude, *supra* note ___, at 231.

remedy the decision's true costs. Perhaps because his focus, like the Court's, is on litigation solely in federal court, those costs were not readily apparent.

Of course, despite its advantages over alternative proposed remedies, eliminating the concreteness requirement is not a complete fix. There will still be plaintiffs who can bring federal claims in state court that they could not have brought in federal court. And Supreme Court review of those cases will be asymmetrical absent reversal of *Doremus*. But eliminating the concreteness requirement lowers the stakes for both of those problems, and it is consistent with (if orthogonal to) reversal of *Doremus*.

CONCLUSION

The paradox of exclusive state-court jurisdiction over certain federal claims is a mirror onto our procedural values in fashioning a judicial system that accommodates both federalism and the separation of powers. The difficulty of resolving it cleanly illustrates the tensions inherent in the structure of judicial federalism. Recent Supreme Court caselaw, embodied most prominently in *Spokeo*, threatens to exacerbate the paradox and push the tradeoffs its solutions require to the fore. Working through these tensions and compromises now promises the possibility of avoiding inadvertent doctrinal acceleration of the paradox's costs.