2021

The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims

Thomas B. Bennett

Article

The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims

Thomas B. Bennett†

INTRODUCTION

Say you buy groceries with a credit card. When you look at the receipt, you notice that the store has included your entire credit card number on it. You start to worry about the potential for credit card fraud or identity theft after you throw it away. Surely there is a law prohibiting receipts that so easily facilitate information-privacy crimes, you think to yourself. So you decide to speak with a lawyer. 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 receive statutory damages of between $100 and $1,000, 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: despite the existence of federal law regulating credit card receipts through a private right of action, you are barred

† Furman Academic Fellow, NYU School of Law. B.A. Swarthmore College; J.D. NYU School of Law. For helpful comments, suggestions, and feedback, I am grateful to Kirti Datla, Barry Friedman, Helen Hershkoff, Sam Issacharoff, Troy McKenzie, Erin Murphy, Burt Neuborne, David Noll, Rick Pildes, Hon. Albert M. Rosenblatt, Jonathan Siegel, Steve Vladeck, and participants at the Eleventh Annual Junior Faculty Federal Courts Workshop and the Fifth Annual Civil Procedure Workshop. Thanks to the editors of the *Minnesota Law Review* in general, and Will Wright, Sarah Nelson, and Abby Oakland in particular, for thoughtful editing. I owe a particular debt of gratitude to Randall Johnston for her wise insight and unflagging support.

1. *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended in scattered sections of 15 U.S.C.).

2. *See* 15 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. *Id.* § 1681n(a).

from bringing your suit in federal court by standing doctrine.[4] 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 mainly in federal court, or at least that federal courts have an important role to play in the adjudication of federal claims.[5] 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 covering not only data privacy but also a broad range of areas including consumer financial regulation, telemarketing, and employment law.

The paradox derives from three related but distinct features of our federated court system. 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 being brought in federal court.[6] Second, state courts are presumed to have jurisdiction to entertain federal claims and indeed have an affirmative duty to hear them if they hear analogous state-law claims.[7] Third, unbound by the strictures of Article III's standing requirements, state courts have fashioned their own

4. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) ("[A] bare procedural violation, divorced from any concrete harm, [cannot] satisfy the injury-in-fact requirement of Article III.").

5. *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019) (reversing prior holding because it made the statutory "guarantee of a federal forum ring[] hollow" where, in practice, plaintiffs were forced to litigate federal claims in state court); *see also* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1236–41 (2004) (collecting authority).

6. *Spokeo*, 136 S. Ct. at 1548–50.

7. *See, e.g.*, Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823–25 (1990) (rejecting the argument that legislative history and an agency adjudication process should be construed to divest state courts of the authority to hear claims arising under Title VII of the Civil Rights Act of 1964); Robb v. Connolly, 111 U.S. 624, 637 (1884) ("Upon the State courts . . . rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them . . . ."); Claflin v. Houseman, 93 U.S. 130, 136 (1876) (noting that state courts have jurisdiction unless "excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case").

standing regimes, many of which welcome claims that do not depend on any showing of concrete injury to a plaintiff.[8] Taken together, those three seemingly disparate aspects of the separation of powers and judicial federalism produce an outcome at best bizarre and at worst harmful to the integrity of federal law.[9]

The paradox teaches two lessons, one narrow and one broad. Narrowly, the paradox reveals the unintended consequences of the Supreme Court's development of the concreteness prong of the Article

8. *See* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RES. L. 349, 354–98 (2015) (conducting a fifty-state survey and showing that many states lack a concreteness requirement).

9. 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, 1260 (2011) (noting that distinctions between mandatory federal and often discretionary state standing doctrine can prevent the Supreme Court from being "the supreme arbiter of federal law"); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 303–06 (2005) (noting tensions between standing doctrine and state sovereign immunity doctrine); Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse*-Erie *Analysis*, 99 NW. U. L. REV. 1315, 1319 (2005) (discussing how the multiplicity of state standing doctrines results in varying levels of enforcement of federal law); 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, 996–1011 (1997) (discussing Article III standing requirements and possible alternative methods of congressionally mandated state court enforcement); 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, 1038–42 (2001) (noting that these distinctions provide an opportunity for environmental advocates); Brian A. Stern, Note, *An Argument Against Imposing the Federal Case or Controversy Requirement on State Courts*, 69 N.Y.U. L. REV. 77, 108–23 (1994) (arguing against imposing federal standing requirements on state courts applying federal law); William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 294–303 (1990) (arguing that state courts should be held to Article III standing requirements in federal question cases); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1151 (1984) (noting the conflict and arguing that the Supremacy Clause requires state courts to enforce federal law over state standing doctrine). Each of those articles predates *Spokeo v. Robins*, discussed *infra* Part I.A. *Cf.* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 437 (2018) (noting in passing the heightened nature of the paradox in the wake of *Spokeo*). However, *Spokeo*'s 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. 583, 589–93 (2018) (noting *Spokeo*'s role); Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1432 (2018) [hereinafter Clopton, *Justiciability*] (arguing that *Spokeo* and other cases constitute invitations for congressional specification of causes of action in state court and administrative agencies); *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.").

III injury requirement, elaborated most recently in *Spokeo v. Robins*.[10] Many commentators have criticized the Court's decision in that case, largely because it unjustly denies plaintiffs a forum for suit, misunderstands the gravity of consumer harm, confuses the law, and was driven by ideological opposition to the plaintiffs' bar.[11] But proper understanding of the paradox reveals that many plaintiffs, and certainly most plaintiffs' *lawyers*, will have no problem finding a forum in which to bring class actions asserting federal claims: state court. Thus, 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, in our system of judicial federalism, novel jurisdictional limitations have unintended consequences. For that reason, every proposal to resolve the paradox that does not restore pre-*Spokeo* jurisdictional limits bumps up against some important principle of our federal judicial system: legislative supremacy, the distinction between jurisdiction and merits, the requirement that the federal judiciary decide actual controversies, the distinct sovereignty of the states, and the supervisory power of the Supreme Court

10. *Spokeo*, 136 S. Ct. 1540.

11. *See, e.g.*, Richard L. Heppner Jr., *Statutory Damages and Standing After* Spokeo v. Robins, 9 CONLAWNOW 125, 133 (2018) (noting that *Spokeo* frustrates the congressional intent to allow private enforcement of statutes); Lauren E. Willis, Spokeo *Misspeaks*, 50 LOY. L.A. L. REV. 233, 240–44 (2017) (arguing that *Spokeo* misunderstands the gravity of consumer harm); Craig Konnoth & Seth Kreimer, *Spelling Out* Spokeo, 265 U. PA. L. REV. ONLINE 47, 60 (2016) (noting the *Spokeo* majority's opposition to the plaintiff's bar); Jackson Erpenbach, Note, *A Post-*Spokeo *Taxonomy of Intangible Harms*, 118 MICH. L. REV. 471, 483 (2019) (arguing that *Spokeo* confuses the law); Vanessa K. Ing, Note, Spokeo, Inc. v. Robins*: Determining What Makes an Intangible Harm Concrete*, 32 BERKELEY TECH. L.J. 503, 504 (2017) (noting the confusion caused by *Spokeo* and offering a three-part test).

The *Vanderbilt Law Review* held a symposium on *Spokeo* while the case was pending; all the discussants criticized the eventual outcome in the case. *See* Howard M. Wasserman, *Fletcherian Standing, Merits, and* Spokeo, Inc. v. Robins, 68 VAND. L. REV. EN BANC 257 (2015); Jonathan R. Siegel, *Injury in Fact and the Structure of Legal Revolutions*, 68 VAND. L. REV. EN BANC 207 (2015); Maxwell L. Stearns, Spokeo, Inc. v. Robins *and the Constitutional Foundations of Standing*, 68 VAND. L. REV. EN BANC 221 (2015); Joan Steinman, Spokeo*, Where Shalt Thou Stand*, 68 VAND. L. REV. EN BANC 243 (2015); Heather Elliott, *Balancing as Well as Separating Power: Congress's Authority To Recognize New Legal Rights*, 68 VAND. L. REV. EN BANC 181 (2015); F. Andrew Hessick, *Understanding Standing*, 68 VAND. L. REV. EN BANC 195 (2015).

A forthcoming article written by F. Andrew Hessick argues that *Spokeo*'s logic should apply even to common law breach of contract claims, casting doubt on its holding. *See* F. Andrew Hessick, *Standing and Contracts*, GEO. WASH. L. REV. (forthcoming), https://ssrn.com/abstract=3560567 [https://perma.cc/NZW3-RN88].

over questions of federal law. By upsetting the balance of federal jurisdiction, *Spokeo* reveals the unintended consequences and hidden tradeoffs of novel jurisdictional limits given the interlocking nature of our judicial federalism.[12] One's preferred resolution of the paradox acts as a mirror of one's commitments as among the values of federalism, separation of powers, and the purpose of federal law.

The best way out of the paradox is to undo the novel jurisdictional limitation introduced in *Spokeo*. *Spokeo* did not create the paradox but intensified it and made it untenable. Overruling *Spokeo*—finding all particularized statutory harms concrete for purposes of Article III—eases the paradox's tensions, ameliorates its costs, and requires the fewest tradeoffs.

This Article has three parts. Part I describes 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 serves to bar certain 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 because the injuries they protect are insufficiently concrete.[13] Next, this Part turns to state courts, where plaintiffs increasingly find a more receptive forum for these federal claims. That oddity is made possible by the variations in state-court standing rules, which differ significantly from their federal analog.[14] The kaleidoscope of state-court jurisdictional rules makes the availability of a forum for the redress of many federal claims contingent on geography.

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

12. *See* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, at 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 judiciaries, functioning in far more subtle combination than is readily perceived."); *see also id.* ("The frequently neglected problems posed in the administration of federal law by state courts.").

13. *See, e.g.*, Corozzo v. Wal-Mart Stores, Inc., 531 S.W.3d 566, 574–76 (Mo. Ct. App. 2017) (embracing *Spokeo* in rejecting a Fair Credit Reporting Act claim).

14. *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); Sassman, *supra* note 8.

federal causes of action[15] depends on accidents of where plaintiffs and defendants reside and have jurisdictional contacts. For defendants, who are typically the ones who argue for dismissal based on standing,[16] the prevailing state of affairs is ironic because defendants generally prefer to litigate in federal court[17] but have relegated themselves to state court.[18] 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. If the guiding principle for claim allocation in the federal system is that federal law should be mainly decided by federal courts (and state law by state courts), the present state of affairs flips that presumption on its head.[19]

15. This phenomenon includes, but (as noted) is not limited to, statutory claims where federal law makes available statutory damages and attorney's fees. Some of the statutes that include such provisions are 47 U.S.C. § 605(e); the Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. § 1681n(a) (the statute at issue in *Spokeo*); the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k; the Stored Communications Act, 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, 15 U.S.C. § 1640(a)(2)(A); and the Worker Adjustment and Retraining Notification Act, 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).

16. In theory, standing is jurisdictional, meaning courts have an independent obligation to consider the issue sua sponte. *See, e.g.*, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) ("We are obliged to examine standing sua sponte where standing has erroneously been assumed below.").

17. *See* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2156 (2019) (cataloguing reasons to "expect corporate defendants to increasingly opt out of state court and move to federal court while plaintiffs' attorneys stay behind"); THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 6–9, 20–22 (2005) (comparing attitudes of defendants' attorneys who removed cases to federal court with those of plaintiffs' attorneys who filed in federal court in the first instance); Victor E. Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41, 63 (1991) (providing a quantitative analysis of the factors that attorneys consider when deciding where to file in diversity cases).

18. *See* Robert J. Herrington, *Think Twice Before Seeking Dismissal for Lack of "Standing,"* A.B.A.: PRAC. POINTS (Jan. 17, 2017), https://www.americanbar.org/groups/litigation/committees/class-actions/practice/2017/think-twice-before-seeking-dismissal-for-lack-of-standing [https://perma.cc/57BL-KGDG] ("[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.").

19. *See* Friedman, *supra* note 5, 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 questions regarding that sovereign's laws.").

Part III evaluates the paradox's potential resolutions. That task is complicated because a fully satisfactory fix must reconcile its collateral consequences on all other aspects of judicial federalism. No solution is without tradeoffs, and thus none is perfect. But overruling *Spokeo* is the best path because it would remedy the imbalance that case created between federal courts and state courts, on the one hand, and the Supreme Court and Congress, on the other.

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

This Part traces the doctrinal development of Article III's requirement of concrete injury, shows how that requirement has forced many federal statutory claims to be litigated in state court, and surveys state standing doctrine to illustrate how federal rights are increasingly contingent on state-court jurisdictional rules.

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 legal injuries, (2) caused by the defendant, that (3) the court can remedy.[20] Without such a showing, federal courts lack jurisdiction to hear the case, and they must dismiss it or send it back to state court.[21] This requirement—a judicial gloss on Article III's restriction of the federal judicial power to "[c]ases" and "[c]ontroversies"[22]—is a gatekeeper.[23]

20. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).

21. *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."); 28 U.S.C. § 1447 (specifying conditions for remand notwithstanding Rule 12(h)(3)).

22. U.S. CONST. art. III, § 2.

23. There is a broad consensus that standing doctrine is a consequence of developments in the 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, 816 (1969) (assigning creation to Justice Frankfurter's misreading of English common law); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 290–99 (2008) (describing the ebb and flow of the doctrine in terms of court makeup); Jonathan Levy, Comment, *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) (describing standing as originating in response to the administrative state, and a progressive easing of the doctrine in the 1970s). 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*

With liberal standing, plaintiffs face fewer obstacles to suit. With restrictive standing, 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.[24] Almost all of the doctrinal changes to this requirement involve the "injury" prong of that three-part test for standing.[25] In

Article III, 91 MICH. L. REV. 163, 179–81 (1992) [hereinafter Sunstein, *Standing After* Lujan]; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1452–57 (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) (noting the difficulty of bringing a claim against the government in a labor contract case and that this difficulty was created by the Court applying standing doctrine). *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."); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 38–48 (2001) (articulating a quasi-originalist argument for the injury-in-fact rule, while acknowledging the rule's recent vintage).

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, 1664 (2007) (arguing that standing doctrine promotes efficient alienation of constitutional rights where "many people's rights are affected by a single government policy").

24. *See generally* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 130–91 (2017) (cataloging empirically how the Court has used Article III to restrict 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, 784 (2011), theorizing that fee shifting induces judicial backlash.

25. *Cf.* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 64 (3d ed. 2006) ("The Supreme Court has said that the core of Article III's requirement for cases and controversies is found in the rule that standing is limited to those who allege that they personally have suffered or imminently will suffer an injury.").

grappling with what constitutes an "injury" for purposes of Article III, the Supreme Court has continually added additional doctrinal requirements. The injury must be: "actual," "imminent," "particularized," non-"hypothetical," non-"conjectural," and—most relevant here—"concrete."[26] As litigants have pressed the boundaries of what constitutes standing, the Justices have generally held that claimed injuries were insufficient.[27]

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 incoherent[28] and nakedly partisan.[29] Like the caselaw, the criticism has mostly focused on the injury requirement.[30]

26. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

27. *See, e.g.*, *id.* at 566–67 (holding that environmental groups lacked standing to sue over whether government regulations violated the Endangered Species Act).

28. 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 Const. Rts. of the S. Comm. on the Judiciary*, 89th Cong. 498 (1966) (statement of Prof. Paul A. Freund); *cf.* Winter, *supra* note 23, at 1372 (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." Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting); *see also* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent 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, Comment, *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).

29. *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 [my students] a grave disservice if I took that traditional legal approach in teaching the law of standing. [They] 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.").

30. *E.g.*, Sunstein, *Standing After* Lujan, *supra* note 23 (discussing how to move forward after *Lujan*'s shift regarding injuries-in-fact); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) (arguing for rejection of the injury-in-fact requirement); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 650 (1985) (noting the flexibility of current precedent); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 31–32 (1984) (criticizing the Court for neglecting the intent of Congress by requiring concrete injury).

Indeed, many scholars questioned the very existence of an injury requirement.[31]

Despite that criticism, the Court has continued to push the injury requirement down its restrictive path, typically in cases divided sharply along partisan lines.[32] 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."[33] 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. Whereas particularization is about whether the plaintiff has suffered an injury more acute than has the public at large, the new requirement of concreteness is about whether the plaintiff's injury is sufficiently tangible, even assuming it is particular to her.

Critical to this story, concreteness is effectively a restriction on types of *injuries* rather than types of *plaintiffs*.[34] 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.[35] A hypothetical injury can be sufficient if a plaintiff can be found who suffered it.[36] In the same way, the concept of particularization implies that there is some plaintiff who feels the injury most acutely, and, in turn, that such a person would have standing to sue.

By contrast, concreteness—because it goes to the nature of the injury itself, rather than the plaintiff's nexus to it[37]—potentially applies to *any* plaintiff claiming certain injuries. In other words, if one type of injury is found to be non-concrete, *no one* can sue in federal court to redress it.

31. *See* Fletcher, *supra* note 30, at 223–24 (arguing that whether a plaintiff has suffered an injury is a question for substantive law rather than Article III).

32. *See* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 668–69 (2004) (finding empirically that Supreme Court standing decisions reflect judicial ideology).

33. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

34. *Cf.* Scalia, *supra* note 23, at 892 ("[I]f all persons who could conceivably raise a particular issue are excluded, the issue is excluded as well.").

35. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 n.2 (1992) (discussing the imminence requirement).

36. *Cf.* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 415–16 (2013) (differentiating this from present injuries incurred in the attempt to avoid hypothetical injuries).

37. *See Spokeo*, 136 S. Ct. at 1548 (noting that the defining feature of an injury's concreteness is that "it must actually exist").

To understand the significance of the concreteness requirement, we turn now to the two cases that gave it birth and bite, respectively: *Lujan v. Defenders of Wildlife* and *Spokeo, Inc. v. Robins*.[38]

1. *Lujan* and the Seeds of Uncertainty

Lujan v. Defenders of Wildlife presented the question of whether Congress could create Article III standing purely by specifying a statutory cause of action.[39] The Endangered Species Act[40] 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.[41] 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.[42] 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.[43] 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.[44] The chronic question throughout the case was whether the nonprofits or their members had suffered an Article III injury and thus whether federal courts had jurisdiction.

Writing for the Court, Justice Scalia rejected each of the plaintiffs' alleged injuries.[45] 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.[46] But the Court disagreed that the plaintiffs themselves *particularly* felt such a loss. Plaintiffs' members claimed to have visited Egypt and Sri Lanka and observed endangered wildlife in those places—wildlife they alleged was now threatened by engineering projects carried out in part with

38. *Lujan*, 504 U.S. 555; *Spokeo*, 136 S. Ct. 1540.

39. *Lujan*, 504 U.S. at 559–60, 571–72.

40. Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544).

41. 16 U.S.C. § 1536(a)(2).

42. *Lujan*, 504 U.S. at 558–59.

43. 16 U.S.C. § 1540(g).

44. *Lujan*, 504 U.S. at 562.

45. *Id.* at 562–67.

46. *Id.* 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))).

U.S. assistance.[47] Each swore to have intentions of returning to those places, but neither had specific plans to do so.[48] That lack of specific intention to return meant that, for the Court, the plaintiffs' claimed injury was not particularized.[49] 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.[50] Stated in terms of doctrinal categories, the Court held that the plaintiffs' injuries were insufficiently particular but said little about whether they were sufficiently concrete.

Doctrinal categories are key to understanding *Lujan*'s wide influence because of the way the Court's opinion reorganized and restated standing doctrine. *Lujan* is among the most cited Supreme Court cases of all time, and many of those citations are because of *Lujan*'s concise articulation of the applicable legal standard.[51] As the Court put it, the three requirements for Article III standing are injury, causation, and redressability, each of which has additional subcategories.[52] As noted, our focus is on two of the subcategories of the injury-in-fact prong, concreteness and particularization: "the plaintiff must have suffered

47. *Id.* at 563.

48. *Id.* at 563–64.

49. *Id.* at 567 ("It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.").

50. 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 the plaintiffs failed to show redressability, leaving that conclusion without a majority. *See id.* at 580 (Kennedy, J., concurring).

51. *See* Peter M. Shane & Christopher J. Walker, Chevron *at 30: Looking Back and Looking Forward—Foreword*, 83 FORDHAM L. REV. 475, 475 n.2 (2014) (reporting *Lujan* as the second-most-cited administrative law case ever decided, behind only *Chevron*); Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 9, 2014), https://yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker [https://perma.cc/BPF8-DFFE] (providing full data). Since it was issued in 1992, the case has been cited in judicial opinions more than 20,000 times. *See* Westlaw (reporting 21,620 citations as of Jan. 31, 2019). By contrast, despite the benefit of an additional thirty years, multiple additional legal issues, and dozens of additional pages of language to quote, *Baker v. Carr*, 369 U.S. 186 (1962), has only been cited in judicial opinions roughly 5,000 times. *See id.*

52. *Lujan*, 504 U.S. at 561–62.

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.'"[53]

In part because *Lujan*'s statement of the legal standard is now so familiar, it is easy to overlook the way it marked a break with prior cases in how it described the applicable legal standard. In particular, past cases had not specified that "concrete" and "particularized" were two separate sub-elements of the injury-in-fact prong of the test for Article III standing. Instead, those earlier cases tended to focus solely on particularization; they mentioned the requirement that an injury be concrete only as a synonym for particularity.[54] No prior case had ever stated in dicta—let alone *held*—that concreteness required something separate from particularization.[55] By setting the requirements of concreteness and particularization apart, *Lujan*'s formulation thus subtly expanded the doctrinal test for standing. By enumerating these sub-elements conjunctively, *Lujan* suggested that they have different content and must be satisfied separately. This somewhat revisionist doctrinal distillation proved extremely influential.[56]

Lujan's restatement of the injury prong also creates the holding most important for purposes of the present paradox: just because a plaintiff has a statutory right, she does not necessarily also have

53. *Id.* at 560 (emphasis added) (footnote omitted) (citations omitted).

54. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984) ("A plaintiff must allege *personal* injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." (emphasis added)); Warth v. Seldin, 422 U.S. 490, 498 (1975) ("[T]he standing question is whether the plaintiff has 'alleged such a *personal* stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction . . . ." (emphasis added)); *id.* at 508 (requiring "concrete *facts*" of personalized injury (emphasis added)).

55. In formulating the injury-in-fact test, the Court cited three cases: *Allen v. Wright*, 468 U.S. 737; *Warth v. Seldin*, 422 U.S. 490; and *Sierra Club v. Morton*, 405 U.S. 727 (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 Allen*, 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 Warth*, 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. *Sierra Club*, 405 U.S. at 740–41 n.16.

56. *See* Richard M. Re, *Standing's* Lujan-*ification*, RE'S JUDICATA (Feb. 1, 2015, 7:12 AM), https://richardresjudicata.wordpress.com/2015/02/01/standings-lujan-ification [https://perma.cc/SGT4-DXHA] (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).

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.[57] The Court's contrary holding that the citizen-suit provision was not enough relied on the premise that, regardless of any statutory cause of action, a plaintiff must also have a particularized and concrete injury.[58]

Yet the concreteness prong remained vague because of the Court's finding that the plaintiffs' theory of standing failed to satisfy the particularization prong.[59] 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 concrete enough to prove standing.[60] Second, and more specifically, could Congress create a concrete injury by specifying an award for a successful suit, as with a statutory-damages claim?[61]

57. That was the logic of the lower court. *See* Defs. 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 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).

58. *See Lujan*, 504 U.S. at 571–76.

59. *Id.* at 567.

60. *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.").

61. 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 572–73. However, this language was likely intended to distinguish qui tam whistleblower suits, such as those under the False Claims Act, 31 U.S.C. § 3730(d). 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 id.* (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. Res. 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 attorney's fees or costs—"cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.*

2. *Spokeo* and an Uncertain Future

In *Lujan*'s wake, it seemed that concreteness and particularization were separate elements of injury-in-fact, but the content of the concreteness requirement was unclear. That question lingered for over a decade after *Lujan*.[62] Then *Spokeo* came to the Court.[63] And in some ways, *Spokeo* offers only a partial answer, because it relied on an incomplete record and therefore its holding purported to be limited. But as we will see, the logic of that holding implied a broader sweep: Congress cannot confer concreteness.

Spokeo involved a statutory cause of action with a provision for statutory damages. The Fair Credit Reporting Act of 1970 (FCRA),[64] as amended by the Fair and Accurate Credit Transactions Act of 2003,[65] requires "consumer reporting agencies" to follow reasonable procedures to ensure the accuracy of the information in credit reports they provide to third parties.[66] To enforce its various requirements, FCRA creates a private cause of action, imposes statutory damages of up to $1,000 for each willful violation of the act,[67] and authorizes awards of punitive damages[68] and attorney's fees[69] 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.[70] Search results can include information about an individual's age, address, marital status, occupation, household value, wealth, and "economic health."[71]

62. 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 Business v. Sebelius*, 567 U.S. 519, 520 (2012).

63. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

64. Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1127.

65. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended in scattered sections of 15 U.S.C.).

66. 15 U.S.C. § 1681(b).

67. *Id.* § 1681n(a)(1)(A).

68. *Id.* § 1681n(a)(2).

69. *Id.* § 1681n(c).

70. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544 (2016).

71. *Id.* While such information is provided at no cost, Spokeo sells more detailed reports to paying subscribers. *See id.* at 1546.

The plaintiff, Thomas Robins, learned that the information Spokeo maintained about him was factually inaccurate.[72] Although Spokeo correctly listed his address and even siblings' names, it included inaccurate information about his age, marital status, employment, education, and children.[73] It also included a photograph of someone else.[74]

Robins sued Spokeo on behalf of a putative class, invoking the district court's subject-matter jurisdiction over claims arising under federal law.[75] Robins's complaint alleged that he was "concerned" that such "inaccuracies" would "affect his ability to obtain credit, employment, insurance, and the like."[76] He alleged to be particularly concerned about his prospects for finding a job, as he was then out of work and seeking employment.[77] 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.[78]

Spokeo moved to dismiss on the grounds that, as relevant here,[79] Robins lacked Article III standing to sue in federal court because he failed to plead a concrete injury.[80] In particular, Spokeo argued that Robins's sole injury was his speculative and hypothetical concern about future harm, rather than any statutorily defined harm.[81] The district court dismissed the complaint because his alleged injuries could not 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."[82]

The Ninth Circuit reversed, per Judge O'Scannlain.[83] Judge O'Scannlain, a Reagan appointee, reasoned that a violation of a

72. Complaint at 5, Robins v. Spokeo, Inc., No. CV 10-5306, 2011 WL 597867 (C.D. Cal. Jan. 27, 2011) [hereinafter *Spokeo* Complaint].

73. *Id.*

74. *Id.*

75. 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 § 17203 (West 2004).

76. *Spokeo* Complaint, *supra* note 72.

77. *Id.*

78. Amended Complaint at 5, *Spokeo*, 2011 WL 597867 (No. CV 10-5306).

79. 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. *Spokeo*, 2011 WL 597867, at *1. The district court did not reach that argument. *Id.* at *2.

80. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546 (2016).

81. *Id.*

82. *Spokeo*, 2011 WL 11562151.

83. Robins v. Spokeo, 742 F.3d 409, 414 (9th Cir. 2014).

statutory right "is usually a sufficient injury in fact to confer standing," and that, so long as the statutory right is particularized, Congress can create a statutory right that, when violated, sustains an Article III injury-in-fact.[84]

The Supreme Court granted certiorari and, after briefing and argument, vacated and remanded.[85] 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*.[86] Calling the Ninth Circuit's analysis "incomplete," the Court remanded for further proceedings below.[87] 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 disposition of the case, 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' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a 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.[88]

Spokeo thus also clarified that Congress alone cannot legislatively specify a concrete injury for purposes of Article III, though it left unclear exactly what "role" Congress has in "identifying and elevating intangible harms."[89]

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, creating ambiguity.[90] The majority opinion

84. *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.

85. *Spokeo*, 136 S. Ct. at 1550.

86. *Id.* at 1548.

87. *Id.* at 1550.

88. *Id.* at 1549.

89. *Id.*

90. *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 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."); Pub. Citizen v. Dep't of Just., 491 U.S. 440, 449 (1989) ("[R]efusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a

apparently reasoned that such cases were distinguishable because they involved alleged intangible harms that were similar enough to harms cognizable at common law that they constituted concrete injuries.[91] Yet 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.[92]

That ambiguity is spreading to other types of statutory claims in lower federal courts, sometimes at the Supreme Court's invitation.[93] 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*, even though the issue of standing was not addressed below.[94] 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."[95] And in another recent case, after requesting special briefing about whether ERISA beneficiaries suffer an Article III injury when their retirement plans are mismanaged but they have not yet suffered a financial loss, the Court relied on *Spokeo* to hold that they did not.[96]

sufficiently distinct injury to provide standing to sue."); Fed. Election Comm'n v. Akins, 524 U.S. 11, 19–20 (1998). Indeed, Robins relied heavily on such cases in his argument to the Supreme Court. *See Spokeo*, 136 S. Ct. at 1548–49, 1553. *But see* Bradford C. Mank, *The Supreme Court Acknowledges Congress' Authority To Confer Informational Standing in* Spokeo, Inc. v. Robins, 94 WASH. U. L. REV. 1377, 1377 (2017) (arguing that *Spokeo* can be reconciled with *Akins* and *Public Citizen*).

91. *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.").

92. In dissent, Justice Ginsburg reasoned that such caselaw can be understood as requiring examination of "Congress' connection of procedural requirements to the prevention of a substantive harm." *Id.* at 1555 (Ginsburg, J., dissenting). If so, 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.

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

94. Frank v. Gaos, 139 S. Ct. 475 (2018). The question presented upon grant of certiorari concerned the propriety of *cy-près* awards in class-action settlements.

95. Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019).

96. *See* Thole v. U.S. Bank, N.A., 139 S. Ct. 2771 (2019); Thole v. U.S. Bank, N.A., 140 S. Ct. 1615 (2020).

B. FEDERAL CLAIMS IN STATE COURTS

Yet despite these Article III obstacles to federal claims being heard in federal court, many sorts of claims implicated by *Spokeo* are still viable—in *state* court. In fact, in the wake of *Spokeo*, FCRA claims increasingly are being brought in state courts.[97] Although the Ninth Circuit held on remand that the plaintiff in *Spokeo* adequately pleaded standing,[98] lawyers for other plaintiffs bringing similar claims have already begun suing in state court.[99] For example, 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.[100]

That shift in forum is made possible by a central feature of our federal court system: plaintiffs generally are free to bring federal claims in state courts, which control their own jurisdiction. 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."[101] Because federal law binds state judges, they must apply it in cases that present it.[102] 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

97. *See* Allison Grande, Spokeo *Helps Consumer Return FCRA Claims to State Court*, LAW360 (Jan. 25, 2017), https://www.law360.com/articles/884799/spokeo-helps-consumer-return-fcra-claims-to-state-court [https://perma.cc/37CS-GJV9] (noting trend).

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

99. *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/usotc-spokeo-idUSKCN18C2DK [https://perma.cc/7CW4-2ELH].

100. *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 [https://perma.cc/6NZK-3MZG].

101. U.S. CONST. art. VI, cl. 2.

102. *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 458 (1990); Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990); Gulf Offshore Co. v. Mobil Oil Corp., 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, 392 (1947); Robb v. Connolly, 111 U.S. 624, 631 (1884); Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("State courts can exercise . . . 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) (Glazier, Masters & Smith eds., 1837) ("When . . . we consider the state governments and the national governments, as they truly are, in the 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.").

constitution was drafted assuming that Congress did not need to create *any* lower federal courts—under the bargain known as the Madisonian Compromise[103]—a fact that highlights state courts as important adjudicators of federal claims in 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' own justiciability rules—for example, standing doctrine under state law.[104]

Subject to the proviso that they may not discriminate against federal claims, states are free to fashion their own jurisdictional rules, which may or may not allow some plaintiffs or claims. The Supreme Court held in the 1989 case of *ASARCO v. Kadish*—to which we will return[105]—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."[106] "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 . . . ."[107]

103. 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. *See* Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 311 (1976) (arguing that the Madisonian Compromise requires state courts to entertain federal causes of action). *But see* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 43 (arguing that the simple account of the Madisonian Compromise is incorrect and that the belief at the time of the framing was that state courts were not empowered to hear all federal claims).

104. 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. *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. N.Y., New Haven, & Hartford R.R., 223 U.S. 1, 59 (1912). For scholarly discussion of the extent of this duty, see generally Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998), which discusses how federal courts might "commandeer" state courts and the implications of this power; Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145 (1984), which explores the role of state substantive law "in protecting the rights of individuals"; and Terrance Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 206–07, which examines power and obligation of state courts to hear federal cases.

105. *See infra* Part II.C.

106. ASARCO v. Kadish, 490 U.S. 605, 617 (1989).

107. *Id.*

Because *ASARCO* was decided in the midst of the revolution in federal standing doctrine that ended with *Lujan*, its reaffirmance that those rules did not apply to state courts is important and enduring.[108] *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

Although federal standing rules do not apply to state courts, state standing law is often a shadow of its federal counterpart.[109] This is surprising. No state constitution imposes the "case or controversy" requirement that the federal Constitution does.[110] Thus, state courts could develop unique justiciability doctrine consistent with their own constitutional text and history.[111]

Instead, state courts regularly define their justiciability rules based on federal law.[112] They grapple with, and ultimately incorporate or reject, federal caselaw when deciding standing cases.[113] Sometimes they do so because litigants urge them to incorporate federal doctrine into state law; other times they do so sua sponte to provide theoretical grounding to a complex and seemingly arbitrary set of holdings.[114]

108. *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).

109. *See, e.g.*, Enright v. Lehmann, 735 N.W.2d 326, 329 (Minn. 2007) (citing and following federal precedent).

110. *See* Hershkoff, *supra* note 14, at 1882–98 (noting the differences in state separation-of-powers systems over time and among states, particularly as compared to the federal government).

111. 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"); *Episode 396: Your Emails, Answered*, *Effectively Wild* (Feb. 28, 2014) (downloaded using Overcast) (answering question from listener Vinit, "If baseball were different, how different would it be? Would it only be slightly different or VERY different?").

112. *See, e.g.*, Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993) ("[W]e look to the more extensive jurisprudential evidence of the federal courts on this subject for any guidance it may yield."); Lee v. Macomb City Bd. of Comm'rs, 629 N.W.2d 900, 905 (Mich. 2001) (referring to federal doctrine of standing to guide ruling).

113. *See* Thomas B. Bennett, State Rejection of Federal Law (unpublished manuscript) (on file with author); *see also, e.g.*, Zeyen v. Pocatello/Chubbuck Sch. Dist., 451 P.3d 25, 36 (Idaho 2019) (Stegner, J., dissenting).

114. *See, e.g.*, Glengary-Gamlin Protective Ass'n v. Bird, 675 P.2d 344, 347–49 (Idaho Ct. App. 1983) (looking to U.S. Supreme Court cases for test of organizational

Regardless of their impetus or motivation for doing so, state courts react to federal standing cases so that the doctrinal lines drawn in federal cases become inscribed in state law—either affirmatively or negatively.[115]

State courts' reaction to *Lujan* shows this pattern well. As discussed in Section A above, *Lujan* was influential in large part because of its concise restatement of doctrine.[116] Because it was easily borrowed, *Lujan* sparked a nationwide reexamination by state courts of standing that reshaped the receptiveness of those courts to claims by plaintiffs who would be barred from federal court for lack of standing.[117]

State courts' varied reception to *Lujan*'s revised standing doctrine led to a kaleidoscope of state standing rules. Figure 1 maps that kaleidoscope.[118] Each state has been categorized along two dimensions: whether it adopted *Lujan* and whether its standing doctrine is constitutional or prudential.

standing); Utsey v. Coos Cnty., 32 P.3d 933, 949 (Or. Ct. App. 2001) (describing the development of Oregon's justiciability doctrine as it formed in parallel with federal doctrine).

115. *See* Bennett, *supra* note 113.

116. *See* Re, *supra* note 56 (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).

117. *See* Bennett, *supra* note 113.

118. 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 8.

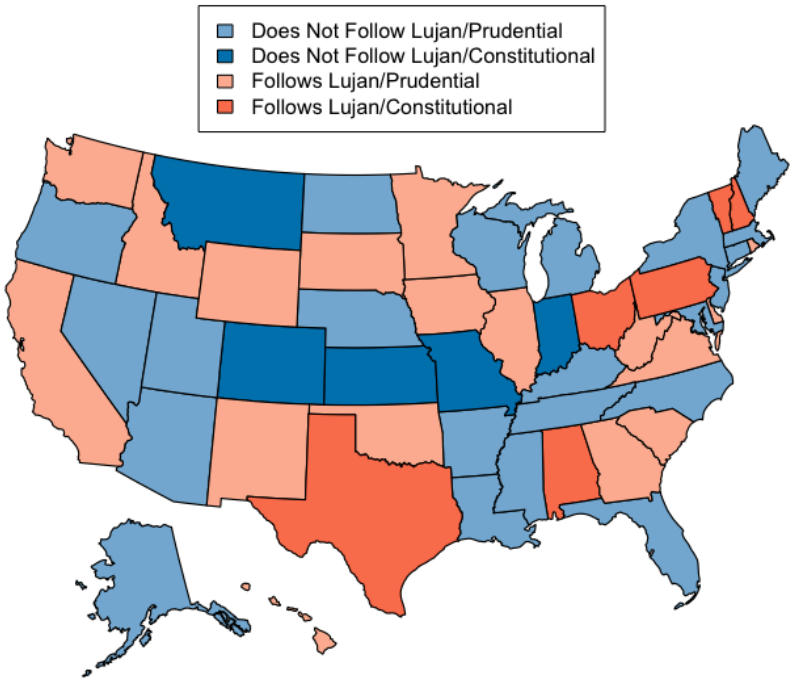

Figure 1: State-Court Adoption of *Lujan*

Because *Lujan* sharpened the injury-in-fact requirement for statutory claims, the roughly half of states that follow its holding are generally more likely to dismiss such claims for lack of standing. But for many reasons—including change in court composition, a general lack of standing cases in state courts, and the politicization of standing as a legal issue—a state's adherence to *Lujan* is no guarantee that *Spokeo*-type claims will be barred there.[119] On the other hand, rejection of *Lujan* does not preclude a state's judiciary from concluding that *Spokeo*-type plaintiffs lack standing. Instead, *Spokeo* gives state courts a new chance to decide whether to follow federal doctrine. Just as with *Lujan*, we should expect states to make different choices—and indeed they already are.

That state-by-state variation creates ambiguity and disuniformity about the availability of a valid forum for federal statutory claims. To be sure, the diversity of state-court jurisdictional rules is

119. *See infra* Part I.D (describing states such as North Carolina, which rejected *Lujan* but bar FACTA claims).

generally praised.[120] But here it not only creates uncertainty about where a suit can be brought but also effectively robs many plaintiffs of any effective remedy.

D. THE PARADOX IN ACTION: THE FACTA WARS

A series of recent cases involving the electronics retailer P.C. Richard & Son makes the paradox's impact clear in two ways.[121] First, they highlight the practical problems that plaintiffs can face in finding a valid forum in the wake of *Spokeo*. Second, they show how *Spokeo*'s reach extends beyond FCRA to many other types of federal statutory claims. In particular, these suits asserted claims under the Fair and Accurate Credit Transactions Act of 2003 (FACTA)[122] alleging that the retailer had included too much of their credit card information on

120. *See, e.g.*, Sassman, *supra* note 8; Schapiro, *supra* note 9, at 305 (noting that "[s]tate courts can participate in the implementation of federal rights that might otherwise not be enforced"); Hershkoff, *supra* note 14, at 1854; Elmendorf, *supra* note 9, at 1003 ("It is my contention that state courts can, will, and should adjudicate the federal environmental claims of parties who lack Article III standing."). *But see* Fletcher, *supra* note 9, at 265 ("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 own constitutions differ from the Federal Constitution before following federal precedent.").

For defenses of state court decisions generally declining to follow federal precedent in questions of state constitutional law, see generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174–78 (2018), which argues 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), which notes that many states will "apply their own constitutional provisions in lockstep with federal analogues"; and James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766, which states, "[T]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."

121. *See* O'Shea v. P.C. Richard & Son, LLC, No. 15-Civ-9069, 2017 WL 3327602, at *3–7 (S.D.N.Y. Aug. 3, 2017); Baskin v. P.C. Richard & Son, LLC, No. OCN-L-911-18 (N.J. Super. Ct. App. Div. Jan. 17, 2019).

122. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108–159, 117 Stat. 1952 (codified as amended in scattered sections of 15 U.S.C.); *see also* 15 U.S.C. § 1681n(a) (creating cause of action).

retail receipts.[123] FACTA, like the FCRA, creates a private cause of action and an entitlement to statutory damages plus attorney's fees.[124]

The plaintiffs filed their first suit in federal court in their home state of New York, where they faced the standing barrier erected by *Spokeo*.[125] Because the only injury the plaintiffs alleged was the improper receipt—and not any of its concrete consequences—P.C. Richard & Son moved to dismiss for lack of injury-in-fact.[126] Based on *Spokeo* and its progeny, the federal court dismissed the claims without prejudice for lack of standing.[127]

After being thrown out of federal court, the same plaintiffs refiled their claims in New Jersey state court, where liberal standing rules prevail.[128] The complaints were substantially the same.[129] In their new suit, the plaintiffs claimed injury from an "increased risk of identity theft and credit and or debit card fraud."[130] That was enough to clear the standing bar in New Jersey state court.[131]

But there was another problem with the suit in New Jersey: personal jurisdiction.[132] Now that they were suing outside their home forum, the plaintiffs' residence was key. 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.[133] As a result, the New Jersey court dismissed the claims for lack of personal jurisdiction over the New York-resident defendant.[134]

123. *See O'Shea*, 2017 WL 3327602, at *1–2.

124. *See* 15 U.S.C. § 1681n(a) (listing damages that offender may be liable for).

125. *O'Shea*, 2017 WL 3327602, at *2.

126. *See id.* at *1.

127. *See id.* at *8 n.2.

128. *See* Baskin v. P.C. Richard & Sons, LLC, No. OCN-L-911-18 (N.J. Super. Ct. App. Div. Jan. 17, 2019). 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. 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. Cnty. 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 v. Realty Equities Corp. of N.Y., 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.").

129. *See Baskin*, No. OCN-L-911-18. The New Jersey complaint added a New Jersey resident as a plaintiff. *Id.* at 2.

130. *See id.*

131. *See id.*

132. *Id.* at 5.

133. *Id.* at 14.

134. *Id.*

This example shows how the viability of federal claims varies both between federal and state court and among various state courts. It also shows why plaintiffs cannot simply shop for the friendliest state forum. The viability of plaintiffs' claims 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. But because they instead shopped in New York, they could not find a court to vindicate their otherwise meritorious claims.

The example also shows how *Spokeo*'s progeny have applied the concreteness requirement to other federal statutory claims. Indeed, FACTA claims relying on pure procedural injury have been widely dismissed or remanded by federal courts in the wake of *Spokeo*.[135] That leaves them mostly shut out of federal court.[136] 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, state courts are split on whether to allow them. In North Carolina, the defense bar won a significant victory when a state trial court cited *Spokeo* to dismiss FACTA claims for failure to allege injury in fact, despite North Carolina's more liberal standing doctrine.[137] Meanwhile, in Illinois, an intermediate state appellate court rejected FedEx's

135. For cases dismissing, see, e.g., *Katz v. Donna Karan Co.*, 872 F.3d 114, 117, 120–21 (2d Cir. 2017); *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727–29 (7th Cir. 2016); *Hendrick v. Aramark Corp.*, 263 F. Supp. 3d 514, 520–21 (E.D. Pa. 2017); *Stelmachers v. Verifone Systems, Inc.*, No. 5:14-cv-04912, 2016 WL 6835084, at *3 (N.D. Cal. Nov. 21, 2016); and *Kamal v. J. Crew Group, 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, 2018 WL 3831337, at *9 (D.N.J. Aug. 13, 2018); and *Mocek v. Allsaints USA Ltd.*, 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 refile in state court.

136. 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, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016))).

137. *See* Miles v. The Co. Store, No. 16-CVS-2346, slip op. at 2–3 (N.C. Super. Ct. 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.").

urging in a FACTA case to adopt *Spokeo*—a significant victory for the plaintiffs' bar.[138] But just weeks earlier a different panel of the same court reached the exact opposite conclusion,[139] 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 only some states. As is common in federal jurisdiction scholarship, 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 look, we have already seen different states reach different conclusions.[140] That means many types of FACTA claims and related statutory-damages suits can be brought only in state courts, and only in certain states. The only federal review is by the Supreme Court—and under the Court's decision in *ASARCO*, to which we turn in a moment—this occurs only if the plaintiff wins in the state supreme court.[141] The perverse result is that state courts have the final say about the meaning of federal law in a considerable swath of lawsuits brought under 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.[142]

138. *See* Duncan v. FedEx Off. & Print Servs., Inc., 123 N.E.3d 1249, 1257 (Ill. App. Ct. 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.").

139. *See* Paci v. Costco Wholesale Corp., No. 1-18-0164, 2018 WL 6829148, at *25 (Ill. App. Ct. Dec. 26, 2018) ("Plaintiff only alleged a mere technical violation of FACTA, which is insufficient to constitute a distinct and palpable injury." (citing *Spokeo*, 136 S. Ct. at 1550)).

140. *Compare* Kline v. Southgate Prop. Mgmt., 895 N.W.2d 429, 437 n.4 (Iowa 2017) (rejecting *Spokeo*), *with* Corozzo v. Wal-Mart Stores, Inc., 531 S.W.3d 566, 574–76 (Mo. Ct. App. 2017) (embracing *Spokeo*).

141. *See infra* Part II.C.

142. Interest analysis is a useful tool for analyzing questions of case allocation between courts of different sovereigns, including federal and state courts. *See, e.g.*, Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 149–58 (2009) (analyzing the question of jurisdictional allocation through the lens of litigant-specific and systemic interests); John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV.

A. PLAINTIFFS' COSTS

For plaintiffs and prospective plaintiffs, the paradox has three main costs. First, at the very least, they lose access to the federal forum. Scholars disagree about the relative competence of state versus federal courts.[143] Regardless of general competency, however, federal judges have more experience and knowledge of, and sympathy for,

247, 292–300 (2007) (assessing sovereign interests in the context of case allocation); *see also* Friedman, *supra* note 5, at 1235 ("[I]nterest analysis is common in federal jurisdiction law and scholarship."). Of course, interest analysis also plays a key role in the *Erie* question of whether state or federal law governs questions of mixed substance and procedure. *See generally* Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415 (1996) (seeking to accommodate both federal and state interests); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) (balancing state interests against countervailing federal interests); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 189–202 (1980) ("[A] successful Rules of Decision Act balancing test must carefully identify and assign weight to the federal and state interests to be considered on each side of the balance."). Finally, interest analysis undergirds the Restatement (Second) of Conflict of Laws, which seeks somewhat in vain to create a set of forum-neutral principles for choice-of-law problems. *See generally* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS (1991) (charting the history of conflicts approaches).

143. There is an extensive literature on the degree of parity between state and federal courts at adjudicating federal constitutional claims. Much of that literature discusses whether federal or state courts are superior at protecting individual liberties. *Compare, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1116 n.45 (1977) (arguing that federal courts are superior fora for vindicating civil rights), *and* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 230 n.86 (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, 607–12 (1999) (arguing that gay rights would never have been expanded to their current ambit absent the availability of litigation in state courts), *and* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 (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 UCLA L. REV. 233, 236 (1988), which argues that the parity debate "is an empirical question . . . for which there can never be any meaningful empirical answer" and advocating for a litigant-choice approach to forum selection in federal constitutional cases. *See also* Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 730 (1981) (arguing that concurrent jurisdiction allows litigant choice to select the forum most likely to "enunciate an expansive vision of the rights of the individual"). Others reject the litigant-choice model in favor of a congressional control model. *See* James M. Fischer, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 U. MIA. L. REV. 175, 179 (1980) ("The question of access to a court is a functional component of the demands of our political process. Such a question must address the issue of political responsibility for deciding where certain cases are to be decided because where cases are decided will often have a profound impact upon how they are decided.").

federal statutory claims—and are collectively better suited to ensure uniform interpretation of federal laws—than their state counterparts.[144] Even those who believe the best approach is one that allows litigants to choose their jointly preferable forum for litigating federal claims[145] must admit that foreclosing the federal forum altogether entails certain costs.[146]

Second, and worse, 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 able to grant the relief to which Congress has entitled them. Here the calculus is not one of forum choice or parity but of raw access to justice. For most residents of say, North Carolina,[147] FACTA's prohibition on including full credit card numbers on receipts might as well not exist.

The final cost imposed on plaintiffs derives from the arbitrariness and uncertainty of making the availability of a remedy for federal statutory grievances turn on state justiciability rules. Most potential plaintiffs have no idea whether they live in a state that has rejected

144. *See* Redish & Muench, *supra* note 103, at 312 ("[S]tate court adjudication of certain federal causes of action might threaten the evolution of federal rights because state judges often lack the expertise to deal with problems unique to federal law."); 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) ("[A] court's level of expertise in and familiarity with a sovereign's body of law will be in direct proportion to the amount of time it devotes to interpretation of that law."); William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 893, 906–07, 912 (1967) (discussing federal courts' expertise in, and sympathy toward, federal law as a general matter); AM. L. INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164–67 (1969) (citing the relatively larger number of writs of certiorari issued to state courts than lower federal courts in FELA cases, over which state and federal courts had concurrent jurisdiction, suggesting federal courts had greater expertise in federal law even where state courts regularly adjudicated federal claims).

145. *See generally* Chemerinsky, *supra* note 143 (looking at "practical implications" of having federal courts "provide an alternative forum for the vindication of constitutional rights").

146. The literature on the desirability of general federal-question jurisdiction intones what Gil Seinfeld has called a "bias-uniformity-expertise" mantra. Seinfeld, *supra* note 142, at 97 & n.4 (collecting citations); *see also* David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 268, 268 (1969) ("Federal judges have relative expertise in dealing with federal law; uniform interpretation is promoted by federal jurisdiction; state courts may be hostile to federal law."). The bias-uniformity-expertise line is echoed in the caselaw. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg. Co., 545 U.S. 308, 312 (2005).

147. *See supra* Part I.D. (describing ruling by North Carolina state court adopting *Spokeo* as a matter of state law in a FACTA case).

Lujan and *Spokeo* in favor of older, more liberal tests. 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. Federal law's dependence on obscure features of state jurisdiction can also blunt its regulatory power. Even when potential plaintiffs have access to attorneys who can advise them about where to file, uncertainty about their chosen forum state's standing rules imposes litigation costs that are a barrier to recovery.

These costs to plaintiffs also should be considered along with recent changes in the law of aggregate litigation that make a plaintiff's choice of forum more fraught.[148] While once plaintiffs might have been able to forum-shop for a state court with liberal standing rules, rules of personal jurisdiction now severely limit that ability. In recent years, the Supreme Court has narrowed the doctrines of both general jurisdiction and specific jurisdiction, restricting plaintiffs' ability to find a valid forum in other ways.[149] Article III standing therefore joins personal jurisdiction in a pincer action to bar plaintiffs from bringing many federal statutory claims in any court.

To show plaintiffs' predicament, recall the P.C. Richard & Son example given in Section D above. Two New York plaintiffs sued in New York federal court, where they were thrown out on standing grounds.[150] When they sued instead in neighboring New Jersey, their

148. *See generally* Alexandra D. Lahav, The New Privity (July 2, 2019) (unpublished manuscript), https://ssrn.com/abstract=3413349 [https://perma.cc/UG9Z-JD52] (charting changes in the law of personal jurisdiction that effectively reintroduce old products-liability defenses under the guise of constitutional due process); Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401 (2018) (documenting restrictive changes in the law of personal jurisdiction but arguing that avenues to jurisdiction survive); Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499 (2018) (critiquing these developments in the law); Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1 (2018) (arguing that personal jurisdiction has arisen as a de facto limitation on aggregate litigation).

149. *See generally, e.g.*, Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773 (2017) (holding that courts must establish specific personal jurisdiction as to each plaintiff's claims in relation to defendant's contact with the forum state); Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (effectively limiting the availability of general jurisdiction to forums in which the defendant is incorporated or headquartered); Walden v. Fiore, 571 U.S. 277 (2014) (finding that defendant's knowledge of plaintiffs' citizenship while committing intentional tort failed to supply the necessary minimum contacts to support specific personal jurisdiction).

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

claims were dismissed for lack of personal jurisdiction.[151] 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 once rejected *Lujan*.[152] 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 unpredictable. That uncertainty—and resulting litigation costs—can be a powerful disincentive to pursuing one's remedies. In any event, 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' COSTS

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.[153] 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.[154] 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 proceed. By robbing the federal district courts of subject-matter jurisdiction over cases involving purely procedural statutory violations, *Spokeo* prohibits defendants from removing such cases.[155]

If anyone prefers to litigate in federal court, it is class-action defendants. Indeed, the defense bar lobbied Congress to pass the Class Action Fairness Act of 2005, which made it substantially easier for class-action defendants to remove state-law class actions with minimal diversity.[156] And conventional wisdom holds—supported by at least one empirical study—that if you ask defense attorneys where they would like to litigate, they will say federal court, while plaintiffs'

151. Baskin v. P.C. Richard & Son, LLC, No. OCN-L-911-18, at *14 (N.J. Super. Ct. App. Div. Jan. 17, 2020), *aff'd*, 228 A.3d 860.

152. *See supra* note 118 and accompanying text.

153. *See* Flango, *supra* note 17, at 71.

154. *See* 28 U.S.C. § 1441(a).

155. *See id.* § 1447(c) (authorizing district courts to "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal" if they determine they lack jurisdiction after removal).

156. *See, e.g.*, Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts*, 156 U. PA. L. REV. 1723, 1747–49 (2008) (analyzing the impact of CAFA on class actions in federal courts).

attorneys generally prefer state court.[157] 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 as in unremoved cases in both state and federal courts.[158]

It is deeply ironic that *Spokeo* bars defendants from removing many federal consumer class actions. It was *defendants* who litigated the issue of Article III standing so vigorously in *Spokeo* and related cases. In the Supreme Court, there were ten 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, and Yahoo!.[159] The merits stage added another seven amici supporting Spokeo.[160] 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.[161]

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 faced multiple federal class-action suits arising out of a hack of its customer data in 2013.[162] Scottrade sought transfer and consolidation before a single Missouri federal district court.[163] That gambit reveals one advantage for defendants of litigating such cases in federal court: ease of centralization and reduced litigation costs. After consolidation, Scottrade sought

157. *See* Flango, *supra* note 17, at 95 & tbl.23 (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).

158. *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").

159. Docket, Spokeo, Inc. v. Robins, No. 13-1339 (U.S. May 5, 2014) (listing amicus briefs).

160. *See id.*

161. *See id.*

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

163. *See id.*

dismissal under Rule 12(b)(1) for lack of standing.[164] Relying in part on *Spokeo*, which was only two months old, the district court granted the motion and dismissed the cases without prejudice.[165] When the plaintiffs in one of the consolidated cases appealed, the Eighth Circuit unanimously affirmed, also relying substantially on *Spokeo*.[166]

Scottrade's lawyers likely celebrated, but their celebration was premature. Two 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.[167] 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.[168] But there was a problem: Scottrade had argued before 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.[169]

The results for Scottrade were decidedly mixed. The Florida federal court transferred the case back to Missouri federal court,[170] which dismissed it on res judicata grounds.[171] But the California federal court agreed with the Missouri court that the plaintiffs lacked standing. Rather than dismissing—as the Missouri court had and as Scottrade wanted—the court held that the appropriate remedy was remand,[172] thus forcing Scottrade 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.'"[173]

164. *See id.* at *2 (arguing that the consolidated complaint should be dismissed for lack of subject matter jurisdiction because the plaintiffs had not suffered an injury in fact and thus do not have standing under Article III).

165. *See id.* at *2, *8.

166. *See* Kuhns v. Scottrade, Inc., 868 F.3d 711, 716, 719 (8th Cir. 2017).

167. Frankel, *supra* note 99.

168. *See id.*

169. *See id.* (explaining how the plaintiffs successfully argued that once the trial judge determined they did not have standing to sue in federal court, the judge should have remanded the class action to state court).

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

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

172. *See* Order Remanding Case, Hine v. Scottrade, Inc., No. 16cv2787, at 4 (S.D. Cal. Jan. 13, 2017).

173. Frankel, *supra* note 99.

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 still need to comply with federal standards backed by the threat of *Spokeo*-like suits rather than face the compliance costs entailed by fifty different jurisdictions.

C. COSTS TO FEDERAL LAW AND FEDERAL COURTS

The potential costs to the federal judiciary and its ability to superintend the development of federal law are grave. We have federal courts so that they can provide expert and uniform interpretation of federal law.[174] By shifting so many federal claims to state courts, the Supreme Court threatens to stymie that purpose. But as with the defendants, the Supreme Court played a key role in the doctrinal developments that created this paradox. For that reason, the Court too must sleep in the bed it made.

But there is reason to think that the consequences of those decisions were unforeseen and unfortunate. One reason to think the costs were unforeseen is that neither *Spokeo* nor *Lujan* even *mentions* the possibility that the types of claims at issue could be brought in state court. The Court's focus in both cases was on the consequences for federal rather than state dockets. As we will see, those unforeseen costs are dear. And though it is tempting 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. The question of case or claim allocation constitutes a primary debate in federal-courts scholarship.[175] And, as here, that debate is mainly one of line-drawing.[176] But regardless of one's

174. *See infra* notes 182–85.

175. *See, e.g.*, Chemerinsky, *supra* note 143 (discussing the "parity" question: whether federal courts are more willing and able to protect constitutional rights than are state courts); Bator, *supra* note 143 (defending state courts as protectors of federal constitutional rights).

176. *See* Bator, *supra* note 143, 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.").

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 solely to state court or vice-versa. Rather, the debates focus on whether federal cases should be heard by state courts simultaneously or never.[177]

The notion that law should be shaped at least *mainly* by the courts of the sovereign that promulgates it is orthodoxy, with good reason.[178] The proposition that federal courts should not decide novel issues of state law is so sacred that it is typically proffered without citation.[179] The converse—that state courts should not be tasked with issuing new interpretations of federal law—is similarly self-evident.[180] Those

177. *See, e.g.*, Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1411, 1467–68 (1999) [hereinafter Schapiro, *Polyphonic Federalism*] (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 decision-making); Ann Althouse, *How To Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1505–06 n.116 (1987) (arguing that state decisions on federal law can "inform and enrich" the ultimate uniform interpretation of those laws by the Supreme Court); 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)).

178. *See* Friedman, *supra* note 5, 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 questions regarding that sovereign's laws."); Redish, *supra* note 144 ("[I]t 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. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415–16 (1964), which notes the abstention doctrine's "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."

179. *See* Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1300 (2003) ("The problem here is that federal courts often get state law wrong because federal judges don't know state law and are not the ultimate decisionmakers on it."); Ann Althouse, *The Authoritative Lawsaying Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush-Gore Litigation*, 61 MD. L. REV. 508, 516 (2002) ("It is axiomatic that the state court has final authority over the interpretation of a state's law."); *see also* Friedman, *supra* note 5, at 1237 n.64 (collecting examples of the proposition given without supporting authority by scholars and the Supreme Court).

180. *See, e.g.*, LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 91 (1994)

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.[181] But as we have seen, the current state of the law threatens to assign a discrete class of federal claims exclusively to state court, frustrating 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."[182] 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.[183] More recent efforts to evaluate the allocation of cases as between state and federal courts have reached the same conclusion. The American Law Institute's landmark 1969 study on the topic concluded that "greater uniformity results

(discussing how actions "arising under" federal law should be channeled to the federal forum); REDISH, *supra* note 142, at 3 ("It seems intuitively appropriate to provide *federal* courts the primary responsibility for adjudicating *federal* law, and leave as the primary function of state courts the defining and expounding of state policies and principles."); Kurland, *supra* note 178 ("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.").

181. *See, e.g.*, Schapiro, *Polyphonic Federalism*, *supra* note 177, 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) (explaining how "federal 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").

182. THE FEDERALIST NO. 80, at 475–80 (Alexander Hamilton) (Glazier, Masters & Smith eds., 1837).

183. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 415–16 (1821).

from hearing [federal] cases in a federal court" and that "lack of uniformity in the application of federal law . . . would be less in the federal courts than in the state courts."[184] Thus, if such uniformity is a primary goal not just of federal courts but also of federal law itself, the present paradox strikes at the very legitimacy of Article III courts.[185]

2. Uniformity and the Limits of Supreme Court Review

Even if one is skeptical of the intrinsic value of uniformity, disuniformity carries instrumental costs.[186] 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 fifty-one interpretations of federal statutes. Those costs would be magnified by the incentives for both

184. AM. L. INST., *supra* note 144, at 165–66.

185. 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)); *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"; and *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring), stating, "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 143, 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* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (questioning the value of uniform interpretation of federal statutory law).

186. *See* Caminker, *supra* note 185 (listing "uniformity" values that could be lost through disuniformity, such as predictable legal obligations and social norms).

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 only because of jurisdictional rules over which they have no control.

Oddly, the possibility of eventual Supreme Court review does not 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 the Court hears each term imposes structural limits on the amount of uniformity that the Court can impose.[187] And even when the Court grants review, it often generates more uncertainty than it resolves.[188]

Second, the Supreme Court is restricted in its ability to ensure uniformity in these kinds of cases because it can only take them on appeal if the plaintiff won in state court below.[189] This odd asymmetry derives from the Court's attempt to grapple with its own Article III justiciability limitations, even though the state courts it reviews follow different rules. In a pair of cases, the Court addressed whether, when cases involving plaintiffs who lack Article III standing appear on its appellate docket, it can hear the case. By giving seemingly contradictory answers in those two cases—*Doremus v. Board of Education*[190] and *ASARCO Inc. v. Kadish*[191]—the Court established asymmetric appellate jurisdiction over state-court judgments involving federal questions.[192] On their facts, *Doremus* and *ASARCO* are essentially indistinguishable.[193] The only difference between them was who won below:

187. *Cf.* David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 161 (2010) (speculating that changes in Court composition led to a decrease in the number of cases heard each year).

188. For example, the Court issued opinions regarding the meaning of the Armed Career Criminal Act's residual clause in 2007, 2008, 2009, 2011, and 2015. *See* Johnson v. United States, 576 U.S. 591 (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). Even after striking the entire clause down as unconstitutional, the cases kept multiplying. *See* Sessions v. Dimaya, 138 S. Ct. 1204 (2018); Stokeling v. United States, 139 S. Ct. 544 (2019); United States v. Stitt, 139 S. Ct. 399 (2018).

189. *See* 28 U.S.C. § 1257.

190. Doremus v. Bd. of Educ., 342 U.S. 429 (1952).

191. ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).

192. *Id.*

193. 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. *Doremus*, 342 U.S. at 430. Likewise, in *ASARCO*, plaintiffs suing as taxpayers sought a declaratory judgment striking down an Arizona statute governing mineral leases. *ASARCO*, 490 U.S. at 610.

in *Doremus*, the defendants won below and the plaintiffs appealed; in *ASARCO*, the plaintiffs won below and the defendants appealed.[194] Yet the cases came out the opposite way: in *Doremus*, the Court held it lacked jurisdiction for want of standing; in *ASARCO*, the Court held that it had jurisdiction despite plaintiffs' lack of standing.[195] The rule established by these two cases is that, when the plaintiff lacks Article III standing, Supreme Court review is available *only* if the plaintiff won in the state court below.[196] The asymmetry goes beyond plaintiffs and defendants to affect the scope of federal rights. Generally, the Supreme Court can only review cases in which the state court has *expanded* the scope of the federal right, because that is typically what happens when a plaintiff vindicates a federal claim. The Court's asymmetric jurisdiction thus ensures that its already-limited supervisory power is also structurally biased against expansive readings of federal law, at least to the extent that the Court is more likely to reverse than affirm when it grants certiorari.[197] Making matters worse, the jurisdictional thicket that inheres in the tension between these cases makes it unlikely the Supreme Court will soon resolve this asymmetry.

194. *Doremus*, 342 U.S. at 430–31; *ASARCO*, 490 U.S. at 610.

195. *Doremus*, 342 U.S. at 434–35; *ASARCO*, 490 U.S. at 633. In *ASARCO*, the Supreme Court dodged the precedent of *Doremus* by identifying a novel injury to support its own jurisdiction to hear the case: the adverse judgment below suffered by the petitioner-*defendant*. *ASARCO*, 490 U.S. at 618–19; *see id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part) ("The Court justifies the result it reaches by saying that the state-court judgment adverse to petitioners is itself a form of 'injury' which supplies Article III standing."). 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 of jurisdiction was proper. *Id.* at 618–19 (majority opinion). 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.

196. *See* Hall, *supra* note 9, at 1272–78 (tracing the development of this asymmetry); *see also* Schapiro, *supra* note 9, at 304 ("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.").

197. The asymmetry 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. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87; *cf.* Hall, *supra* note 9, at 1291 (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).

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 as a backdoor limitation on Congress's Article I power to legislate.[198] 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 substantial obstacle—for any potential solution to the problem.

III. CONCRETE STEPS TO RESOLVE THE PARADOX

As Part II made clear, the paradox created by *Lujan* and *Spokeo* imposes substantial costs. As it happens, however, there is no easy way out of the paradox because any solution must balance five different substantive principles of judicial federalism and the separation of powers. After setting out those principles, this Part examines four possible solutions.

A. CORE PRINCIPLES OF FEDERAL JURISDICTION

Five core principles of federal jurisdiction are implicated by the *Spokeo* paradox.

198. *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 (1993) ("If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional. . . . [B]ut the conclusion that Article III limits congressional power can hardly be regarded as remarkable."); Fletcher, *supra* note 30, at 233 (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").

First is the notion of legislative supremacy, the idea that Congress enacts the content of statutory law and that judges are constrained by that content.[199] In the language of economics, this principle maintains that "[j]udges must be honest agents of the political branches."[200] At the very least, legislative supremacy requires judges not to contradict clear statutory text. To be consistent with this principle, any solution to the paradox must avoid eliminating, altering, or adding elements to a congressionally enacted statutory cause of action.

Second, any solution to the paradox must respect the distinction between jurisdiction and a decision on the merits.[201] In the traditional formulation in federal courts, jurisdiction is about the power of the court to issue a judgment in a particular dispute, while merits is about whether a claimant's asserted legal right is valid. Many consequences flow from the jurisdiction-merits characterization, the most notable of which here are that jurisdictional elements are unwaivable and, at least in theory, must be raised by the court sua sponte if unaddressed by the parties.[202] To track the distinction between jurisdiction and merits, then, a solution to the paradox should avoid treating Article III

199. *See, e.g.*, Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281 (1989) ("It is a commonplace that, apart from constitutional issues, judges are subordinate to legislatures in the making of public policy."). *But see* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 322 (1989) (challenging a thoroughgoing view of legislative supremacy).

200. Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984).

201. *See, e.g.*, Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 56 (2008) ("[W]hether a particular question is jurisdictional or not means a great deal. The problem is that determining whether a particular issue is jurisdictional is often difficult."); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 662 (2005) ("Two consequences flow from the characterization of a particular fact as jurisdictional or merits-related. The first is procedural—the time and manner in which that fact is resolved in the adjudicative process. The second is formalist—Congress treats jurisdiction and merits differently in its various statutory enactments and, in a formalist framework, distinct concepts should be addressed in a distinct manner." (footnotes omitted)). *But see* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1622 (2003) ("Jurisdiction is ultimately about the legitimacy of any resulting judgment, whether we want to speak of normative legitimacy or sociological legitimacy. The merits are also ultimately about the legitimacy of any resulting judgment. There is nothing about either one that necessarily sets it apart from the other." (footnotes omitted)).

202. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) ("[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("[A] court . . . will raise lack of subject-matter jurisdiction on its own motion.").

standing, a jurisdictional requirement, as an element of the statutory cause of action, a merits requirement.[203]

The third principle is the one that traditionally animates federal standing doctrine: the federal judiciary can only decide actual controversies.[204] This limit derives from federal separation-of-powers principles.[205] Translating those abstract principles into concrete guidance is difficult, but standing may be taken broadly to promote the separation of powers by limiting the judicial branch to its appropriate role, both in terms of institutional competency and in terms of not intruding on the traditional bailiwick of the other branches.[206] Respect for this principle therefore demands that the federal judiciary not be tasked with deciding insufficiently adversarial disputes or engaging in quasi-legislative or quasi-executive action.

The fourth principle implicated by the paradox is the distinct sovereignty of the states, which are free to create their own schemes of separated power.[207] State sovereignty is not mere formalism; it is one essential half of the "double security" promised by our structural, constitutional order.[208] The independence of the states in general and their judiciaries in particular is an important facet of the separation of powers.[209] For example, state courts have always served as the lone

203. *Cf.* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93 (1998) (accusing the dissent of "attempt[ing] to convert the merits issue in this case into a jurisdictional one").

204. *See* Allen v. Wright, 468 U.S. 737, 750 (1984) ("Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'").

205. *See id.* at 752; Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996) (identifying that the "actual injury" requirement encourages separation of powers).

206. *See, e.g.*, F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 684–85 (2017) (cataloging four justifications for standing doctrine derived from separation of powers); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 468 (2008) (documenting three categories of separation-of-powers justifications for standing doctrine); Scalia, *supra* note 23, at 892–93 (arguing that liberalized standing alters the relationships among the coordinate federal branches).

207. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 3 (1998) ("[I]t is the state constitution—and not the federal Constitution—that creates the state government, largely determines the scope of its powers, and distributes those powers among the branches of the state government and between state and locality."); *see also* ALBERT L. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938–1968, at 6 (1970) ("[W]riters of state charters are relatively free to prescribe the structure and authority of state organs.").

208. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

209. *See* A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1357 (1994) (illustrating how interbranch federal conflicts are mitigated by the existence of state courts); *see also* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 500–03 (2012) (highlighting how states' prerogatives enforce the separation of powers).

valid forum for vindicating federal law when Congress has failed to vest in lower federal courts the maximum of federal jurisdiction permitted under Article III. State court independence is made possible because states are free to establish their own systems of separated powers,[210] including by "establish[ing] the structure and jurisdiction of their own courts" and "apply[ing] their own neutral procedural rules to federal claims."[211] As relevant here, due respect for states' separate sovereignty means heeding state courts' unique roles within both the states' own systems of separated powers and the larger federal system.

The fifth and final consideration is the constitutional role of the Supreme Court as the ultimate adjudicator of questions of federal law. Ensuring uniformity of federal law has always been the chief justification for the existence not only of federal judicial power in general but also the Supreme Court in particular.[212] Due respect for this constitutional role demands that the Supreme Court have jurisdiction at least to hear every *type* of federal claim, if not every case implicating federal law. Ideally, the selection of cases for such review would not be systematically biased in ways that would tend to expand or contract the

210. *See* Dreyer v. Illinois, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate . . . is for the determination of the State."); Hershkoff, *supra* note 14, at 1884–86 (describing the variation in state separation of powers). Some commentators argue that the federal Constitution requires some minimum scheme of state separated powers, but they do not contend that any states' schemes fall below that minimum. *See* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 58 (1998) (arguing that a principle requiring separation of state government powers can be inferred from the Constitution); Louis H. Pollak, *Judicial Power and "The Politics of the People*,*"* 72 YALE L.J. 81, 88 (1962) (postulating that, although the Constitution does not require state governments to mirror the federal structure, the Constitution implies that an "idea" of the three branches must exist at the state level).

211. Howlett v. Rose, 496 U.S. 356, 372 (1990); *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.").

212. *See* THE FEDERALIST NO. 80, *supra* note 182, at 476 ("The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."); *see also* Charles E. Grassley, *The Role of the Supreme Court*, 26 U. RICH. L. REV. 449, 449 (1992) ("The most important reason to have a Supreme Court is to ensure uniformity in the law."). *See generally* discussion *supra* note 185 (collecting authority for the proposition that ensuring uniformity of federal law is central to the work of federal courts).

ambit of federal law—e.g., in favor of only plaintiffs or defendants.[213] Any solution to the paradox ought therefore to permit the Supreme Court to eliminate variations in federal law from one state to the next without requiring it to ratchet federal law in only one direction.

Using these principles as lodestars, the rest of this Part evaluates four possible ways to solve the problem identified in Part II.

B. REQUIRE STATE COURTS TO APPLY ARTICLE III STANDING WHEN ADJUDICATING FEDERAL CLAIMS

The first proposal in the scholarly literature is to have state courts follow Article III standing doctrine, at least when adjudicating federal claims.[214] Proponents of this approach include Paul Freund, Judge William Fletcher, and Michael Morley, though each advocated for it decades apart.[215] Their proposal has one clear advantage: it

213. *Cf.* Maxwell Mak, Andrew H. Sidman & Udi Sommer, *Is Certiorari Contingent on Litigant Behavior? Petitioners' Role in Strategic Auditing*, 10 J. EMPIRICAL LEGAL STUD. 54, 66–72 (2013) (documenting selection bias in certiorari process attributable to litigant incentives); Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda*, 71 J. POL. 574, 578–90 (2009) (documenting selection bias in certiorari process attributable to Court's desire to avoid congressional retribution).

214. *See* Fletcher, *supra* note 9, at 265 ("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 A. Freund, *The Supreme Court, 1951 Term—Foreword: The Year of the Steel Case*, 66 HARV. L. REV. 89, 95 (1952) ("Would it not be sounder practice in such cases [as *Doremus*] to treat the standing of the complainants as itself a federal question . . . ?"); Morley, *supra* note 9, at 596–603 (identifying three reasons why state courts "should presume that causes of action created by federal statutes are limited to litigants with Article III standing"); Ralph F. Bischoff, *Status to Challenge Constitutionality*, *in* SUPREME COURT AND SUPREME LAW 26, 35 (Edmond Cahn ed., 1954) (transcribing the remarks of Professor Paul Freund during a discussion of *Doremus*); William P. Murphy, *Supreme Court Review of Abstract State Court Decisions on Federal Law: A Justiciability Analysis*, 25 ST. LOUIS U. L.J. 473, 498 (1981) ("[J]usticiability of all federal issues in state or federal courts should be controlled by article III principles."); Jonathan D. Varat, *Variable Justiciability and the* Duke Power *Case*, 58 TEX. L. REV. 273, 311–13 (1980) (discussing the strengths of "Professor Freund's appealing suggestion that the Court should vacate state court decisions of federal law rendered in non-article III proceedings"); Katz, *supra* note 9, at 1317 ("[S]tate courts should abide by federal standing requirements to enforce federal causes of action consistently with federal courts."). *But see* Elmendorf, *supra* note 9, at 1006–08 (arguing against such a proposal in the context of federal environmental law); Stern, *supra* note 9, at 94 ("[A]ltering state standing rules would change how responsibility is divided between the coordinate branches of the state government.").

215. *See* sources cited *supra* note 214. Judge Fletcher and Professor Freund were spurred to the suggestion by the decisions in *ASARCO* and *Doremus*, respectively. *See*

eliminates the phenomenon of federal claims that can be brought only 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 standing issue. 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 this proposal's efficacy in resolving the paradox comes at a substantial cost to litigants because it ensures that despite clear congressional intent to the contrary, plaintiffs who suffer purely statutory violations will be without a valid forum for suit. 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.[216] Even before analyzing this proposal on its own terms, then, we should ask whether resolving the paradox is worth nullifying otherwise valid statutory claims.

Even if those larger concerns could be met, the details pose more intractable problems. In particular, *how* are we to compel a state court to 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.[217] 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

Fletcher, *supra* note 9, at 264 (citing *ASARCO*); Freund, *supra* note 214 (citing *Doremus*).

216. *See* Pierce, *supra* note 198, at 1179 (analyzing *Lujan* and determining that Article III standing has been transformed into "a judicially enforceable limit on congressional discretion").

217. *See* Fletcher, *supra* note 9, at 294–302 (discussing the implementation of a common case-or-controversy standard).

decisio[ns] on questions of federal law, [and to] require the adoption of" such doctrine by state courts.[218]

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 difference in federal and state standing law.[219] 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.[220] In the second half of the twentieth century, however, he claims that there was a convergence between federal and state practice, which resulted in *ASARCO*'s restoring partial Supreme Court review of state court judgments even when the plaintiff lacked Article III standing.[221] Given that historical background, Judge Fletcher argues for applying Article III standing for three reasons: (1) to ensure quality of adjudication 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."[222] 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 through the Supremacy Clause.[223]

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 Section I.B above, the text of Article III by its terms applies only to the judicial power "of the United States"[224]—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."[225] It is hard to understand how the limitations on that judicial power embodied in the case-or-

218. *Id.* at 303.

219. *See id.* at 267–69.

220. *See id.* at 275–79.

221. *See id.* at 281–82.

222. *See id.* at 282–84.

223. *See id.* at 286–87.

224. U.S. CONST. art. III, § 1.

225. *Id.*; *see* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1525 (2020) ("State courts exercise the judicial power of their respective states, and this is perfectly square with the text of Article III, which regulates only '[t]he judicial power *of the United States*.'").

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—rather than those in the Sixth and Seventh Amendments—apply in state courts.[226] Indeed, the Supreme Court has generally rejected attempts to require federal law to carry with it to state courts unincorporated procedural rules.[227] Judge Fletcher anticipates this problem and 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.[228] 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.

The proposal to use Article III to regulate state separation of powers also violates the fourth structural principle identified above: due respect for states as separate sovereigns. If this principle is worth valuing—for example, because states have their own institutions, political traditions, constituencies, and judicial competencies—abrogating it to make state courts mirror federal ones conflicts with those values. The independence of state courts from federal courts is the key premise of judicial federalism. To abolish that difference is in many ways to abolish the structural separateness of state courts.

226. *See* CHEMERINSKY, *supra* note 25, at 503–05 (describing the current state of incorporation doctrine as being limited to the Bill of Rights).

227. *See* Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 221 (1916) (rejecting argument that a FELA action in state court 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").

228. *See* Fletcher, *supra* note 9, 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 to the federal courts.").

2. Statutory Text or Interpretation

Statutory text and interpretation offer no more support for the idea that state courts should be bound by federal standing doctrine when adjudicating federal claims. A statutory interpretation approach would involve reading federal standing doctrine into all federal causes of action as an element of the claim.[229] Indeed, at least one state court has already, though perhaps erroneously, taken this approach.[230] 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. And as discussed in Section I.B above, where Congress is silent on the issue, an established presumption supports concurrent jurisdiction, and Congress has long legislated against that background presumption.[231] 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.[232]

Against this view, Michael Morley has recently argued that, despite the lack of statutory text requiring federal standing doctrine in state courts, federal courts should still read federal statutes creating

229. Such a shift would subtly alter how the issue would be litigated in state court, as it could be raised by defendants in a motion to dismiss for failure to state a claim (or an 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.

230. *See* Navigators Ins. Co. v. Sterling Infosystems, Inc., 42 N.Y.S.3d 813, 814 (App. Div. 2016) (treating standing as a requirement "[t]o make out a claim under the FCRA").

231. *See* discussion *supra* Part I.B; *see, e.g.*, Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990) ("To give federal courts exclusive jurisdiction over a federal cause of action, Congress must . . . affirmatively divest state courts of their presumptively concurrent jurisdiction."); Robb v. Connolly, 111 U.S. 624, 636 (1884) ("In establishing [federal courts], Congress has taken care not to exclude the jurisdiction of the state courts from every case to which, by the constitution, the judicial power of the United States extends."); Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("State courts can exercise concurrent jurisdiction with the Federal courts . . . where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.").

232. Some commentators believe existing federal standing law does just that. *See* Pierce, *supra* note 198 (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.

actions involving statutory damages to include federal standing doctrine as an element of the cause of action.[233] 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 warrants limiting statutory-damages claims on the merits to plaintiffs who would have Article III standing.[234] Second, he argues that the broad grant of federal-question jurisdiction 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.[235]

Neither argument has merit. The constitutional-avoidance argument depends on the incorrect assumption that the creation of a federal cause of action 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; 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 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.[236] Even then, it was subject to a substantial amount-in-controversy requirement, which was jurisdictional and not eliminated until 1980.[237] Before then, it was clear that wide swaths of federal claims were intended by Congress to be heard in state court.[238] So

233. Morley, *supra* note 9, at 585 ("[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.").

234. *Id.*

235. *Id.*

236. *See* Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470.

237. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369.

238. *See id.* (noting that eliminating the amount-in-controversy requirement would allow many more federal question cases to be heard in federal court).

when, as a matter of history, did Professor Morley's proposed presumption take effect? Not in 1789, when the entire edifice of federal statutory law depended on state courts for enforcement.[239] Nor could it plausibly be in 1875, when small-dollar federal claims were intended to be state-court actions.[240] Perhaps it arose in 1980, upon the elimination of the federal-question amount-in-controversy requirement.[241] But if so, it is not clear why courts should apply that new presumption to statutes that were enacted *before* 1980—such as FCRA, the statute at issue in *Spokeo*—which was first enacted in 1970.[242]

As a matter of constitutional precedent, 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.[243] 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. Without some change in the law or indication from the Supreme Court or Congress, there is little basis to invent new presumptions that upset the balance of judicial federalism.

Reading additional doctrinal elements into statutory causes of action also conflicts with the first principle outlined above: legislative supremacy, or the idea that courts should act as faithful agents of legislatures when reading statutes. It is one thing for federal courts to abnegate power to hear cases outside their jurisdiction. Indeed, judges denying themselves the power to hear cases out of due respect for the appropriately limited role of the federal judiciary has a long and proud tradition.[244] But it is quite another thing for those same

239. Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 56 (1975) ("The possibility that Congress would decide not to create lower federal courts was naturally inherent in the Madisonian Compromise. Thus it presumably was Madison's view—as it clearly was Rutledge's—that in such an event state courts would be able to provide adequate remedies to litigants with federal claims.").

240. *See* Jurisdiction and Removal Act of 1875, § 1 (creating general federal question jurisdiction subject to an amount-in-controversy requirement of more than $500).

241. *See* Federal Question Jurisdictional Amendments Act of 1980 (abolishing the amount-in-controversy requirement for all federal-question cases).

242. *See* Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970) (codified at 15 U.S.C. § 1681); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544 (2016).

243. See *supra* note 231 and accompanying text.

244. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (holding that the Supreme Court lacked jurisdiction to issue a writ of mandamus because the

courts to arrogate to themselves the power to create novel aspects of substantive law applicable in both federal and state courts. That sort of atextualism must be backed by a very strong substantive value;[245] yet, for the reasons discussed above, no such value applies here.

Professor Morley's proposal also appears to collapse the distinction between jurisdiction and merits in arbitrary ways, violating the second structural principle outlined above. Because Article III standing is a jurisdictional requirement only applicable in federal court, the only way a court could read it into statutory text would be by deeming it to be element of the cause of action on the merits. That elision obscures important questions about the practical effects of his proposal. 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?

3. Federal Common Law

Nor can federal common law justify 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—violating the principle of legislative supremacy—but its limited enclave also lacks the sweep to do the job.[246] 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 essential to the federal statutory right, and therefore state courts must apply them when adjudicating that right.[247] And while some

Judiciary Act of 1789, which granted such authority, violated Article III of the Constitution). *But cf. id.* at 180 (establishing that the federal judiciary's power to declare acts of Congress void was unconstitutional).

245. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 537 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) ("Substantive canons are presumptions, clear statement rules, or even super-strong clear statement rules that reflect judicial value judgments drawn from the common law and from constitutional law (created by judges), as well as from statutes themselves (as understood and interpreted by judges).").

246. *See* Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1420 (2017) ("Federal courts generally lack the power to make substantive rules of decision in diversity cases where, were the case brought in state court, a rule of state law would apply.").

247. *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. Ry. Co., 319 U.S. 350, 354 (1943))); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 218 (5th ed. 2007) ("If the

have suggested that federal standing law qualifies for reverse-*Erie* treatment,[248] the case is flimsy.[249] 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.[250] 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.

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.[251] But state courts are embedded in different systems of separated powers governed by different constitutional texts and different structural considerations.[252] Many state courts might rightly wonder why they must change their jurisdiction to accommodate increasingly restrictive federal jurisdiction. The normative bite of the appeal therefore violates the second structural principle outlined above: the distinct sovereignty of states and their concomitant power to organize their sovereignty as they see fit.

And as a practical matter, appeals to state law will be merely precatory, because the content of state law is determined by state legislatures and courts. And in large part, they have already spoken on the issue—which is how we got the kaleidoscope of state standing illustrated in Part I. So long as some state courts decline the invitation to apply federal standing doctrine as a matter of state law—as the map at Figure 1 in Part II shows they do—a merely prudential appeal will be necessarily incomplete.

C. PERMIT SUPREME COURT REVIEW OF ALL STATE JUDGMENTS INVOLVING FEDERAL QUESTIONS

Matthew Hall has suggested that we restore the original appellate jurisdiction of the Supreme Court to include "*all* state court judgments

federal law expressly specifies the procedures to be used with regard to a particular cause of action, then, of course, states must follow it.").

248. *See* Katz, *supra* note 9, at 1340–49.

249. *See* Hall, *supra* note 9, at 1288–89 (rejecting this notion).

250. *See* CHEMERINSKY, *supra* note 247, at 219.

251. *See* discussion *supra* Part III.A; *see also* discussion *supra* Part II.B.

252. *See* Hershkoff, *supra* note 14, at 1882–98 (noting the differences across various states' separation-of-powers systems over time, particularly as compared to the federal government).

regarding a claimed federal right."[253] 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.[254] If the vice of the paradox at issue is a lack of uniformity of federal law (rather than the other costs catalogued in Section II.B above), and if Supreme Court review is an effective means to ensure such uniformity, this solution would seem to do the trick.

But *Spokeo* changed the calculus.[255] 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 being 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.[256] Because *Spokeo* creates a class of *claims*, not *plaintiffs*, that are barred from federal court, federal district and circuit courts would never have a chance 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 insomuch 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.[257] There is little reason to think they would fare better in disciplining state courts.

253. Hall, *supra* note 9, at 1291.

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

255. Professor Hall's article predates the *Spokeo* decision.

256. 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. Pa. Bd. of Prob. & Parole, 851 A.2d 859, 863–64 (Pa. 2004) (cataloguing how state supreme courts treat federal courts' interpretations of federal law). Connecticut and Maine give deference to such interpretations issued by courts in their respective circuits. *See id.* at 864. "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. *Id.* at 863.

257. *See* discussion *supra* Part III.C.

D. TREAT ALL VIOLATIONS OF STATUTORY RIGHTS AS ARTICLE III INJURIES

Given 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.[258] 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 on, and developed not only by federal courts but also by state courts.[259] For that reason, liberalizing federal standing law at this point risks creating the opposite paradox: state law claims that can be brought only in federal court.

Second, and more structurally, Article III standing doctrine is a constitutional limitation on the power of federal courts. It represents a "constitutional minimum" that is "irreducible" by Congress or any other political actor.[260] Any steps to overrule *Lujan* and all of its progeny therefore requires a change of heart—or of personnel—on the part of the Supreme Court. As a practical matter, such a change seems unlikely given the current composition of the Supreme Court. After all, even *Spokeo* was decided 6–2 by an eight-member Court, and no one on the Court has expressed an inclination or desire to revisit *Lujan*.[261]

Even if one is skeptical of the separation-of-powers values ostensibly animating standing doctrine, we must recognize that such a judgment reflects a desire to trade off one structural value—the separation of powers—for others, such as legislative supremacy. There can be no disagreement that allowing unlimited citizen suits in federal court would require denying the importance of the separation-of-powers concerns proffered by courts and scholars in justifying Article

258. *See, e.g.*, Fallon, *supra* note 30, at 54 (arguing for the permissibility of congressional grants of standing); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1371 (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).

259. *See* discussion *supra* Parts I.C–D (illustrating how state courts have adopted *Lujan* and its progeny).

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

261. The only dissenters in *Lujan* were Justices Blackmun and O'Connor; the only member of the *Lujan* Court still on the bench is Justice Thomas.

III standing.[262] That denial itself reflects a tradeoff among competing structural jurisdiction values.

Nor is such a tradeoff a costless one. Although the exact linkages between Article III standing and the separation of powers are murky,[263] some exercises of judicial power obviously undermine the power of coordinate branches, which is just to say that some wolves come as wolves.[264] Permitting generalized citizen suits to challenge the legality of any government action would threaten to create a judicial veto over every statute, repeal, regulation, or alleged dereliction of duty.[265] Particularly when combined with the tendency of the federal district courts to issue so-called "nationwide" or universal injunctions against the government,[266] 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, the third structural principle outlined above. 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'

262. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 820 (1997) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." (quoting Allen v. Wright, 468 U.S. 737, 752 (1984))); *see also* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 (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, 568 U.S. 398, 408 (2013))).

263. For example, while Heather Elliott has identified "[a]t least three" ways in which standing enforces the separation of powers, F. Andrew Hessick has identified four other separation-of-powers purposes served by standing doctrine. *See* Elliott, *supra* note 206; Hessick, *supra* note 206.

264. *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.").

265. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–97 (1983).

266. *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1067 (2018); Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418 (2017). *But cf.* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924 (2020) (arguing that, contrary to recent scholarship, such injunctions are not novel).

habitats at issue.[267] 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 for Separation of Church and State, Inc.*; *Los Angeles v. Lyons*; *Allen v. Wright*; and *Clapper v. Amnesty International USA*.[268] 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.[269]

E. ELIMINATE CONCRETENESS AS A SEPARATE DIMENSION OF ARTICLE III INJURY

Having determined that particularization has its uses, we must subject concreteness to the same analysis. As we have seen, *Spokeo*'s doctrinal emphasis on concreteness was new. After all, not even 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.[270] 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.[271]

We have also seen how concreteness is the key driver of the paradox. Whereas pre-*Spokeo* standing law combined with variable state standing law 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.[272]

267. Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1991) ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

268. *See* Warth v. Seldin, 422 U.S. 490 (1975); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982); City of L.A. v. Lyons, 461 U.S. 95 (1983); Allen v. Wright, 468 U.S. 737 (1984); Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

269. *See, e.g.*, William Baude, *Standing in the Shadow of Congress*, 2016 SUP. 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).

270. *See* Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014).

271. *See supra* Part I.C.

272. Zachary Clopton has argued that the paradox is no serious problem, and that instead we should view its existence as an "invitation[] to legislators to consider other

Eliminating the concreteness requirement, or at least considering 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.

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 problems, and it does not preclude reversal of *Doremus*.

In practical terms, eliminating the concreteness requirement demands overruling *Spokeo*. As explained above, *Spokeo* necessarily held that concreteness is a distinct doctrinal category and that the Ninth Circuit erred in failing to analyze it separately. Any attempt to collapse concreteness back into particularization must therefore confront the holding in *Spokeo*. Against this idea, William Baude has argued that treating concreteness as satisfied by particularized injuries fits with a more "permissive" reading of Justice Thomas's concurrence in

pathways for adjudication." Clopton, *Justiciability*, *supra* note 9, at 1432. In part, that is because he tells a story in which Congress affirmatively chooses to create statutory rights that are unenforceable in federal court because of Article III. *See id.* at 1465–67 (theorizing why states might create more liberal standing for federal rights, and why Congress might continue to create rights that can only be enforced in some state courts). Of course, as an historical matter, the novel jurisdictional limitation imposed by *Spokeo* and its progeny *postdate* the creation of dozens of statutory causes of action subject to the paradox. *See* FARHANG, *supra* note 15, at 63 (discussing the growth of private enforcement schemes to achieve a regulatory purpose). For that reason, Clopton's framing of the issue is misleading. And even if that were not the case—for example, if Congress continued to create federal statutory-damages actions in the face of an increasingly robust concreteness requirement—the idea that federal courts' refusal to entertain otherwise meritorious federal claims is somehow a friendly invitation to its coordinate branch to imagine a different remedial forum is an odd recasting of interbranch hardball.

Spokeo.[273] Justice Thomas reasoned that, as much as the FCRA created "a private duty owed personally to Robins to protect *his* information," that would be enough for purposes of Article III.[274] 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.[275] Indeed, Baude's admission of the similarity between such an approach and Judge O'Scannlain's reveals the inconsistency between it and the *Spokeo* majority.[276] For that reason, Baude disclaims the necessity of overruling the holding in *Spokeo*, silently or otherwise, to 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. Yet, as this Article has catalogued, those costs are significant, and they are best addressed by overruling *Spokeo* while retaining the requirement of particularization.

CONCLUSION

The paradox of exclusive state court jurisdiction over certain federal claims is a mirror of our procedural values in fashioning a judicial system that accommodates both federalism and the separation of powers. The difficulty of resolving it cleanly reveals the tensions 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.

273. *See* Baude, *supra* note 269, at 231.

274. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1554 (2016).

275. This is perhaps unsurprising, given that Justice Thomas's opinion was a concurrence, not the majority opinion, and his vote was not even pivotal given the six votes for the majority opinion. *See* Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions and Legal Change*, 103 CORNELL L. REV. 817, 847 (2018).

276. Baude, *supra* note 269, at 231.