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The New Standing Doctrine, Judicial Federalism, and the Problem of Forumless Claims

ABSTRACT. The standing doctrine articulated by the Supreme Court in *Spokeo, Inc. v. Robins* and *TransUnion LLC v. Ramirez* bars "inconcrete" statutory-damages claims from federal courts. As state courts also restrict their own standing doctrines, they leave valid federal claims without a forum. This problem of forumless claims leaves litigants without redress, frustrates Congress's legitimate efforts to regulate, and creates tensions in principles of federalism. We argue that the Supremacy Clause requires state courts to hear these claims, and we propose a test for when they must do so that accounts for other doctrinal developments. State courts cannot use state standing rules to leave valid federal claims forumless.

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INTRODUCTION

Federal courts are courts of limited jurisdiction: Article III of the Constitution cabins their subject-matter jurisdiction to certain "cases" and "controversies."[1] Constitutional standing doctrine governs whether a claim constitutes a case or controversy justiciable in federal court. In *Lujan v. Defenders of Wildlife*, the Supreme Court set out a three-part test defining "irreducible constitutional minimum" requirements for Article III standing.[2] To proceed in federal court, plaintiffs must show that they have (1) suffered an actual or imminent injury in fact that (2) is fairly traceable to the conduct of the defendant and that (3) would be redressed by a favorable decision of the court.[3]

Injuries in fact are "concrete and particularized" harms; they "affect the plaintiff in a personal and individual way" and are "'real' and not 'abstract.'"[4] The Court's recent standing cases—*Spokeo, Inc. v. Robins*[5] and *TransUnion LLC v. Ramirez*[6]—mark a new era in Article III standing doctrine focused on policing the metes and bounds of justiciable harms. They are the first cases between private parties in which the Court held that the harms alleged were insufficient for federal-court jurisdiction.[7] In *Spokeo*, the Supreme Court decoupled concreteness and particularity into two discrete requirements and set out guidelines for assessing the concreteness of statutory harms.[8] While a harm need not be tangible in order to be concrete, it cannot be abstract or amount to a "bare procedural violation" of a statute.[9] The Court subsequently explained in *TransUnion* that only tangible harms and intangible harms analogous to harms traditionally recognized at common law are concrete, further narrowing the kinds of statutory claims that can be heard in federal court.[10]

Spokeo and *TransUnion* have been characterized—and we believe misunderstood—by scholars who characterize the cases as imposing "Article III limits on

1. U.S. CONST. art. III, § 2.
2. 504 U.S. 555, 560 (1992).
3. *Id.* at 560-61.
4. Spokeo, Inc. v. Robins, 578 U.S. 330, 339-40 (2016) (citations omitted) (quoting *Lujan*, 504 U.S. at 560 & n.1).
5. *Id.*
6. 594 U.S. 413 (2021).
7. *See* Thomas P. Schmidt, *Standing Between Private Parties*, 2024 WIS. L. REV. 1, 9.
8. *Spokeo*, 578 U.S. at 340-43.
9. *Id.* at 341.
10. *TransUnion*, 594 U.S. at 424-25.

Congress's power to authorize private parties to sue other private parties."[11] This interpretation illustrates the misapprehension that *Spokeo* and *TransUnion* (which we refer to as "the new standing cases") limit Congress's Article I power to create causes of action to the confines of federal-court jurisdiction, the boundaries of which are set by Article III.

Yet this is a view that the new standing cases explicitly reject. As the *TransUnion* Court recognized, to say that Congress cannot confer federal-court jurisdiction over claims for abstract harms is not to say that Congress cannot create a cause of action for them. Writing for the majority, Justice Kavanaugh explained that "[f]or standing purposes, . . . an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law."[12] The Court was clear that, under Article I, "Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations."[13] Article III's injury-in-fact requirement only limits Congress's ability to authorize plaintiffs to bring inconcrete claims "in federal court."[14] The new standing cases thus reaffirm the distinction between Congress's power to create rights and corresponding remedies and Congress's power to confer jurisdiction that Chief Justice Marshall articulated in *Marbury v. Madison*.[15] Article III standing requirements simply reflect the limited jurisdiction of federal courts. But our system also has courts of general jurisdiction: state courts.

Article III's limitations on the subject-matter jurisdiction of federal courts reflect the assumption, under the Madisonian Compromise,[16] that state courts of general jurisdiction would be available to hear federal claims. That assumption is evident in Article III's text, which vests the "judicial power of the United

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11. Schmidt, *supra* note 7, at 83; *see also* Carlos M. Vázquez, *Converse*-Osborn*: State Sovereign Immunity, Standing, and the Dog-Wagging Effect of Article III*, 99 Notre Dame L. Rev. 717, 742 (2023) (interpreting *TransUnion*'s concreteness standard "not as a limit on the jurisdiction of the federal courts, but as a limit on Congress's power to create a cause of action for damages").

12. *TransUnion*, 594 U.S. at 426-27.

13. *Id.* at 427.

14. *Id.*

15. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-63, 175-76 (1803) (recognizing a distinction between Marbury's legal right to his commission and the mandamus remedy, on the one hand, and the Court's ability to assume jurisdiction over his claim under Article III, on the other, and holding a jurisdictional grant beyond Article III's limits unconstitutional).

16. *See infra* Section II.C.1.

States . . . in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[17] The Constitution did not fail to provide for courts of general jurisdiction by leaving the creation of federal courts to the discretion of Congress and by limiting their jurisdiction. Instead, the Constitution delegated this constitutional role to state courts, affirmatively binding "the Judges in every State" to enforce "the Laws of the United States," "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[18] State courts are the constitutional default fora for federal claims.

Consistent with the distinction between courts of limited and general jurisdiction, the Court held in *ASARCO Inc. v. Kadish* that state courts can hear federal claims over which federal courts would lack subject-matter jurisdiction under Article III.[19] In other words, federal standing and state standing need not be coterminous, and Congress's power to create causes of action is not limited by the boundaries of Article III jurisdiction.

Yet state standing requirements vary and increasingly mimic the requirements for Article III standing, leading to an ever-greater number of states in which no court will hear certain federal statutory-damages actions.[20] This trend risks rendering relief contingent on geography or even foreclosing it entirely.

When state courts refuse to hear a cause of action that Congress validly created and for which there is no other forum, they abdicate their constitutional role—undermining the supremacy of federal law, straining the horizontal and vertical separation of powers, and depriving would-be litigants of their statutory rights without due process.

Happily, this is not the law. The best reading of the Supremacy Clause and the Court's precedent applying it to state courts—*Testa v. Katt*[21] and its progeny—requires state courts to exercise jurisdiction over these claims. In other words, the Supremacy Clause forbids state courts from wielding standing rules in a manner that leaves valid federal claims forumless. We argue that the Constitution *affirmatively requires* state courts to exercise jurisdiction over federal claims that (1) are insufficiently concrete for Article III standing and (2) are for violations of private rights, but (3) allege a particularized harm to a private statutory right traceable to the defendant's conduct and redressable by the court and (4) have been created by Congress as a matter of statutory interpre-

17. U.S. CONST. art. III, § 1.

18. *Id.* art. VI, cl. 2.

19. 490 U.S. 605, 617 (1989).

20. *See infra* Section II.A (discussing state adoption of Article III standing requirements).

21. 330 U.S. 386 (1947).

tation. Put another way, we believe that state courts must hear claims between private parties that Congress did in fact create if the claims are insufficiently concrete but otherwise satisfy the criteria for standing in federal court.

Our argument has important practical stakes both for Congress's ability to regulate and for people put at risk by the illicit behavior of others. The stringent standard for concreteness set out in *Spokeo* and *TransUnion* creates concern that the federal judiciary will frustrate legitimate legislative attempts to regulate intangible harms in areas such as credit reporting, data management, and digital privacy.

Even before the new standing cases, standing doctrine was contentious. Critics have decried it as an ahistorical and amorphous doctrine that denies relief to litigants, encroaches on the authority of Congress, and permits courts to use justiciability to achieve policy and political goals or to avoid difficult disputes.[22] *Spokeo* and *TransUnion* have not quieted the skeptics. An age-old metaphysical question asks whether a tree that falls in a forest makes a sound if no one is around to hear it. The Court's new standing doctrine seems, to its detractors, to provide the wrong answer to a high-stakes variation on the same question. To borrow the formulation from Judge Tatel that the *TransUnion* Court cited approvingly, "'If inaccurate information falls into' a consumer's credit file, 'does it make a sound?'"[23] Our solution shows that the Court's new standing doctrine can be interpreted in a way that resolves apparent tensions between principles of federalism, preserves Congress's ability to regulate risk through private enforcement, and protects the rights of litigants.

We proceed in four Parts. Part I describes the doctrinal shift signaled in *Spokeo* and *TransUnion*, which narrowed the definition of concrete harms, establishing a stricter approach to the injury-in-fact requirement. Part II explains how the new standing cases create what we call "forumless claims"—valid federal claims for statutory damages that cannot be brought in any forum due to state standing requirements that increasingly mimic those of the federal courts. Part II also describes the claims most vulnerable to this problem. We argue that when state courts leave valid federal claims forumless, they abdicate their constitutional role as the default fora for federal claims. This role is immanent in the Constitution's text, structure, and history and is integral both to our hori-

22. For some examples of this criticism, see generally Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

23. TransUnion LLC v. Ramirez, 594 U.S. 413, 433 (2021) (quoting Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 879 F.3d 339, 344 (D.C. Cir. 2018)).

zontal and vertical separation of powers and to due process. The problem of forumless claims makes it more difficult for Congress to regulate effectively and for litigants to seek relief, putting pressure on important constitutional principles.

In Part III, we advance a novel argument that the Court's Supremacy Clause precedents require state courts to exercise jurisdiction over forumless claims when Congress requires.[24] These precedents prohibit states from discriminating against federal claims or substantially burdening federal rights, and, correctly understood, permit state courts to decline jurisdiction over federal claims only on the basis of narrowly defined "valid excuse[s]."[25] We read these precedents to require state courts to hear certain federal claims that would otherwise be forumless because the application of state standing rules would fail both the nondiscrimination and burden requirements.

Part IV addresses the administrability of this constitutional obligation. We explain how the obligation can be enforced and propose a test for determining whether the requirement has been triggered. Next, we consider when courts should construe Congress as having directed them to hear these claims. Finally, we respond to concerns about the implications of our argument for the uniformity of federal law.

Our aim in this Note is not to show that the prevailing approach to standing, exemplified in cases like *Spokeo* and *TransUnion*, is right and just and true. Our more modest goal is to show what must follow if we accept the present approach to standing as a durable feature of our legal practice. The counterintuitive upshot of our argument is that these cases can be interpreted to produce a legal system that is on the whole more friendly to plaintiffs and more effective at deterring conduct that Congress has proscribed. Put differently, we aim to

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24. *See* Note, *Standing in the Way: The Courts' Escalating Interference in Federal Policymaking*, 136 HARV. L. REV. 1222, 1237 (2023) (explaining that no response to *TransUnion* has explored mandatory state-court jurisdiction). Other pieces have also considered, but not argued for, our position. Jacob L. Burnett, for example, discusses the general duty of state courts under the Supremacy Clause to hear federal claims as evidence that concerns about the new standing cases are overblown. Jacob L. Burnett, *A Bug or a Feature?: Exclusive State-Court Jurisdiction over Federal Questions*, 170 U. PA. L. REV. ONLINE 147, 160-65 (2022). However, Burnett merely assumes, rather than argues, that "state courts are obliged [under the Court's Supremacy Clause precedents] to open their doors to federal questions and have done so historically." *Id.* at 158. Burnett's analysis considers neither the increasing convergence between state standing requirements and those of Article III, nor the applicability of the valid-excuse doctrine to standing rules under state law. He also omits any discussion of how other constitutional provisions, such as Article II, might delimit the duty of state courts to hear federal claims.

25. *See, e.g.*, *Testa*, 330 U.S. at 392; Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 369-72 (1990); Felder v. Casey, 487 U.S. 131, 143 (1988).

show that even though there may be good reasons to think that the new standing cases were wrongly decided, all is not lost. We offer plaintiffs a new argument: state courts must adjudicate their valid claims when federal courts cannot.

I. THE COURT'S NEW STANDING DOCTRINE

Article III of the Constitution vests the federal judiciary with the power to hear "Cases . . . and Controversies."[26] Plaintiffs must have Article III standing to have a justiciable case or controversy. In *Lujan v. Defenders of Wildlife*, Justice Scalia, writing for the majority, formulated a three-prong test that a plaintiff must satisfy in order to have constitutional standing in federal court.[27] First, the plaintiff must demonstrate an "injury in fact" that is both "concrete and particularized" and "actual or imminent."[28] Second, there must be "a causal connection between the injury and the conduct complained of."[29] Finally, the injury must be redressable "by a favorable decision" of the court.[30] *Spokeo* and *TransUnion* significantly refined the test federal courts use to determine whether a plaintiff has suffered a concrete injury in fact by decoupling concreteness and particularity.[31] We now outline the doctrinal shift in these cases.

A. Spokeo, Inc. v. Robins

Spokeo, Inc. is a "people search engine"[32] that "searches a wide spectrum of databases and gathers and provides [personal] information . . . to a variety of users, including . . . 'employers who want to evaluate prospective employees.'"[33] After discovering that his Spokeo profile contained inaccurate information about him, Thomas Robins brought a class action against the company alleging a violation of the Fair Credit Reporting Act (FCRA) of 1970.[34] FCRA

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26. U.S. CONST. art. III, § 2.

27. 504 U.S. 555, 560-61 (1992).

28. *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

29. *Id.*

30. *Id.* at 561 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38 (1976)).

31. Jacob Phillips, TransUnion, *Article III, and Expanding the Judicial Role*, 23 FEDERALIST SOC'Y REV. 186, 192 (2022).

32. Spokeo, Inc. v. Robins, 578 U.S. 330, 333 (2016).

33. *Id.* at 335-36 (quoting Brief of Respondent at 7, *Spokeo, Inc. v. Robins*, 578 U.S. 330 (No. 13-1339)).

34. *Id.* at 336.

"requires consumer reporting agencies to 'follow reasonable procedures to assure maximum possible accuracy of' consumer reports" and imposes liability on "[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any" individual."[35]

The federal district court dismissed the case for lack of subject-matter jurisdiction, finding that Robins did not have standing because he had failed to plead an adequate injury in fact.[36] The Ninth Circuit reversed, reasoning that "the violation of a statutory right is usually a sufficient injury in fact to confer standing."[37] According to the Ninth Circuit, because Robins alleged that "Spokeo violated *his* statutory rights, not just the statutory rights of other people," and because his "personal interests in the handling of his credit information are individualized rather than collective," Robins's "alleged violations of [his] statutory rights [were] sufficient to satisfy the injury-in-fact requirement of Article III."[38]

The Supreme Court reversed and remanded.[39] On behalf of a six-member majority (with Justice Thomas also concurring in the judgment), Justice Alito explained that the Ninth Circuit erred in addressing only the particularity prong of the injury-in-fact inquiry.[40] It failed to establish that the harm Robins alleged was concrete.[41] For an injury to be concrete, said Justice Alito, it "must be '*de facto*'; that is, it must actually exist."[42] A concrete harm is not "abstract."[43]

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35. *Id.* at 335 (alterations in original) (first quoting 15 U.S.C. § 1681e(b) (2018); and then quoting 15 U.S.C. § 1681n(a) (2018)).

36. Robins v. Spokeo, Inc., No. CV10-05306, 2011 WL 597867, at *2 (C.D. Cal. Jan. 27, 2011), *rev'd and remanded*, 742 F.3d 409 (9th Cir. 2014), *vacated and remanded*, 578 U.S. 330 (2016).

37. Spokeo, Inc. v. Robins, 742 F.3d 409, 412 (9th Cir. 2014), *vacated and remanded*, 578 U.S. 330 (2016).

38. *Id.* at 413-14.

39. *Spokeo*, 578 U.S. at 343.

40. *Id.* at 339-40, 342-43.

41. *Id.* at 334, 339-40.

42. *Id.* at 340.

43. *Id.* The Court remanded *Spokeo* to the Ninth Circuit without addressing whether Robins had adequately alleged an injury in fact. *Id.* at 342-43. However, the Court seemed to doubt that there was a concrete injury in a passage that hints at how the Court might approach future concreteness inquiries. In dicta, Justice Alito remarked:

> A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect

The *Spokeo* Court explained that an injury does not have to be tangible to be concrete.[44] Rather, "both history and the judgment of Congress play important roles" in determining whether an intangible harm is concrete.[45] However, the violation of a statutory right is not automatically an injury in fact. To get into federal court, plaintiffs must demonstrate that they have suffered "a concrete injury even in the context of a statutory violation."[46] A "bare procedural violation" of a statute, "divorced from any concrete harm," is not an injury in fact under Article III.[47] Put simply, a harm is not concrete and therefore sufficient for Article III standing just because Congress has recognized it as a statutory injury in law.

B. TransUnion LLC v. Ramirez

The Court further clarified the concreteness requirement in *TransUnion LLC v. Ramirez*, another case involving a class action under FCRA.[48] Sergio Ramirez sued TransUnion, a credit-reporting agency, for mistakenly listing him as a potential threat to national security, causing an automobile dealership to refuse to sell him a car because he was on a "terrorist list."[49] Contending that the mistake was due to TransUnion's use of faulty software, Ramirez brought suit on behalf of himself and others whom the software identified as national-security threats.[50] Ramirez maintained, among other things, that TransUnion's reliance on the flawed screening program constituted a failure to follow the reasonable procedures required by FCRA to ensure the accuracy of information in his credit file, and he sought statutory and punitive damages.[51]

Many members of the plaintiff class, like Ramirez, had misleading reports disseminated by TransUnion to third parties.[52] Other class members, though,

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zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Id. at 342.

44. *Id.* at 340.

45. *Id.* After *TransUnion*, the role of Congress's judgment in this determination seems to be deciding whether to elevate an analogue of a common-law harm to an injury in law by statute.

46. *Id.* at 341.

47. *Id.*

48. 594 U.S. 413 (2021).

49. *Id.* at 420.

50. *Id.* at 420-21.

51. *Id.* at 421.

52. *Id.* at 417, 421.

merely had misleading information reported in their internal TransUnion files, which were never distributed to anyone outside the company.[53] The Court explained that the 1,853 class members who had misleading credit reports provided to third-party businesses had "demonstrated concrete reputational harm and thus ha[d] Article III standing to sue on the reasonable-procedures claim."[54] The 6,332 class members who *did not* have their misleading internal files sent to third parties, however, had "not demonstrated concrete harm and thus lack[ed] Article III standing."[55] A faulty report, absent dissemination, was not enough for Article III standing, even if the erroneous report was created in violation of FCRA.

The *TransUnion* Court explained that certain harms, such as tangible physical or financial harms, "readily qualify as concrete injuries under Article III."[56] Intangible harms can also be concrete, but they do not automatically become so when Congress legislates against them; to be concrete, an intangible harm must bear "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts."[57]

According to the majority, "[f]or standing purposes . . . an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law."[58] While "Congress may enact legal prohibitions and obligations" and "create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations,"[59] Congress cannot confer standing on a plaintiff who has not suffered an injury in fact.[60] Congress's Article I power to create causes of

53. *Id.* at 417.

54. *Id.*

55. *Id.*

56. *Id.* at 425.

57. *Id.* The implications of this route to Article III standing remain unclear, and lower courts have struggled to apply this standard. *See, e.g.*, Dinerstein v. Google, LLC, 73 F.4th 502, 518-22 (7th Cir. 2023) (examining the new standing cases and finding that "a breach of contract alone—without any actual harm—is purely an injury in law, not an injury in fact"). Time will tell how many intangible claims will be heard in federal court on the strength of an analogy to common-law harms. We do not speculate but confess skepticism that the answer is any more than a handful.

58. *TransUnion*, 594 U.S. at 426-27.

59. *Id.* at 427.

60. *See id.* at 426.

action does not license it to confer federal-court jurisdiction in excess of Article III.[61] "[A]n injury in law is not an injury in fact."[62]

Applying these principles to the case at hand, the *TransUnion* Court concluded that the class members whose information was not distributed to third parties had not shown that they had suffered concrete harm.[63] While the risk of such a harm might have formed the basis of a claim for forward-looking injunctive relief, it could not ground a claim for backward-looking statutory damages in federal court.[64]

Spokeo and *TransUnion* collectively create a standard for concreteness that is much more, well, concrete, than what existed before. This standard drastically limits Congress's ability to confer standing to litigate statutory causes of action for intangible harms in federal court. Criticism of standing doctrine has intensified in the wake of these cases.[65] Most importantly for our purposes, *Spokeo* and *TransUnion* created the problem of forumless claims.

II. THE CONCRETE AND PARTICULARIZED PROBLEM OF FORUMLESS CLAIMS

By restricting access to federal courts, *Spokeo* and *TransUnion* create a class of federal claims that can only be heard in state court, if at all.[66] But state courts have their own jurisdictional rules, including requirements for standing. When state standing requirements mirror federal standards, the doors of federal and state courts alike are closed to valid but "inconcrete" federal claims. This leaves

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61. *Id.* at 425-26.

62. *Id.* at 427.

63. *Id.* at 439.

64. *Id.* at 435-36 (explaining that while "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, . . . a plaintiff must 'demonstrate standing separately for each form of relief sought'" (quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 185 (2000)).

65. *See, e.g.*, Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. Rev. Online 269, 269 (2021) (arguing that *TransUnion* "has the potential to dramatically restrict standing to sue in federal courts to enforce federal statutes"); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. Rev. Online 62, 62 (2021) (arguing that "the U.S. Supreme Court has significantly undermined the effectiveness" and "nullified a key enforcement component of many privacy laws").

66. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that the 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 . . . .").

these valid federal claims "forumless" in states with restrictive standing requirements by depriving plaintiffs of any court with jurisdiction to decide their merits and grant appropriate relief. In this Part, we explain how state discretion creates forumless claims and illustrate the problem's scope and stakes.

A. How State Discretion Leaves Claims Without a Forum

States are generally free to craft their own justiciability rules.[67] The diversity of approaches that this flexibility enables is meant to promote legal innovation and to respect state sovereignty.[68] Yet in exercising this privilege, states have increasingly looked to federal standing requirements for guidance, leaving valid but inconcrete claims without a forum. As Professor Thomas B. Bennett has shown, many states have adopted standing requirements that mirror those of Article III.[69] Twenty-two states have standing rules that parrot language from *Lujan*, including California, Texas, Pennsylvania, and Illinois, to name the four most populous.[70] About half of Americans live in states with standing requirements that parallel Article III, at least insofar as they have adopted *Lujan*.[71] While it remains to be seen whether courts in all of these states will incorporate the new standards set out in *Spokeo* and *TransUnion*, their adoption of *Lujan* suggests they will look to the Supreme Court for guidance in interpreting their own standing requirements.[72]

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67. *Id.*

68. *See generally* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE AGRIC. & NAT. RES. L. 349 (2015) (surveying state-court practices).

69. Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1233 (2021) ("[T]he roughly half of states that follow [*Lujan*] are generally more likely to dismiss [statutory] claims for lack of standing."); *see also* Sassman, *supra* note 68, at 353 & n.17 (noting that twenty-five states follow the *Lujan* test, in part or in full).

70. Sassman, *supra* note 68, at 354-98. The others are, in order of population: Ohio, Georgia, Virginia, Washington, Minnesota, South Carolina, Alabama, Oklahoma, Iowa, New Mexico, Idaho, West Virginia, New Hampshire, Rhode Island, Delaware, South Dakota, Vermont, and Wyoming. *Id.*

71. We get this figure from a rough sum of the population of the states reported by Sassman, *id.*, as having adopted *Lujan*.

72. We do not claim that state courts take themselves to be compelled by the Court's standing doctrine, but only that favorable references to cases like *Spokeo* and *TransUnion* likely indicate that state courts are contracting their own standing requirements in a manner that is likely to create forumless claims. The cases below are meant to illustrate a trend—namely that some states are tightening their own standing requirements—in an impressionistic way.

Already, some state courts are citing *Spokeo* and *TransUnion* to dismiss federal claims that could not be heard in federal court.[73] Courts in Florida,[74] Indiana,[75] Texas,[76] and West Virginia[77] have already endorsed *TransUnion*'s standard for concreteness. *Spokeo* has been favorably invoked by courts in Connecticut,[78] Missouri,[79] Ohio,[80] and West Virginia.[81] In North Carolina, a lower-court judge cited federal cases which in turn relied on *Spokeo* to deny standing for want of a concrete harm.[82] Even in states with standing requirements that are ostensibly more liberal than those under Article III, courts have endorsed the approach to concreteness in *Spokeo*.[83] The U.S. Supreme Court's sharp turn in standing jurisprudence has therefore resulted in restricted access to federal and state courts alike.

For example, a court of appeals in Florida recently cited *TransUnion* favorably in dismissing a claim brought under the Fair and Accurate Credit Transac-

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73. Bennett, *supra* note 69, at 1236; *see also infra* notes 74-86 and accompanying text (discussing examples of state courts' recent use of *Spokeo* and *TransUnion*).

74. Southam v. Red Wing Shoe Co., 343 So. 3d 106, 112 (Fla. Dist. Ct. App. 2022).

75. Serbon v. City of East Chicago, 194 N.E.3d 84, 97 (Ind. Ct. App. 2022).

76. Dohlen v. City of San Antonio, 643 S.W.3d 387, 398 (Tex. 2022).

77. State *ex rel.* W. Va. Univ. Hosps. v. Hammer, 866 S.E.2d 187, 198 (W. Va. 2021).

78. Main St. Acquisition Corp. v. Barlow, No. KNLCV176029169S, 2017 WL 3176307, at *3 (Conn. Super. Ct. June 20, 2017) (endorsing the *Spokeo* standard).

79. Courtright v. O'Reilly Auto., 604 S.W.3d 694, 700 (Mo. Ct. App. 2020) (endorsing the standard for concreteness articulated in *Spokeo*).

80. Smith v. Ohio State Univ., No. 17AP-218, 2017 WL 6016627, at *2-3 (Ohio Ct. App. Dec. 5, 2017) (citing *Spokeo* in holding that Ohio's doctrine of statutory standing does not apply to federal claims that do not establish an injury in fact sufficient for Article III standing).

81. State *ex rel.* Healthport Techs., LLC v. Stucky, 800 S.E.2d 506, 510 & nn.13-14 (W. Va. 2017) (citing *Spokeo* favorably for its definition of concreteness).

82. *See* Miles v. Co. Store, Inc., No. 16-CVS-2346, slip op. at 2-3 (N.C. Super. Ct. Nov. 16, 2017), https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2017/11/Miles-v.-The-Company-Stores.pdf [https://perma.cc/3E5K-NAKD] ("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."). In support of applying a strict standard for concreteness, *Miles* cited, inter alia, *Hendrick v. Aramark Corp.*, 263 F. Supp. 3d 514, 519-21 (E.D. Pa. 2017); *Kamal v. J. Crew Group, Inc.*, No. 15-cv-00190, 2016 WL 6133827, at *2-3 (D.N.J. Oct. 20, 2016); and *Stelmachers v. Verifone Systems, Inc.*, No. 14-CV-04912, 2016 WL 6835084, at *3-4 (N.D. Cal. Nov. 21, 2016). *Miles*, slip op. at 2-3.

83. *See, e.g.*, Bennett, *supra* note 69, at 1236 ("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."); *Healthport Techs.*, 800 S.E.2d at 509-10.

tions Act (FACTA) of 2003.[84] Despite acknowledging that "Florida courts are . . . 'tribunals of plenary jurisdiction'" and therefore not bound by the limits of Article III, the court viewed "federal case law as to standing to be persuasive" and held that litigants cannot be heard when they bring valid but inconcrete federal claims.[85] State courts in Pennsylvania have similarly barred inconcrete FACTA claims.[86]

Commentators on both sides of debates about standing point to the availability of state courts to hear claims that federal courts cannot, and the plaintiffs' bar has pivoted to bringing cases in these fora.[87] The phenomenon that Professor Bennett describes, though, shows that many litigants now risk being frozen out of federal *and* state court alike. Differences in state standing rules lead to differential opportunities for relief when state courts have exclusive jurisdiction over a class of claims.[88]

State jurisdictional discretion risks leaving valid but inconcrete claims forumless, a problem with a wide sweep given the number of states that look to federal requirements for guidance. As we now show, the scope of claims vulnerable to this problem is also broad.

B. Claims Vulnerable to the Problem

After *TransUnion*, a harm is sufficient for Article III standing only if it is tangible or, if intangible, has a common-law analogue.[89] The Supreme Court has given limited guidance on how courts are to distinguish tangible harms from intangible ones or assess whether an intangible harm is sufficiently analogous to one recognized at common law in American courts. Absent clearer guidance from the Supreme Court, it is difficult to predict with certainty the full scope of statutory rights affected by *Spokeo* and *TransUnion*, and academic prognosticators have reached different conclusions about the sweep of the new

84. Southam v. Red Wing Shoe Co., 343 So. 3d 106, 109-12 (Fla. Dist. Ct. App. 2022).

85. *Id.* at 109, 111 (quoting Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 720 (Fla. 1994)).

86. Budai v. Country Fair, Inc., 296 A.3d 20, 27-28 (Pa. Super. Ct. 2023).

87. *See* Roger Perlstadt & Jay Edelson, *Learning the Limits (and Irony) of* Spokeo, LAW360 (Dec. 12, 2016, 11:35 AM EST), https://www.law360.com/articles/871191/learning-the-limits-and-irony-of-spokeo [https://perma.cc/KBG5-LZ8K] (discussing bringing Fair and Accurate Credit Transactions Act claims in state court).

88. Bennett, *supra* note 69, at 1215 ("The kaleidoscope of state-court jurisdictional rules makes the availability of a forum for the redress of many federal claims contingent on geography.").

89. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 424-25 (2021).

doctrine.[90] Lower courts, meanwhile, have taken differing and sometimes counterintuitive approaches to questions the Court has left unanswered, deepening the uncertainty about the impact of the recent standing cases.[91]

For our part, we think that the class of claims at risk of being effectively extinguished by the problem of forumless claims is substantial. The scope of the problem turns on (1) the nature of the interest that a statute protects and (2) how the statutory scheme protects that interest. Some statutes protect interests that are necessarily intangible and therefore arguably abstract, such as dignitary interests. Other statutory schemes proactively protect tangible interests, such as the pecuniary interest against identity fraud, by regulating conduct that jeopardizes those interests *before* a tangible harm materializes. These risk-regulation statutes are also vulnerable under the new doctrine, as the outcome in *TransUnion* demonstrates. Still other statutory schemes have both vulnerabilities, protecting intangible interests against the risk of harm.

Claims already rejected under the new standing doctrine have often involved consumer-protection statutes like FCRA, at issue in both *Spokeo* and *TransUnion*. Like FCRA, claims under FACTA,[92] the Fair Debt Collections Practices Act,[93] and the Telephone Consumer Protection Act (TCPA),[94] along

90. Chemerinsky, *supra* note 65, at 270-71, 284-85 (suggesting that claims under statutes including the Family and Medical Leave Act, the Freedom of Information Act, various titles of the Civil Rights Act of 1964, the Religious Freedom Restoration Act, the Fair Labor Standards Act, and the Administrative Procedure Act might all be vulnerable). On the other hand, litigants continue to pursue these claims successfully. Elsewhere, Daniel J. Solove & Danielle Keats Citron doubt that the Court will pursue the logic of *TransUnion* to its furthest point, but they recognize that "curtail[ing] such a result" would require "selective application" and "questionable distinctions." Solove & Citron, *supra* note 65, at 65.

91. Diana M. Eng, Andrea M. Roberts & Alina Levi, *The Aftermath of 'TransUnion v. Ramirez': An Emerging Circuit Split*, N.J. L.J. (Jan. 3, 2023, 10:00 AM), https://www.law.com/njlawjournal/2023/01/03/the-aftermath-of-transunion-v-ramirez-an-emerging-circuit-split [https://perma.cc/LC5H-PBHA]. The Seventh Circuit, for example, recently held that a breach of contract was insufficient for federal-court standing, despite such a breach itself being sufficient for a suit at common law. *See* Dinerstein v. Google, LLC, 73 F.4th 502, 508 (7th Cir. 2023). This suggests a demanding view of the analogy requirement and a correspondingly broad view of the claims susceptible to the problem of forumless claims. *See* Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 365-74 (2022) (noting the tort-like structure of the new approach to injury in fact).

92. 15 U.S.C. §§ 1601, 1681 (2018).

93. *Id.* § 1692.

94. 47 U.S.C. § 227 (2018); *see also* Spencer Weber Waller, Daniel B. Heidtke & Jessica Stewart, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 375 (2014) (discussing the importance of private enforcement of the Telephone Consumer Protection Act (TCPA)); Sebastian W. Johnson, Note, *A Toothless TCPA: An Analysis of Article III Standing, Personal Jurisdiction, and the Dis-*

with claims relating to data breaches,[95] have already been successfully challenged on standing grounds in several jurisdictions. Such statutes enforce their procedural safeguards for consumers with a private right of action for statutory damages;[96] their protection is effectively nullified when these claims are left forumless.

But the problem of forumless claims is not limited to consumer-protection statutes. For example, lower courts are split on whether testers under the Americans with Disabilities Act have Article III standing, a question the Court declined to answer when it was presented in a recent case.[97] Lower courts have also dismissed various federal claims based on harms such as emotional and economic distress and informational injuries, including claims alleging confusion, lost time, mitigation costs, "loss of credit, loss of ability to purchase and benefit from credit, increased interest rate, loss of mortgage loans, the mental and emotional pain, anxiety, anguish, humiliation, and embarrassment of credit denials," and many other intangible injuries.[98] The Seventh Circuit even recently concluded that breach of contract, without more, was insufficient for Article III standing—despite breach of contract being a canonical common-law harm.[99]

The emerging theme is that statutory rights that protect intangible interests or that regulate risk of harm to an interest, whether tangible or intangible, are vulnerable to standing challenges and being left without a forum. It also remains to be seen what role stare decisis will play as courts apply the new standing doctrine. For example, though strike-notification claims under the Farm Labor Contractor Registration Act have previously sufficed for Article III

juncture Problem's Impact on the Efficacy of the Telephone Consumer Protection Act, 92 U. CIN. L. REV. 1199, 1200 (2024) ("[T]he concrete injury requirement of Article III standing and the recently restricted doctrine of personal jurisdiction combine to effectively render the TCPA toothless.").

95. Caleb A. Johnson, Note, *Data Breach Class Actions: How Article III Standing Analysis Should Evolve After* TransUnion, LLC v. Ramirez, 107 MINN. L. REV. 2249, 2250-51 (2023).

96. 15 U.S.C.§ 1681n (2018) (creating a private right of action for monetary damages under the Fair Credit Reporting Act and the Fair and Accurate Credit Transactions Act); 15 U.S.C. § 1692k (2018) (creating a private right of action for monetary damages under the Fair Debt Collections Practices Act); 47 U.S.C. § 227(b)(3)(B), (5)(B) (2018) (creating a private right of action for monetary damages under the Telephone Consumer Protection Act).

97. Acheson Hotels LLC v. Laufer, 601 U.S. 1, 3-5 (2023) (vacating the case as moot and declining to reach the standing question).

98. Eng et al., *supra* note 91 (citing Demarattes v. Enhanced Recovery Co., No. 20-CV-4722, 2022 WL 4121217, at *4 (E.D.N.Y. Sept. 9, 2022); Nojovits v. Ceteris Portfolio Servs., LLC, No. 22-CV-2833, 2022 WL 2047179, at *1 (E.D.N.Y. June 7, 2022); Gross v. TransUnion, LLC, 607 F. Supp. 3d 269, 273 (E.D.N.Y. June 13, 2022)).

99. Dinerstein v. Google, LLC, 73 F.4th 502, 518 (7th Cir. 2023).

standing, these claims allege harms functionally similar to the procedural injuries in *TransUnion* and may no longer be considered concrete.[100] Even if its precise contours remain unclear, the problem's scope already includes claims brought under a diverse set of consumer-protection, telecommunications, and civil-rights statutes, to name a few.

Informational and privacy rights, which protect inherently intangible interests constituted through legal procedural protections, are especially if not uniquely vulnerable. As Congress increasingly regulates in these areas where the harms are frequently or necessarily abstract, its inability to address these harms effectively through private enforcement becomes more urgent. The Court's standing doctrine thus "has foreboding implications for privacy laws—both enacted and proposed—that employ a private right of action."[101]

Regulating risk through private enforcement is a legitimate legislative aim that is all the more important as our lives are increasingly bound up in intangible interests in a digital world. Laws like FCRA are designed to prevent harm before it materializes by deterring dangerous practices.[102] These statutes force companies—not consumers—to bear the risk associated with their own illicit conduct. But, to borrow from the facts in *TransUnion*, the problem of forumless claims forces litigants to wait until after they are wrongly identified as a terrorist in public before they can seek relief. This underdeters illicit conduct, undercompensates litigants, and undermines Congress's plenary authority to create private rights. Congress did not just give Sergio Ramirez a right against having false information disseminated about him; it gave him a right not to have that false information generated. One eminently sensible reason Congress might have structured FCRA in this way is because it determined that neither injunctive relief alone nor damages for dissemination alone would effectively ensure accurate credit-reporting practices and protect consumers like Ramirez. The problem of forumless claims nullifies this decision.

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100. Chemerinsky, *supra* note 65, at 285. The Farm Labor Contractor Registration Act was repealed and replaced by the Migrant and Seasonal Agricultural Worker Protection Act of 1983, Pub. L. No. 97-470, 96 Stat. 2583 (codified as amended in scattered sections of 29 U.S.C.). However, the new Act contains substantially the same provision. *See* 29 U.S.C. §§ 1821, 1831 (2018).

101. Peter Ormerod, *Privacy Qui Tam*, 98 Notre Dame L. Rev. 267, 299 (2022); *see also* Solove & Citron, *supra* note 65, at 69 (critiquing *TransUnion* based on its implications for enforcing privacy laws).

102. *See* Sande Buhai, *Statutory Damages: Drafting and Interpreting*, 66 Kan. L. Rev. 523, 542 (2018).

To be sure, some lower courts have held that certain risks are sufficient for standing as "imminent" injuries in fact.[103] But this is yet another area of lower-court dissensus resulting from the line-drawing issues under *TransUnion*'s new test.[104] It is a far cry from full recognition of the risk-regulating rights that Congress created.

Our lives are wrapped up in digital records, biometric information, and the like. The problem of forumless claims has high stakes for plaintiffs' access to redress for illicit risk exposure and for Congress's ability to regulate risky behavior effectively. In the next Section, we show that when state courts create this problem, they generate constitutional issues, not just policy ones.

C. Constitutional Dimensions of the Problem

State courts play a unique and important role in our constitutional system of governance as the default fora for federal claims. The essential function of state courts is immanent in the Constitution's text, structure, and history and is integral both to the proper function of the horizontal and vertical separation of powers and to the preservation of litigants' due-process rights.[105] When state courts abdicate their institutional role in our constitutional architecture and create forumless claims, they put these principles in tension with each other and impose costs on plaintiffs, defendants, federal courts, and federal law.[106]

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103. *See, e.g.*, Clemens v. ExecuPharm Inc., 48 F.4th 146, 150 (3d Cir. 2022).

104. For example, district courts in the Ninth Circuit are split on whether pre-*TransUnion* circuit precedent holding that risk of future harm can sometimes constitute an imminent injury in fact remains good law. *Compare* Riordan v. W. Digit. Corp., No. 21-cv-06074, 2022 WL 2046829, at *4 (N.D. Cal. June 7, 2022) (comparing the threat of harm at issue to the threat of harm deemed sufficient in Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010), to reach its conclusion that plaintiffs failed to allege an injury in fact), *with* I.C. v. Zynga, Inc., 600 F. Supp. 3d 1034, 1054 n.15 (N.D. Cal. 2022) ("More fundamentally, in light of *TransUnion*'s rejection of risk of harm as a basis for standing for damages claims, the Court questions the viability of *Krottner* and *Zappos*'s holdings finding standing on this very basis.").

105. Writing in the wake of *Spokeo*, Professor Thomas B. Bennett pointed to the "paradox" of exclusive state-court jurisdiction over "a large and growing number of federal statutory claims" created by the Court's concreteness jurisprudence. *See* Bennett, *supra* note 69, at 1212. He argues that *Spokeo* put five "core principles of federal jurisdiction" in tension. *Id.* at 1250. These include "the notion of legislative supremacy," "the distinction between jurisdiction and merits," the mandate that federal courts "only decide actual controversies," "the distinct sovereignty of the states," and "the constitutional role of the Supreme Court as the ultimate adjudicator of questions of federal law." *Id.* at 1251-53. These coincide with costs to plaintiffs, defendants, federal courts, and federal law. *Id.* at 1237-50.

106. *Id.* at 1215-16.

The problem of forumless claims is therefore not merely a policy problem; it is also a constitutional one.

This Section first provides an account of state courts as default fora based on the text, structure, and history of the Constitution. It then shows how this role is vital to maintaining the separation of powers and due process, demonstrating the constitutional costs of the problem of forumless claims. In the next Part, we argue from precedent that these constitutional problems have a constitutional solution.

1. The Default Status of State Courts

Article III not only limits the subject-matter jurisdiction of federal courts but also leaves the decision whether to create inferior federal courts to Congress. The Constitution commands only that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[107] Congress has the power, but not the obligation, to create any lower federal courts at all.

This feature of our federal judicial architecture emerged from the Madisonian Compromise.[108] It represented a middle ground between the Virginia Plan's proposal that the Constitution directly create a system of lower federal courts and proposals that saw no role for federal trial courts in our system at all.[109] By leaving Congress "the option of choosing whether or not to create lower federal courts," the Madisonian Compromise created our Constitution under the "assumption that the state courts would be open to hear all federal claims."[110] The discretionary existence of federal courts explains and justifies the Constitution's limitations on their subject-matter jurisdiction. In light of Article III's Vesting Clause, "it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States."[111] By remaining agnostic about the existence of federal trial courts, the Constitution gave state courts a central role in upholding the supremacy of federal law. Indeed, Con-

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107. U.S. CONST. art. III, § 1.

108. *See* 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, 52-56 (1975).

109. *See id.* at 52-54.

110. *Id.* at 47.

111. Printz v. United States, 521 U.S. 898, 907 (1997).

gress did not give federal courts jurisdiction over federal questions for nearly a century.[112]

And Article III is not the Constitution's last word on the relationship between federal law and state courts. The Supremacy Clause of Article VI dictates that "the Judges in every State shall be bound" by the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof."[113] There is a textual assumption in the Constitution that federal law—"the supreme Law of the Land"[114]—will be enforced by state judges, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[115] The Constitution contemplates both federal and state courts, limiting the jurisdiction of the former while affirmatively obligating the latter to uphold and enforce federal law.

As Justice Thomas pointed out in *TransUnion*, state courts had no injury-in-fact requirement when they were designated as constitutional default fora for enforcing federal rights.[116] State courts of general jurisdiction have therefore played an essential role in vindicating federal rights from the very beginning, unburdened by the constraints of Article III. They are the presumptive and preferred fora for claims of all kinds.

2. *Implications for the Separation of Powers*

The general jurisdiction of state courts is integral to the horizontal separation of powers between the three branches of the federal government and the vertical separation of powers between the federal government and the states. With respect to the former, state courts' general jurisdiction ensures that Congress's power to make law and create causes of action is not constrained by the limits of Article III jurisdiction. Article III limits Congress's ability to enlarge the subject-matter jurisdiction of federal courts, not its power to create causes of action—as the *TransUnion* majority explicitly recognized.[117] The Court did not deny Congress the ability to create causes of action for abstract harms; it

112. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

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

114. *Id.*

115. *Id.*

116. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 446-47 (2021) (Thomas, J., dissenting) ("At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community.").

117. *Id.* at 426-27 (majority opinion); *see also supra* text accompanying notes 12-14 (discussing the language in *TransUnion* to this effect).

simply held that the creation of these causes of action is insufficient to confer Article III standing and so federal-court subject-matter jurisdiction.

Congress's power to create causes of action flows from Article I, not the Court's grace. It is not the case that, as some claim, "the scope of Congress's Article I power depends exactly on the scope of federal courts' powers under Article III."[118] While Article III limits Congress's power to confer federal-court jurisdiction, Article I gives Congress plenary authority to act within its enumerated powers.[119]

This distinction between Article III's jurisdictional limitations and Congress's Article I power to create causes of action that govern the merits of individual claims is no mere formalism. It is key to "the notion of legislative supremacy, the idea that Congress enacts the content of statutory law and that judges are constrained by that content."[120] We agree that "[t]o be consistent with this principle, any solution to the [problem of forumless claims] . . . must avoid *eliminating*, altering, or adding elements to a congressionally enacted statutory cause of action."[121]

The problem of forumless claims risks collapsing this distinction. When claims are left forumless, the unstoppable force of Congress's Article I power to create causes of action seems to meet the immovable wall of Article III's constraints on jurisdiction. The apparent incompatibility of these constitutional principles is one that critics charge the Court with resolving in its own favor, imposing "a backdoor limitation on Congress's Article I power to legislate."[122]

The safety valve for this horizontal friction in our federal system is the vertical separation of powers organized by the supremacy of federal law. As courts of general jurisdiction, state courts can hear inconcrete federal claims. Justice Thomas remarked upon exactly this fact in his dissent in *TransUnion*. "[S]tate courts," he wrote, "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"; they remain "the sole for[a] for such cases, with defendants unable to seek removal to federal court."[123]

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118. Note, *supra* note 24, at 1240.

119. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) ("[T]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects.").

120. Bennett, *supra* note 69, at 1251.

121. *Id.* (emphasis added).

122. *Id.* at 1250.

123. TransUnion LLC v. Ramirez, 594 U.S. 413, 459 n.9 (2021) (Thomas, J., dissenting) (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989)).

As Justice Thomas notes, the Court recognized the principle that state courts are not constrained by Article III in *ASARCO Inc. v. Kadish*.[124] The *ASARCO* Court explained that the right of state courts to disregard federal standing limitations "follows from the allocation of authority in the federal system."[125] Despite not being bound by Article III, state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law."[126]

That state courts can—as *ASARCO* held—consider federal claims that would not be justiciable in federal court flows from the vertical and horizontal separation of powers under our Constitution. As the majority in *ASARCO* pointed out, "[I]nferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that 'the Judges in every State shall be bound' by federal law."[127] In our system of judicial federalism, state courts are the presumptive fora for legal claims, and federal courts exercise power only "in the last resort, and as a necessity."[128]

State courts also play a vital role in safeguarding due process, as the literature on jurisdiction-stripping makes clear.[129] Supporters of a broad congressional power to strip federal courts of jurisdiction often point to the availability of state courts as a corrective to an overzealous Congress.[130] State courts protect due process by ensuring that some forum is available. Arguments about due process usually focus on constitutional rights "because Congress arguably has power to prevent the adjudication of claims based upon statutorily created rights," which, "[u]nlike rights emanating from the Constitution, . . . exist at the discretion of Congress."[131] From the greater power to create a cause of action flows the lesser, included power to control those rights, subject only to those constraints imposed by the Constitution itself. This includes decisions about which courts of competent jurisdiction can hear statutory claims.

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124. *See id.*

125. *ASARCO,* 490 U.S. at 617.

126. *Id.*

127. *Id.* (quoting U.S. CONST. art. VI, cl. 2).

128. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting Chi. & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

129. *See* Redish & Woods, *supra* note 108, at 56 ("The Madisonian Compromise was based, therefore, on the assumption that lower federal courts need not exist because state courts could always stand in their stead to provide adequate remedies and dispense justice as needed.").

130. *Id.*

131. *Id.* at 76 n.142.

Even in the jurisdiction-stripping context, the applicability of this argument "is lessened by the developing judicial doctrine that significant statutory rights may not be denied without due process of law."[132] That is, for due-process purposes, causes of action, like other federal legal entitlements created by statute, are considered property that cannot be deprived by fiat.[133] So understood, forumless claims create a due-process problem. And whether or not Congress is empowered to create statutory rights without a valid forum to hear them, it is state courts, not Congress, that leave claims forumless in the circumstances we discuss. Federal statutory rights do not exist at the discretion of state courts or legislatures, so states do not even arguably have the lesser included power to control—or deprive litigants of—those rights.[134] To paraphrase Justice Brennan in *Felder v. Casey*, the decision to create these rights is for Congress, not the states.[135] When states deprive litigants of their federal statutory rights, due-process concerns press with full force.

III. STANDING UP FOR THE SUPREMACY CLAUSE IN STATE COURT

The line of cases applying the Supremacy Clause to state courts forbids them from either discriminating against federal claims or substantially burdening federal rights. Under *Testa v. Katt* and its progeny, only a "neutral rule of judicial administration" can be a "valid excuse" for declining jurisdiction over a federal claim.[136] A jurisdictional rule is only "neutral" if it is nondiscriminatory; rules of judicial administration must ensure "equal treatment" of analogous

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132. *Id.*

133. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970) (stating that federal entitlements are subject to due-process protections); Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976) (same); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-30 (1981) (collecting cases for the proposition that causes of action are property for purposes of the Due Process Clause); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 779-81 (1964) (observing that pre-*Goldberg* cases were moving towards the recognition of government largesse as property).

134. Professor Erwin Chemerinsky notes that a due-process problem might arise "if state courts refuse[d] to hear federal constitutional aims in an instance where federal court jurisdiction was precluded," pointing to "numerous cases in which the Supreme Court has held that state courts cannot discriminate against federal claims and refuse to hear cases arising under federal law." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 233 (8th ed. 2021). These are the same cases we rely upon for our argument about statutory claims.

135. 487 U.S. 131, 143 (1988).

136. Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 373-74 (1990) ("unanimously reaffirm[ing]" the principles of federal jurisdiction set out in *Testa v. Katt*); *accord* Testa v. Katt, 330 U.S. 386, 392 (1947).

federal and state claims.[137] This equal-treatment requirement, though, is a necessary, but not sufficient, condition for a valid jurisdictional excuse.[138] Precedent is clear that jurisdictional rules that burden federal rights are not valid excuses for declining jurisdiction, even when they treat analogous federal and state claims equally.[139]

The case law varies in the nomenclature it uses to set out this additional requirement for valid excuses, sometimes treating it as a requirement for neutrality[140] while other times describing it as a requirement that supplements neutrality.[141] But however the requirement is characterized, the doctrinal upshot is the same: valid excuses for declining jurisdiction can neither discriminate against federal law nor effectively burden federal rights. In this Part, we argue that state jurisdictional rules that leave valid federal claims forumless satisfy neither of these requirements. They are, therefore, not valid excuses for declining jurisdiction.

For reasons set out fully in Part IV, our argument is limited to claims (1) that are insufficiently concrete for Article III standing; (2) that assert a violation of a private federal right; (3) that allege a particularized injury traceable to the conduct of the defendant and redressable by a favorable decision of the court; and (4) for which, as a matter of statutory interpretation, Congress has created a cause of action held by the plaintiff.

The conventional view in federal-courts scholarship has long been that "federal law takes the state courts as it finds them."[142] The Constitution preserves states' "distinct sovereignty" by limiting the federal government's ability to commandeer their governments.[143] There is, accordingly, a strong presump-

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137. Haywood v. Drown, 556 U.S. 729, 738 (2009) (observing that equal treatment of federal and state claims is merely necessary but not sufficient for constitutionality).

138. *Id.* ("The [lower court's] holding was based on the misunderstanding that . . . equal treatment of federal and state claims rendered [the statute] constitutional. . . . [E]quality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action.").

139. *See, e.g.*, *Felder*, 487 U.S. at 141; *Haywood*, 556 U.S. at 738.

140. *Felder*, 487 U.S. at 141 ("Nor is [the state rule] a neutral and uniformly applicable rule of procedure; rather, it is a substantial burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority.").

141. *Haywood*, 556 U.S. at 739 ("A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear.").

142. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954).

143. Bennett, *supra* note 69, at 1252; *see also* Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 372 (1990) ("The States thus have great latitude to establish the structure and jurisdiction of their own courts.").

tion that Congress may not interfere with the states' administration of their own court systems. As sovereigns, states are generally free to design their courts—and to set requirements such as standing that govern their courts' jurisdiction—as they see fit.

A strong presumption, however, does not a categorical bar make. While states enjoy "great latitude to establish the structure and jurisdiction of their own courts,"[144] the Court has been clear that this latitude does not permit state courts to decline jurisdiction over a federal claim without a "valid excuse."[145] States can neither discriminate against nor substantially burden federal rights.

Precedent establishes that only "neutral rule[s] of judicial administration" can be valid excuses.[146] At minimum, this means that state courts cannot discriminate against federal claims by refusing to hear a federal claim when they *would* hear an "analogous" claim under state law.[147] The analogy required for competent jurisdiction is loose; state courts hearing state actions at law or suits in equity is enough to trigger an obligation to hear any federal claim for damages or equitable relief, respectively.[148]

When faced with a putatively neutral (i.e., nondiscriminatory) rule of judicial administration, federal courts "must act with utmost caution before deciding that [a state court] is obligated to entertain the [federal] claim."[149] However, the Court has been clear that even a court acting with the utmost caution must invalidate a neutral rule of judicial administration that substantially burdens federal rights.[150] We argue that state standing requirements that create forumless claims impose precisely this kind of impermissible burden.

A. States Cannot Decline Jurisdiction Over a Federal Claim Without a Valid Excuse

The leading case on when state courts must hear federal claims is *Testa v. Katt*.[151] There, a Rhode Island court refused to entertain a claim under the Federal Emergency Price Control Act, which provided for concurrent federal- and

144. *Howlett*, 496 U.S. at 372.

145. *See* Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. 377, 388 (1929); Testa v. Katt, 330 U.S. 386, 392 (1947).

146. *Howlett*, 496 U.S. at 374.

147. Haywood v. Drown, 556 U.S. 729, 740 (2009).

148. *Id.* at 739.

149. *Howlett*, 496 U.S. at 372.

150. Felder v. Casey, 487 U.S. 131, 141 (1988).

151. 330 U.S. 386 (1947).

state-court jurisdiction.[152] The Supreme Court of Rhode Island affirmed the dismissal on the grounds that state courts "need not enforce penal laws of a government which is foreign in the international sense."[153] "The basic premise" of this argument was that state courts have "no more obligation to enforce a valid penal law of the United States than . . . to enforce a penal law of another state or a foreign country."[154]

A unanimous Court disagreed. The Supremacy Clause, Justice Black explained, makes federal law as binding on states as laws passed by states' own legislatures.[155] States "do not bear the same relation to the United States that they do to foreign countries."[156] They accordingly cannot discriminate against federal law.[157] When state courts open their doors to state claims, they commit themselves to hearing similar federal claims.[158]

The *Testa* Court's interpretation of the Supremacy Clause drew on the historical role of state courts in enforcing federal law that we discussed above. As Justice Black emphasized, "The first Congress that convened after the Constitution was adopted conferred jurisdiction upon the state courts to enforce important federal civil laws, and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures."[159] Justice Black admitted that "[e]nforcement of federal laws by state courts did not go unchallenged."[160] The antebellum period featured "[v]iolent public controversies" over "the extent of the constitutional supremacy of the Federal Government."[161] During that time, both "[the Supreme] Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdic-

152. *Id.* at 387-88.

153. *Id.* at 388.

154. *Id.* at 389.

155. *Id.* at 392 ("When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." (quoting Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 57 (1912))).

156. *Id.* at 389.

157. *See* Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 929 (2017) ("[O]nce a state opens its courthouse doors to particular classes of claims, it cannot discriminate against federal claims."); *Testa*, 330 U.S. at 392 (recognizing this foundational principle of nondiscrimination).

158. *See* Vázquez & Vladeck, *supra* note 157, at 929.

159. *Testa*, 330 U.S. at 389-90 (footnote omitted).

160. *Id.* at 390.

161. *Id.*

tion to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so."[162]

These "fundamental issues over the extent of federal supremacy,"[163] though, were resolved by the Civil War. The 1876 decision of a unanimous Court in *Claflin v. Houseman*, wrote Justice Black, teaches "that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."[164] Invoking *Claflin*, Justice Black continued, "If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court."[165]

Testa left open the possibility that state courts could have a "valid excuse" for declining to exercise jurisdiction over federal claims in certain limited circumstances.[166] "[C]onceptions of impolicy or want of wisdom on the part of Congress," however, cannot provide such an excuse.[167] Subsequent decisions have narrowly defined which excuses are valid.

1. A Valid Excuse Must Treat "Analogous" Federal and State Claims Equally

Writing for a unanimous Court, Justice Stevens reaffirmed *Testa*'s nondiscrimination principle in *Howlett ex rel. Howlett v. Rose*.[168] Justice Stevens wrote that "the Courts of the several states must remain open to [federal-law] litigants on the same basis that they are open to litigants with causes of action springing from a different source."[169] He then summarized how the Supremacy Clause applies to state courts:

> Three corollaries follow from the proposition that "federal" law is part of the "Law of the Land" in the State:

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162. *Id.*

163. *Id.*

164. *Id.* at 391 (citing Claflin v. Houseman, 93 U.S. 130, 137 (1876)).

165. *Id.* (quoting *Claflin*, 93 U.S. at 137).

166. *Id.* at 392 (quoting Douglas v. N.Y., New Haven & Hartford R.R. Co., 278 U.S. 377, 378 (1929)).

167. *Id.* (quoting Minn. & Saint Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222 (1916)).

168. 496 U.S. 356 (1990).

169. *Id.* at 372 (quoting Miles v. Ill. Cent. R.R. Co., 315 U.S. 698, 703 (1942)).

> 1. A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse." "The existence of the jurisdiction creates an implication of duty to exercise it."
>
> 2. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source . . . .
>
> 3. When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim.[170]

Only "neutral rules of judicial administration"[171] can excuse a state court from hearing an otherwise-valid federal claim.

The Court's subsequent decision in *Haywood v. Drown* narrowed the class of permissible excuses even further.[172] New York had enacted a law that barred state courts from hearing money-damages claims under either federal or state law against correction officers for actions within their scope of employment.[173] In *Haywood*, the Supreme Court reversed the New York Court of Appeals and held that New York could not bar federal damages claims under 42 U.S.C. § 1983.[174]

After reiterating *Howlett*'s holding that states may not "dissociate" from federal law on the basis of a policy disagreement, the *Haywood* majority articulated the valid-excuse doctrine in even narrower terms than *Howlett*.[175] According to the Court, the fact that the New York law gave "equal treatment" to federal and state law did not make it a valid excuse.[176] What mattered for the purposes of the Supremacy Clause was the state's decision to "create[] courts of general jurisdiction that routinely sit to hear analogous § 1983 actions."[177]

The New York Constitution vests the state's courts with jurisdiction over both actions "at Law" and suits "in Equity," and New York courts could hear

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170. *Id.* at 369-72 (citations omitted) (first quoting *Douglas*, 278 U.S. at 387-88; and then quoting Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 58 (1912)).

171. Vázquez & Vladeck, *supra* note 157, at 936 ("[S]tate courts must entertain federal claims, subject only to neutral rules of administration.").

172. 556 U.S. 729 (2009).

173. *Id.* at 731.

174 *Id.* at 733.

175. *Id.* at 736.

176. *Id.* at 738.

177. *Id.* at 739.

claims for damages under Section 1983 against state officials other than correction officers and for injunctive relief under Section 1983 against correction officers.[178] Because the state courts of New York already entertained claims under the same statute against correction officers and could grant the same kind of relief against other kinds of state officials, the Court held that they were competent to hear damages actions under Section 1983 against correction officers.[179] In the view of the *Haywood* majority, this competence to hear federal claims is all that is required to have an obligation to do so under the Supremacy Clause. The treatment of strictly analogous state-law claims is irrelevant and may, in fact, only further evidence an impermissible policy disagreement with Congress.[180]

At minimum, *Howlett* and *Haywood* set a loose standard for how analogous state and federal claims must be to require state-court jurisdiction; that is, if a state authorizes its courts to hear cases that are even remotely similar to some class of federal cases, exclusion of those federal cases from state court is likely unconstitutional. We follow others below in interpreting these cases to stand for the broader proposition that mere disanalogy is not enough for a state court to decline jurisdiction over a federal claim.[181] On this reading, when states create courts of general jurisdiction, they consent to hearing certain federal claims over which they would have exclusive jurisdiction. In other words, to create courts of general jurisdiction is to accept jurisdiction over a class of state claims adequate to trigger obligations to hear federal claims. To refuse to do so would be to discriminate against federal law.

This reading articulates a similar principle for statutory claims to the one the Court has established for constitutional violations. As Professors Carlos M. Vázquez and Stephen I. Vladeck point out, the Court held in *General Oil Co. v. Crain* that "if a plaintiff has a constitutional right to injunctive relief, a state law denying its courts jurisdiction to entertain an action seeking such relief [is] itself unconstitutional."[182] State courts have "an obligation to entertain a suit

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178. *See id.* at 739-40.

179. *See id.* at 740 ("We therefore hold that, having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy.").

180 *Id.* at 737-39.

181. *See, e.g.*, Vázquez & Vladeck, *supra* note 157, at 929-35 (making a similar argument in the context of habeas review).

182. *Id.* at 937; *accord* Gen. Oil Co. v. Crain, 209 U.S. 211, 226 (1908) ("If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may

seeking that constitutionally required remedy whether or not state law authorize[s] [them] to do so."[183] Our argument interprets the *Testa* line of cases similarly for statutory rights.

A recent Supreme Court decision confirms this understanding. As Professor Vázquez notes, the majority in *Mims v. Arrow Financial Services* opined that "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."[184] In the view of a unanimous Court, state courts can decline jurisdiction over claims under the TCPA only because the statute itself provides that TCPA actions can be pursued "'in an appropriate court of [a] State,' 'if [such an action is] otherwise permitted by the laws or rules of court of [that] State.'"[185] The Court noted that "[w]ithout the 'if otherwise permitted' language, there is little doubt that state courts would be obliged to hear TCPA claims."[186]

2. *A Valid Excuse Cannot Burden a Federal Right*

The Court has rejected the argument that nondiscriminatory (i.e., putatively neutral) rules are always valid excuses, explaining in *Haywood v. Drown* that "the Supremacy Clause cannot be evaded by formalism."[187] Instead, "[e]nsuring equality of treatment is . . . the beginning, not the end, of the Supremacy Clause analysis."[188] The *Haywood* Court invoked *Howlett*'s observation that various "provisions of the Constitution, including the Full Faith and Credit Clause and the Privileges and Immunities Clause . . . compel States to open their courts to causes of action over which they would normally lack jurisdiction"[189] to hold that the Supremacy Clause is no different.[190] Nondiscrimina-

be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution . . . .").

183. Vázquez & Vladeck, *supra* note 157, at 937.

184. Vázquez, *supra* note 11, at 739 (quoting Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 382 n.12 (2012)).

185. *Mims*, 565 U.S. at 371 (alterations in original) (quoting 47 U.S.C. § 227(b)(3), (c)(5) (2018)).

186. *Id.* at 382 n.12 (citations omitted).

187. 556 U.S. 729, 742 (2009).

188. *Id.* at 739.

189. *Id.* at 740 n.7.

tion is therefore necessary but not sufficient for a valid excuse, and jurisdictional rules "cannot be used . . . to undermine federal law, no matter how even-handed [they] may appear."[191]

Howlett and *Haywood* built on cases applying *Testa*'s reasoning to state procedural rules.[192] In *Brown v. Western Railway of Alabama*, the Court held that a state court could not impose stricter pleading requirements on federal claims than would exist in federal court.[193] It rejected the argument "that while state courts are without power to detract from 'substantive rights' granted by Congress . . . , they are free to follow their own rules of 'practice' and 'procedure.'"[194] Putting aside the thorny question of how to distinguish substance and process, the Court explained that a "federal right cannot be defeated by the forms of local practice."[195] State procedure "cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."[196] Failing "to protect federally created rights from dismissal because of over-exacting local requirements" would undermine "desirable uniformity in adjudication of federally created rights."[197]

In *Felder v. Casey*, Justice Brennan's majority opinion reiterated this rationale emphatically, holding that a state court's reliance on the state's notice-of-claim statute to bar a suit brought under a federal civil-rights law was incompatible with *Testa*.[198] He wrote, "The decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the State has no authority to override."[199] The merits of a state's objections to the statute are irrelevant because interference with federal law "is patently incompatible with the

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190. *Id.* ("[T]his theory of the Supremacy Clause was raised and squarely rejected in *Howlett*. . . . We saw no reason to treat the Supremacy Clause differently." (citing Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 382-83 (1990))).

191. *Id.* at 739; *see also id.* at 738 ("[E]quality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action.").

192. *See* Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952); Brown v. W. Ry. of Ala., 338 U.S. 294, 295-98 (1949); Felder v. Casey, 487 U.S. 131, 138 (1988).

193. *Brown*, 338 U.S. at 298-99.

194. *Id.* at 296.

195. *Id.* (citing Am. Ry. Express Co. v. Levee, 263 U.S. 19, 21 (1923)).

196. *Id.* at 298.

197. *Id.* at 299.

198. Felder v. Casey, 487 U.S. 131, 143 (1988).

199. *Id.*

compensatory goals of the federal legislation."[200] Burdening a federal right "is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule."[201] The majority accordingly emphasized that "[f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'"[202]

B. State Standing Requirements Are Not a Valid Excuse for Declining to Hear Inconcrete Federal Claims

The *Testa* line of cases permits states to decline jurisdiction over federal claims only with a valid excuse—a neutral rule of judicial administration that neither discriminates against federal law nor burdens federal rights. State standing rules that leave valid but inconcrete federal claims forumless are both discriminatory and burdensome. First, substance-sensitive or harm-based restrictions on standing are plausibly discriminatory because they second-guess Congress's policy decision to create a cause of action for an inconcrete harm. Second, even if these requirements are facially neutral (i.e., nondiscriminatory), they burden federal rights by leaving federal claims forumless. *Spokeo* and *TransUnion* have created circumstances in which even a court exercising "utmost caution"[203] in the face of neutral rules should find mandatory jurisdiction.

State jurisdictional rules cannot discriminate against federal claims; state courts must therefore hear any federal claims analogous to those they entertain under state law. Even narrowly construed, the relevant precedents establish that only a loose analogy between state and federal claims is necessary for state-court jurisdiction to be mandatory.[204] This prevents states from disguising disagreement with Congress's policy judgment as a putatively neutral, facially nondiscriminatory jurisdictional rule.

As *Howlett* and *Haywood* explained, the "elements of, and the defenses to, a federal cause of action are defined by federal law."[205] When Congress enacts a cause of action for an abstract or procedural harm, states lack the constitutional authority to modify or effectively nullify this decision. So long as state courts

200. *Id.*

201. *Id.* at 144.

202. *Id.* at 150 (quoting *Brown*, 338 U.S. at 298-99).

203. Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 372 (1990).

204. *See supra* Section III.A.1.

205. Haywood v. Drown, 556 U.S. 729, 737 n.5 (2009) (quoting *Howlett*, 496 U.S. at 375).

entertain "the same type of claim" as the federal one at issue, they cannot decline to exercise their jurisdiction.[206]

In *Haywood*, this requirement was met because "Section 1983 damages claims against other state officials and equitable claims against correction officers [were] both sufficiently analogous to petitioner's § 1983 claims."[207] State courts were competent to exercise jurisdiction over § 1983 damages claims against correction officers because they already exercised jurisdiction over claims under the statute for injunctive relief against these officers and for damages against other state officials. The cases that state courts *did* hear were similar enough to the federal cases they *did not* hear that the state jurisdictional rule was invalid.

Standing requirements that prohibit state courts from exercising jurisdiction over valid but inconcrete federal claims are similarly infirm. State courts are competent to hear concrete but otherwise-identical federal claims. That is, they already hear claims with the same elements seeking the same relief. Under *Howlett* and *Haywood*, these state courts hear analogous claims.

The only difference between otherwise-identical concrete and inconcrete federal claims is the kind of harm alleged. But the decision to create a cause of action for an abstract or procedural harm is Congress's; state jurisdictional rules based on concreteness express a policy disagreement with that decision. Congress makes a policy choice when it makes an abstract or procedural harm actionable by elevating it to an injury in law. Under the Supremacy Clause, state courts cannot discriminate against federal law because of its substance or content, including harm alleged or the conduct proscribed. Because these courts already hear analogous claims with the same elements seeking the same relief, they cannot decline jurisdiction because they disagree with the scope of harms for which Congress created a cause of action. State courts would therefore have an obligation to hear FCRA claims like those in *TransUnion* because they already have concurrent jurisdiction over concrete FCRA claims for statutory damages. For the purposes of the Supremacy Clause, this is sufficient to establish the competence of these state courts to hear inconcrete FCRA claims and to bar these courts from declining jurisdiction.

But *Howlett* and *Haywood* can also be read more broadly. On this broader reading, state courts must hear federal claims whether or not they hear analogous state claims. Under *Haywood*, "[f]ederal claims for damages must be entertained if the state has courts of general jurisdiction empowered to entertain

206. *Id.* at 740 n.6 (quoting Martinez v. California, 444 U.S. 277, 283 n.7 (1980)).

207. *Id.*

actions 'at law.'"[208] As a direct consequence, "[i]f federal law recognizes the particular class of claim, the nonexistence of the claim as a matter of state law reflects a state policy in conflict with the relevant federal policy."[209] This is the interpretation of the *Testa* line of cases that Professors Vázquez and Vladeck offer to argue that collateral postconviction review "must be available, in the first instance, in state courts, even if the state has not chosen to provide collateral post-conviction relief for comparable state-law claims."[210]

The rationale extends easily to statutory claims for procedural violations. Federal law instantiates these claims, so state courts that hear actions at law must hear them. This argument, in fact, presents fewer doctrinal impediments than Professors Vázquez and Vladeck's cognate argument in the habeas setting—we need not contend with, for example, *Tarble's Case*.[211]

On this broader reading, state courts of general jurisdiction that open their doors to statutory actions for damages cannot leave federal statutory claims for damages forumless because they are procedural or abstract; doing so would impermissibly burden federal rights, which *Brown*, *Felder*, *Howlett*, and *Haywood* proscribe.[212] Congress has plenary authority to create statutory rights and the elements of and remedies for their violation. Hearing these claims requires state courts to do only what they already competently do in other cases: determine whether the elements are met and so whether the plaintiff is entitled to statutory damages as Congress provided. That state courts already hear concrete claims under the same federal statutes is conclusive evidence of their competence to do so, as is their historical practice of hearing abstract or procedural claims before the innovations in *Spokeo* and *TransUnion*. On this reading, the decision by a state to create courts of general jurisdiction that hear cases "in law" is enough to obligate those courts to hear federal actions at law. The same conclusion follows for claims in equity.

This conclusion harmonizes precedent with the unique role of state courts in our constitutional system. As the constitutional default fora for federal claims, the "Judges in every State" are the primary and presumptive enforcer of supreme federal law, "any Thing in the Constitution or Laws of any State to the

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208. Vázquez & Vladeck, *supra* note 157, at 933.

209. *Id.* at 935.

210. *Id.* at 905-06.

211. *Id.* at 941. *Tarble's Case* held that state courts lack the jurisdiction to issue writs of habeas corpus to federal officials—an example of state courts being forbidden from providing otherwise-available constitutional relief. 80 U.S. 397, 411-12 (1872). In the circumstances that we are concerned with, the Supreme Court has not created an analogous barrier to state courts providing relief in federal statutory-damages cases.

212. *See supra* Section III.A.2.

Contrary notwithstanding."[213] Using state standing rules to frustrate Congress's plenary authority to act within its enumerated powers inverts this constitutional hierarchy.

C. Commandeering and Converse-Osborn

The Supremacy Clause "is not an independent grant of legislative power to Congress" but instead supplies a "rule of decision" that "specifies that federal law is supreme in case of a conflict with state law."[214] Like the Supremacy Clause, the Spending Clause confers no direct regulatory authority but permits Congress to incentivize states to pursue federal aims that fall outside the scope of its enumerated regulatory powers.[215] As the Supreme Court has explained, "The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes."[216]

But neither the Supremacy Clause nor the Spending Clause permits Congress to "commandeer" state legislatures or executives or to "outright coerc[e]" them into serving federal aims.[217] This anti-commandeering doctrine flows from the "dual sovereignty" of federal and state governments under the Constitution, which grants Congress a set of limited legislative powers enumerated in Article I, Section 8, while reserving "all other legislative power[s]" for the states in the Tenth Amendment.[218]

As the Supreme Court explained in *New York v. United States*, "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[219] Congress can preempt state law with federal law but cannot "command a state government to enact *state* regulation."[220] Likewise, Congress can impose "conditions on the receipt of federal funds"[221]

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213. U.S. CONST. art. VI.

214. Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 477 (2018).

215. *See* United States v. Butler, 297 U.S. 1, 53 (1936); Sabri v. United States, 541 U.S. 600, 605 (2004).

216. New York v. United States, 505 U.S. 144, 188 (1992).

217. *Id.* at 161, 166-67, 173, 178-79.

218. *Murphy*, 584 U.S. at 458, 470-71.

219. New York v. United States, 505 U.S. at 166.

220. *Id.* at 178.

221. *Id.* at 167 (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)).

to incentivize states to adopt regulations outside of Congress's enumerated powers, but cannot secure state compliance through "outright coercion."[222] *Printz v. United States* clarified that the anti-commandeering doctrine applies to state legislatures and executives alike, holding that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[223]

"State courts," though, "are a different matter."[224] Even at its most deferential to the states, the Court has affirmed that "Congress can require state courts, unlike state executives and legislatures, to enforce federal law."[225] Though "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs," "the Constitution . . . permit[s]" Congress to "impos[e] . . . an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions relate[] to matters appropriate for the judicial power."[226]

The text, structure, and history of the Constitution explain why the "anti-commandeering doctrine applies 'distinctively' to a state court's adjudicative responsibilities."[227] As the Supreme Court has put it, "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause,"[228] which "refers specifically to state judges."[229] As confirmed by early congressional practice, the "Constitution does not prohibit the Federal Government from imposing adjudicative tasks on state courts."[230] This distinction between state legislatures and executives and state courts "makes sense against the backdrop of the Madisonian Compromise: Since Article III established only the Supreme Court and made inferior federal courts optional, Congress could have relied almost entirely on state courts to apply federal law."[231]

As the Supreme Court has recognized, the obligation of state courts to enforce federal law neither "offload[s] the Federal Government's responsibilities onto the States" nor places state legislatures and executives "under the direct

222. *Id.* at 166.

223. 521 U.S. 898, 925 (1997).

224. Haaland v. Brackeen, 599 U.S. 255, 259 (2023).

225. *Id.* (citing New York v. United States, 505 U.S. at 178-79).

226. *Printz*, 521 U.S. at 907, 925.

227. *Haaland*, 599 U.S. at 288.

228. New York v. United States, 505 U.S. at 178-79.

229. *Haaland*, 599 U.S. at 288 (quoting *Printz*, 521 U.S. at 907).

230. *Id.* at 290.

231. *Id.* at 290-91.

control of Congress."[232] This obligation is "a logical consequence of," rather than a violation of, "our system of 'dual sovereignty' in which state courts are required to apply federal law."[233] Under the Supremacy Clause, "when Congress enacts a valid statute pursuant to its Article I powers, 'state law is naturally preempted to the extent of any conflict with a federal statute.' End of story."[234]

The main objection to our position in the literature mounts an anti-commandeering challenge premised on the view that Congress's Article I powers are structurally limited to the confines of federal-court jurisdiction under Article III.[235] For example, a student note in the *Harvard Law Review* begins by identifying, as we have, the potential for *TransUnion* to frustrate legitimate congressional objectives before briefly considering whether Congress could mandate that state courts hear claims barred by *TransUnion* to avoid such frustration.[236] After all, the author reasons, the Constitution does not require Congress to create any lower courts.[237] This might imply that "if Congress can create statutory rights at all, they must be enforceable in state courts."[238] The greater includes the lesser.

Despite acknowledging the appeal of mandatory state-court jurisdiction, the author ultimately concludes that *Alden v. Maine* forecloses our solution.[239] The *Alden* Court held that states enjoy sovereign immunity in their own courts as well as federal courts, despite the Eleventh Amendment referencing only the latter.[240] According to the note author, dicta in *Alden* establishes that "the scope of Congress's Article I power depends exactly on the scope of federal courts' powers under Article III."[241]

In particular, the *Alden* Court opined that

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232. *Id.* at 291 (quoting Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 474 (2018)).

233. *Id.*

234. *Id.* at 287 (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000)).

235. Note, *supra* note 24, at 1236-41; *see also* Vázquez, *supra* note 11, at 717 ("In recent years . . . the axiom has sometimes operated in the opposite direction: if the federal courts lack the constitutional power to adjudicate cases based on certain types of substantive federal statutes, the legislature must lack the power to enact the statute in the first place.").

236. Note, *supra* note 24, at 1228, 1236-41.

237. *Id.* at 1239 n.135.

238. *Id.* at 1241.

239. *Id.* at 1239.

240. Alden v. Maine, 527 U.S. 706, 712 (1999).

241. Note, *supra* note 24, at 1240.

> [i]t would be an unprecedented step . . . to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress' authority to pursue federal objectives through the state judiciaries exceeds . . . even its control over the federal courts themselves.[242]

This "conclusion would imply that Congress may in some cases act only through instrumentalities of the States."[243]

According to the Court, "[t]he provisions of the Constitution" that make "state courts peculiarly amenable to federal command . . . do not distinguish those courts from the Federal Judiciary."[244] Though the "Supremacy Clause does impose specific obligations on state judges," the Court said, "[t]here can be no serious contention . . . that the Supremacy Clause imposes greater obligations on state-court judges than on the Judiciary of the United States itself."[245]

The position that Congress's legislative powers must have the same measure as the judicial power of the United States is what Professor Vázquez has called a "converse-*Osborn*" argument, following Chief Justice Marshall's opinion in *Osborn v. United States*, on which the dicta in *Alden* relied.[246] In *Osborn*, the Court explained that "the legislative, executive, and judicial powers, of every well constructed government, are co-extensive with each other . . . . [T]he judicial department may receive from the Legislature the power of construing every . . . law [which the Legislature may constitutionally make]."[247] The *Osborn* Court held that Congress's legislative powers determine the scope of the judicial power.[248] As Vázquez puts it, the *Alden* dicta construes Article III as the tail that wags the dog of Article I by cabining the scope of the legislative power to the scope of the judicial power.[249] On this converse-*Osborn* view of standing doctrine, Congress can only create causes of action over which a federal court could constitutionally exercise jurisdiction.

But, in context, the *Alden* dicta cannot be read as endorsing the converse-*Osborn* view. As the student note's author acknowledges, *Alden* turned on "the

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242. *Alden*, 521 U.S. at 752-53.

243. *Id.* at 753.

244. *Id.*

245. *Id.*

246. Vázquez, *supra* note 11, at 717, 720.

247. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818 (1824).

248. *Id.* at 818-19.

249. Vázquez, *supra* note 11, at 720-32.

history and principles behind sovereign immunity."[250] The *Alden* Court linked sovereign immunity to the commandeering of state legislatures and executives, holding that Congress cannot abrogate sovereign immunity in state courts in order to coerce state compliance with federal aims through private causes of action.[251] In other words, *Alden* forbids Congress from using state courts as a backdoor to indirectly commandeer the other branches of state government. The Constitution prohibits commandeering state legislatures and executives by any means, "whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own."[252] Sovereign immunity is therefore not merely jurisdictional but also imports the anti-commandeering doctrine's substantive constraints on Congress's legislative powers.[253]

This converse-*Osborn* view of standing cannot be reconciled with existing doctrine, which reaffirms the jurisdictional nature of Article III. The *TransUnion* Court reiterated that standing requirements under Article III are jurisdictional and do not constrain Congress's authority to create private rights or protect those rights through private causes of action.[254] And as the *ASARCO* Court explained, "Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law."[255] Yet if the converse-*Osborn* dicta from *Alden* applied to constitutional standing requirements, Congress would lack the authority to create a cause of action insufficient for constitutional standing; the class of cases that could be heard under *ASARCO* would be a null set. *Alden* did not cite, let alone overturn, *ASARCO*; the dicta in *Alden* therefore cannot be read to extend to constitutional standing requirements.

The *Testa* line of cases is clear that state courts cannot decline jurisdiction over a valid federal claim without a valid excuse that neither discriminates against nor burdens federal rights.[256] An expansive reading of the *Alden* dicta

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250. Note, *supra* note 24, at 1239.

251. Alden v. Maine, 527 U.S. 706, 749 (1999).

252. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 578 (2012).

253. Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the* Alden *Trilogy*, 109 YALE L.J. 1927, 1930 (2000); Vázquez, *supra* note 11, at 720.

254. TransUnion LLC v. Ramirez, 594 U.S. 413, 426-27 (2021).

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

256. Of course, another potential objection to our view is that precedent is wrong. While they do not address our position directly, Professors Ann Woolhandler and Michael G. Collins attack Carlos M. Vásquez and Stephen I. Vladeck's similar reliance on the *Testa* line of cases by arguing that the *Testa* cases were wrongly decided. Ann Woolhandler & Michael G. Collins,

cannot be reconciled with this vital precedent. For example, *Testa* requires state courts to hear any federal claims that are analogous to state-law claims heard by those courts.[257] A broad reading of the *Alden* dicta would suggest that state courts could engage in otherwise-impermissible discrimination against inconcrete federal claims even if their own standing rules permitted them to hear inconcrete state claims. If the *Testa* line of cases remain good law, it *cannot* be the case that state courts are never obligated to hear non-Article III claims, further suggesting that the converse-*Osborn* analysis does not apply to standing's jurisdictional requirements.

The *Alden* Court's concern "that Congress may in some cases act only through instrumentalities of the States"[258] leads to paradoxical results when applied to Article III's jurisdictional requirements. Congress is free to provide for exclusive state-court jurisdiction when it legislates a cause of action over which federal-court jurisdiction would be constitutionally permissible. As the Court's commandeering cases remind us, "Since Article III established only the Supreme Court and made inferior federal courts optional, Congress could have relied almost entirely on state courts to apply federal law."[259] In other words, the Constitution expressly gives Congress the discretion to rely on state courts.

State Jurisdictional Independence and Federal Supremacy, 72 FLA. L. REV. 73, 75-77 (2020) (pushing back on Vázquez and Vladeck's readings of *Testa* and *Crain*); *see* Carlos M. Vázquez & Stephen I. Vladeck, Testa, Crain, *and the Constitutional Right to Collateral Relief*, 72 FLA. L. REV. F. 10, 21 (2021) ("The arguments put forward by Professors Woolhandler and Collins . . . would require a rethinking not just of *Testa*, and *Haywood*, and *Crain*, but also of large swaths of Federal Courts doctrine."). Woolhandler and Collins claim that *Testa* conflicts with the original understanding of the Constitution. Woolhandler & Collins, *supra*, at 125 ("There is little early support for requiring state courts to entertain affirmative federal statutory and constitutional claims. In the twentieth century, however, the Court began to compel state courts to take jurisdiction of certain federal statutory actions in the *Testa* line of cases. Such compulsion was not justified by the Supremacy Clause or related arguments."). Our project, by contrast, seeks to leave the case law as we find it. Our Note is motivated by the need for practical scholarship that responds to *Spokeo* and *TransUnion* but that does not bet on the Court changing course. That said, we agree with Vázquez and Vladeck that "the position eventually adopted in *Testa* and *Haywood* is more consistent with a key feature of the original design—the Madisonian Compromise—than is the position advocated by Professors Woolhandler and Collins." Vázquez & Vladeck, *supra*, at 12. As Vázquez and Vladeck write, "The default regime established by the Constitution . . . was one in which enforcement of federal law mainly depended on state courts." *Id.* at 13. Interpreting Congress's creation of inferior federal courts as vitiating the obligation of state courts to enforce federal law would render the Madisonian Compromise illusory.

257. Testa v. Katt, 330 U.S. 386, 394 (1947).

258 Alden v. Maine, 527 U.S. 706, 753 (1999).

259. Haaland v. Brackeen, 599 U.S. 255, 290-91 (2023) (citing Printz v. United States, 521 U.S. 898, 907 (1997)).

When Congress creates a cause of action that is insufficient for Article III standing, it simply exercises that discretion. Under the Constitution, the decision to rely on state courts belongs to Congress, whether or not federal courts are available.

Other structural features of the Constitution support this view. For example, Article III also permits federal-court jurisdiction in diversity cases.[260] A diversity claim under state law brought in federal court that is insufficient for standing in federal court is properly remanded to state court, not dismissed with prejudice.[261] The fact that a federal court may not hear the claim does not imply that the claim was not valid under state law. States exercise their reserved legislative powers unconstrained by Article III, including the power to recognize inconcrete private rights of action. There is no reason to presume that Congress enjoys less latitude in exercising its own enumerated powers. To the contrary, "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects."[262]

This Note takes the *TransUnion* Court at its word in reaffirming the distinction between Article III's jurisdictional limits and Congress's substantive authority to create causes of action. From there, our argument seeks to harmonize the case's holding with existing precedent and with the text, history, and structure of the Constitution. Article III's limits on federal-court jurisdiction do not constrain Congress's power to create private rights of action. Neither Article III nor state standing requirements permit state courts to decline jurisdiction over validly enacted claims. The Supremacy Clause requires state courts to hear these claims. This obligation is limited only by constitutional constraints on Congress's legislative power.

IV. ADMINISTRABILITY

As we have argued, the Supremacy Clause requires state courts to hear certain inconcrete federal claims notwithstanding their own standing requirements. This Part lays out the mechanics of this obligation. After considering how the obligation can be enforced, we discuss the constitutional and statutory parameters of the obligation. Finally, we draw on these parameters to respond to concerns about the implications of our argument for the uniformity of federal law.

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260. U.S. CONST. art. III, § 2.

261. *See* Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. F. 87, 90-92 (2021).

262. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

A. Enforcing the Obligation

An important question regarding the administrability of our proposal is how state courts' obligation to hear federal claims can be enforced. Appellate review by the Supreme Court is often asymmetrically available only to defendants when the plaintiff below lacks an injury in fact. This raises the question of whether and how a plaintiff who loses on standing grounds could enforce the constitutional obligation for which we argue.

The *ASARCO* Court held that the wallet injury, or pecuniary loss, that a defendant suffers due to an adverse judgment is a sufficient injury for the defendant to have standing on appeal to the Supreme Court, even when the plaintiff below did not have Article III standing in the first instance.[263] In so holding, the *ASARCO* Court distinguished *Doremus v. Board of Education*, a nearly identical case in which the Court found that it lacked jurisdiction to hear a losing plaintiff's appeal.[264] Some scholars have therefore construed *Doremus* and *ASARCO* to mean that "if a non-Article III plaintiff receives an adverse judgment on a matter of federal law, no Supreme Court review is available."[265]

There are several reasons to believe that the situation is not so dire. First, a plaintiff appealing a state court's decision not to hear their case on the merits has a different sort of claim than a plaintiff seeking appellate review of a state-court decision on the merits. Second, even under a strict interpretation of *Doremus*, review may still be had via *ASARCO*. Third, collateral attack against state courts who decline jurisdiction may be available.

As a threshold matter, both *Doremus* and *ASARCO* addressed the availability of Supreme Court review on the merits of the federal claim. But a plaintiff-appellant petitioning to enforce mandatory state-court jurisdiction is not asking the Court to review the merits; if their claim has been dismissed on standing grounds, then there is no merits determination to review. Instead, their appeal asks the Court to determine whether the state court had a valid excuse for declining jurisdiction, a question the Court could decide as it did in *Testa* and subsequent cases. The issue of whether a federal law preempts state standing rules is separate from the merits of a claim.

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263. ASARCO Inc. v. Kadish, 490 U.S. 605, 619 (1989).

264 342 U.S. 429, 432-33 (1952).

265. *E.g.*, Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 304 (2005); *see also* Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1260 (2011) ("[T]he Court has deduced that it lacks jurisdiction over state court determinations of federal law rendered in cases that would not satisfy federal justiciability standards."); Bennett, *supra* note 69, at 1248-50 (describing the relationship between *Doremus* and *ASARCO*).

That is important because neither *Doremus* nor *ASARCO* actually held that only defendants have appellate standing when a plaintiff lacks standing to sue in federal court in the first instance. Both cases simply reiterated that the petitioner must demonstrate Article III standing on appeal, and it is generally true that a plaintiff-appellant who lacks standing to sue in federal court also lacks standing to appeal a merits judgment in federal court.[266]

But as *ASARCO* and other precedents make equally clear, standing to appeal does not turn on standing to sue.[267] A decision below can give rise to a distinct injury that is itself sufficient for appellate standing.[268] And a plaintiff whose valid but inconcrete federal claim is dismissed on standing grounds has plausibly suffered a distinct due-process injury from that judgment.

Doremus and *ASARCO* were both taxpayer-standing suits. The plaintiffs in each held no cause of action under either the Constitution or a federal statute. Our argument, by contrast, applies only to claims for which Congress has given plaintiffs a private cause of action. As the Supreme Court has explained, causes of action are property under the Fourteenth Amendment that cannot be deprived without due process.[269] State jurisdictional rules that leave a plaintiff's valid federal claim forumless therefore give them a due-process injury traceable to the state court's dismissal below. Because constitutional injuries are concrete under *TransUnion*,[270] a plaintiff-appellant could have Article III standing to enforce the obligation of the state court to hear their claim on appeal to the Supreme Court.

Even if we are mistaken and defeated plaintiffs lack appellate standing even with regard to their due-process claims, the question whether state courts are obligated to hear inconcrete federal claims can still reach the Supreme Court. A plaintiff who brings an inconcrete federal claim in a state court that does not exercise jurisdiction over inconcrete claims may argue that the Supremacy Clause requires that state court to hear their case. A state court that agrees—holding that it is obligated to hear the case for federal constitutional reasons despite state law to the contrary—would give the defendant a wallet injury (as-

266. Diamond v. Charles, 476 U.S. 54, 69 (1986) (explaining that "[t]o continue" a suit in the absence of another party who had standing, the remaining part "must satisfy the requirements of Art. III").

267. *See, e.g.*, Hollingsworth v. Perry, 570 U.S. 693, 705 (2013).

268. *ASARCO*, 490 U.S. at 618-20; *see, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 211 (2020); West Virginia v. EPA, 597 U.S. 697, 718 (2022); Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 433 (2019); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149-50 (2010).

269. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-33 (1982).

270. TransUnion LLC v. Ramirez, 594 U.S. 413, 425 (2021).

suming the plaintiff also wins on the merits) adequate for Supreme Court review under *ASARCO*.[271]

Plaintiffs might also attempt to enforce the obligation through collateral attack. Though the Court has held that there is no implied right of action under the Supremacy Clause,[272] a plaintiff could attempt to bring a collateral action for declaratory or injunctive relief in federal court on due-process grounds. However, this approach might face steep odds. In *Whole Woman's Health v. Jackson*, the Court held that *Ex parte Young*'s exception to sovereign immunity "does not normally permit federal courts to issue injunctions against state-court judges or clerks," foreclosing the availability of collateral attack for such relief in federal court in that case.[273] The Court explained that this limitation arises because state-court judges and clerks "do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties. If a state court errs in its rulings, too, the traditional remedy has been some form of appeal, including to this Court."[274] The Court did not address whether declaratory judgment would be available against state-court judges, nor did it clarify what should happen if appellate review is unavailable, as might be the case here. Thus, whether collateral attack remains a viable option for a plaintiff whose claim was left forumless seems to be an open question.

Finally, it is worth emphasizing that the stakes of this question for our argument are low. As Chief Justice Marshall emphasized in *Marbury*, a plaintiff can have rights and remedies that are not enforceable through judicial review by the Supreme Court.[275] Not all constitutional guarantees are justiciable.[276] Mandatory state-court jurisdiction may therefore require state courts to self-police, leaving state high courts to determine whether the obligation for which we argue will be enforced. But this would not change the fact that the obligation exists.

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271. This argument presumes that some defeated defendant will eventually appeal. The factual particulars are important. If a state court merely held that its own standing rules were not preempted but should be construed to avoid preemption as a matter of state-constitutional or statutory interpretation, that reasoning would constitute an independent and adequate state ground for the decision and deprive the Supreme Court of jurisdiction.

272. Armstrong v. Exceptional Child Ctr., 575 U.S. 320, 329 (2015).

273. Whole Woman's Health v. Jackson, 595 U.S. 30, 39 (2021).

274. *Id.*

275. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-65 (1803).

276. For instance, the Supreme Court has held that the guarantee that each state have a republican form of government is nonjusticiable. Luther v. Borden, 48 U.S. 1, 26, 47 (1849).

B. Constitutional Limitations on Mandatory State-Court Jurisdiction

As we have argued, Article III does not excuse state courts from their obligation under the Supremacy Clause to hear federal claims. However, other constitutional parameters shape the metes and bounds of legislative authority to provide for private enforcement. The power to create causes of action, for example, must be "necessary and proper" to the exercise of Congress's enumerated powers.[277]

The scope of the constitutional obligation for which we argue is therefore cabined by important limiting principles. These can help courts police the boundary between claims that must be heard by state courts and others which are more properly enforced through legislative tribunals or agency adjudication. Having articulated those limits in the formulation of our test offered above, we now justify those limitations.[278] Specifically, we argue that the constitutional obligation to hear inconcrete federal claims is cabined by three qualifications. Mandatory jurisdiction only attaches to inconcrete federal claims (1) between private parties, which (2) allege particularized harm traceable to a violation of a private statutory right that is redressable by a favorable judicial decision, and where (3) as a matter of statutory interpretation, Congress has created a cause of action held by the plaintiff. So limited, Congress's power to mandate state-court jurisdiction respects the structural limitations imposed by the Constitution.

Mandatory state-court jurisdiction, we argue, extends only to private—as opposed to public—rights. As Justice Thomas put it, the key distinction between private and public rights "is whether an individual asserts his or her own rights."[279] Historically, Justice Thomas noted, "[w]here an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation [in law]."[280] A showing of concrete harm was required only "where an individual sued based on the violation of a duty owed broadly to the whole community."[281] Justice Thomas therefore contended in his dissent in *TransUnion*:

> In light of this history, tradition, and common practice, our test [for Article III standing] should be clear: So long as a "statute fixes a mini-

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277. U.S. CONST. art. I, § 8, cl. 18.

278. See *supra* p. 1032, which enumerates our proposed test.

279. TransUnion LLC v. Ramirez, 594 U.S. 413, 446 (2021) (Thomas, J., dissenting).

280. *Id.* at 447.

281. *Id.*

> mum of recovery . . . , there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss." . . . [C]ourts for centuries held that injury in law to a private right was enough to create a case or controversy.[282]

While this position did not carry the day as the test for standing in federal court, we believe it might furnish a sensible limitation on the scope of federal claims that we argue state courts are required to hear. The requirement that a plaintiff invoking mandatory jurisdiction demonstrate an injury to a private right ensures that our argument only applies to claims for which Congress's ability to create alternative fora is legally limited.

Alternatively, our constitutional system gives Congress the option of creating other mechanisms for vindicating public rights. For instance, Congress can create non-Article III legislative tribunals or establish administrative agencies with the power to adjudicate claims.[283] Some scholarship has emphasized the role of these institutions in preserving private enforcement after *Spokeo* and *TransUnion*. Professor Zachary D. Clopton, for example, posits that "when federal courts find that a dispute is not a case or controversy, Congress should understand that conclusion as an invitation to non-Article III resolution."[284] Yet precedent curtails Congress's ability to use these tools to vindicate private rights, and prudential considerations suggest that they would sometimes be inadequate to the task.

Legislative courts, as the Supreme Court explained in *Crowell v. Benson*, can generally only adjudicate disputes involving private rights as adjuncts to Article III courts.[285] It is unclear whether federal courts could perform this supervisory function for claims over which they lack subject-matter jurisdiction. Though the Court has subsequently vacillated in the degree to which it will depart from this rule on the basis of functional considerations, the doctrine is clear that

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282. *Id.* at 449 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 271 (Chicago, Callaghan & Co. 1879)).

283. *See* Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 583 (1985) ("Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts.").

284. Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1457 (2018).

285. 285 U.S. 22, 50-60 (1932).

some subset of private rights cannot be heard by unsupervised Article I courts.[286] State courts are the only game in town for these claims.

Additionally, leaving claims to vindicate private rights to public enforcement by agencies is likely to be ineffective. As Professor Susan Rose-Ackerman has explained, "*ex ante*, state-initiated" regulation through agencies is preferable to "*ex post*, private[]" enforcement when (1) harms are diffuse and there is little individual incentive to sue; (2) defendants would lack resources to pay for damage caused; (3) "harm can be demonstrated on a statistical, but not an individual, basis"; (4) the "same information . . . is relevant to many instances of harm"; and (5) "administrative costs" of litigation are high.[287] When these five factors do not weigh in favor of agency enforcement, the pursuit of private enforcement becomes necessary.[288]

Cases like those brought by the plaintiffs in *TransUnion* fare poorly under Rose-Ackerman's criteria. First, the harms were not diffuse; they were individual to the litigants who had misleading information placed in their credit files. Second, massive companies like credit-reporting agencies are not judgment-proof and have the resources to compensate individuals for the damage they cause. Third, harm may be easily proved on an individual basis by examination of particular credit files. Fourth, while the same information may be relevant to many individual harms in instances where company policies produced many of the same reporting errors, the totality of the factors show that public enforcement is a poor fit for the claims at issue in *TransUnion*. Finally, the administrative costs of litigation seem no higher in consumer cases than other kinds of litigation.

By requiring claims to allege a *particularized* harm to a private right, our argument also avoids a potential Article II problem. In *Lujan*, the majority argued that strict limits on standing were necessary to prevent the federal courts from usurping the power and duty of the President to take care that the laws are faithfully executed.[289] According to Justice Scalia, cases where private parties

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286. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-68 (1982) (plurality opinion); *Thomas*, 473 U.S. at 585-87; Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986); Stern v. Marshall, 564 U.S. 462, 482-89 (2011).

287. Susan Rose-Ackerman, *Regulation and the Law of Torts*, 81 AM. ECON. REV. (PAPERS & PROC.) 54, 54-55 (1991); *see also* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF THE LAW 497-500 (2004) (describing "imperfect" information, "individual benefits from acts," and the "magnitude of harm" as relevant factors).

288. *See* Heather Elliot, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 175-76 (2011) (explaining that citizen suits provide a means for citizens to force administrative agencies to act when, in their view, the executive branch fails to execute the laws).

289. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individu-

have a cause of action to enforce a general obligation to the public must be strictly policed because of their potential to intrude into the province of the Executive and make the courts "virtually continuing monitors of the wisdom and soundness of Executive action."[290] In other words, there are separation-of-powers risks inherent in allowing private enforcement of public rights. *TransUnion* and *Spokeo* each reaffirmed the Court's increasing emphasis on the additional constraints on standing immanent within Article II. As Justice Kavanaugh put it in *TransUnion*, "A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."[291] By limiting our test to private harms, we sidestep any potential Article II issues as we resolve brewing tension between Congress and the judiciary.

Recall the distinction between creating a cause of action and conferring jurisdiction. Unlike Article III, which restricts only Congress's ability to grant federal-court jurisdiction over a claim, Article II limits congressional power to provide for private enforcement of public rights in *both* state *and* federal court.[292] This explains why the test we articulate requires mandatory state-court jurisdiction over claims for *particularized* harms: the particularity of an injury is what delineates a claim for the violation of a private right from a generalized grievance or a claim to vindicate a public right.

The other requirements of our test are part and parcel of ensuring that the plaintiff has a valid federal claim and that a state court has competent jurisdiction. For example, the traceability requirement will be satisfied whenever a plaintiff adequately alleges an actionable injury in law to a private right. Otherwise, the plaintiff would lack a cause of action against the defendant. The redressability requirement ensures that Congress has both authorized the relief

al 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.'" (quoting U.S. CONST. art. II, § 3)).

290. *Id.* (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

291. TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021).

292. *See, e.g.*, Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 821 (2009) ("[T]he Constitution does not permit the delegation of such expansive discretionary enforcement authority to private parties"); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1794 (1993) (arguing that, given the "policymaking inherent in enforcement of federal law, Article II prohibits Congress from vesting . . . the power to bring enforcement actions on behalf of the public" in private parties "without allowing for sufficient executive control over the litigation"); Vázquez, *supra* note 11, at 752 (explaining that locating limits on standing in Article II "would require their application in the state as well as federal courts").

sought and that the state court is competent to grant that relief. For example, state courts of chancery generally cannot award legal damages, suggesting that another state court would be the proper court of competent jurisdiction for federal-damages claims. Restricting our argument to claims between private parties avoids considerations of sovereign immunity and related constraints on the validity of a federal claim.

There could be other constitutional constraints on the validity of private rights of action for damages. Professor Vázquez, for example, argues that *TransUnion*'s concreteness requirement should be understood as a substantive constraint on Congress's power to authorize statutory damages as a remedy.[293] The *TransUnion* Court, as we have described, declined to endorse this approach, treating concreteness as a jurisdictional requirement under Article III. The Constitution's constraints on Congress's power to enforce private rights through private actions for damages seem more appropriately located in the Fifth Amendment's Due Process Clause than in Article III.[294] We are agnostic as to whether due process imposes a substantive limit on Congress's remedial powers similar to concreteness.

We have argued that the obligation of competent state courts to hear valid claims is limited only by substantive constraints on Congress's power, and we have proposed a test for mandatory state-court jurisdiction that seeks to avoid these external constraints. Yet other scholars have argued that standing doctrine is best understood in terms of these substantive limits rather than in jurisdictional terms.[295]

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293. Vázquez, *supra* note 11, at 742-55.

294. *See, e.g.*, Wakefield v. ViSalus, Inc., 51 F.4th 1109, 1120-25 (9th Cir. 2022) (holding that a lower court's award of statutory damages violated due process under the test announced in St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919)); *see also* Emile Katz, *Due Process and Standing*, 47 HARV. J.L. & PUB. POL'Y 395, 397 (2024) ("[T]his article argues that the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than Article III, require courts to conduct a standing analysis."); Vázquez, *supra* note 11, at 750 ("Absent stronger historical or doctrinal support for the proposition that the Due Process Clause disables Congress from creating liabilities for injuries that do not correspond to those traditionally protected by the common law, we must find the source of Congress's disability in standing doctrine itself-but understood to be based on a constitutional provision other than Article III.").

295. In the lower courts, Judge Newsom has advanced the view that the only constitutional limitations on standing are those in Article II and has accordingly advocated for framing the doctrine, as Justice Thomas suggests, around the distinction between private and public rights. *See* Jonathan H. Adler, *Standing Without Injury*, 59 WAKE FOREST L. REV. 1, 3-4, 30, 58 (2024); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring); Laufer v. Arpan, LLC, 29 F.4th 1268, 1283 (11th Cir. 2022) (Newsom, J., concurring).

For example, Professor Vázquez argues that *TransUnion*'s concreteness requirement is best understood as a substantive constraint on Congress's remedial authority, which is located in Article II.[296] His "main purpose is to understand the Court's understanding of standing doctrine, not to criticize it."[297] As we have argued, we disagree that *TransUnion* should be read to articulate concreteness as a purely substantive constraint, given the majority's emphasis on Article III standing as a jurisdictional requirement distinct from Congress's power to create causes of action. Moreover, Article III applies to all claims in federal court, not just federal claims. Inconcrete state claims also cannot be heard by federal courts sitting in diversity under *TransUnion*. Yet Article II confers no authority to execute state law to the executive branch, further limiting Article II's explanatory power in rationalizing *TransUnion*.

Though the *TransUnion* Court cited both Article II and Article III to support its reasoning, there is good reason to believe that at least some injuries that fail the concreteness test do so on the grounds of Article III alone. Under *TransUnion*, an injury must be tangible or, if intangible, analogous to a common-law harm to confer Article III standing. The Court explained that "abstract" harms and "bare procedural violations" failed this test.[298] It is easy to see how private enforcement of certain procedural violations or especially abstract harms might arrogate the executive power and offend Article II. But many inconcrete injuries do not do so. Our argument applies with full force to these claims.

Mandatory state-court jurisdiction preserves Congress's plenary authority to regulate under its enumerated powers without unconstitutionally enlarging the jurisdiction of federal courts. These additional limiting principles ensure that our proposal neither arrogates the executive power vested in Article II nor impermissibly commandeers the organs of state government in violation of the Tenth Amendment.

C. Statutory Limitations on Mandatory State-Court Jurisdiction

The Supremacy Clause, as we have shown, *permits* Congress to direct state courts to hear certain federal claims that allege inconcrete statutory harms. These claims include those alleging particularized injury to a private statutory right enacted under Congress's regulatory authority. In this Section, we consid-

296. Vázquez, *supra* note 11, at 758.

297. *Id.* at 757.

298. TransUnion LLC v. Ramirez, 594 U.S. 413, 424, 440 (2021).

er when state courts should construe Congress as having *already* directed them to hear such claims.

To begin with an easy case: where Congress has expressly provided for exclusive federal-court jurisdiction, the cause of action itself should be understood as delimited by the standing requirements of Article III. State courts have no obligation to hear them, and, indeed, cannot hear them. Where Congress has not provided for exclusive federal jurisdiction, however, the question of when Congress should be considered to have directed state courts to hear a forumless claim remains. We consider two possibilities. First, the usual presumption in favor of concurrent jurisdiction might imply that Congress *already has* directed state courts to hear an inconcrete claim any time it creates a private right of action. Alternatively, constitutional avoidance might counsel state courts to apply a clear-statement rule requiring an explicit congressional directive before concluding they are obligated to hear forumless claims.

Except in the limited circumstances where exclusive federal jurisdiction applies—as is the case, for example, in claims arising under patent law[299]—there is a strong presumption in favor of concurrent jurisdiction. When this presumption applies, federal and state courts can each exercise jurisdiction over a federal claim.[300] The Supreme Court has explained that this presumption "lies at the core of our federal system"[301] and can only be overcome "by an explicit statutory directive, by unmistakable implication from legislative history, or by clear incompatibility between state-court adjudication and federal interests."[302] For forumless claims, though, federal jurisdiction is extinguished by Article III standing requirements. Concurrent jurisdiction becomes exclusive state-court jurisdiction.[303] In light of the presumption in favor of concurrent jurisdiction, perhaps Congress should be understood to have already directed state courts to hear forumless claims whenever it creates a cause of action without providing for exclusive federal jurisdiction.

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299. 28 U.S.C. § 1338(a) (2018).

300. The Court's *Rooker-Feldman* doctrine interprets the certiorari statute to prohibit federal courts other than the Supreme Court from exercising appellate jurisdiction over a state court, absent explicit authorization from Congress. *See* D.C. Ct. of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fid. Tr. Co., 263 U.S. 413, 416 (1923). The Anti-Injunction Act prohibits federal courts from enjoining ongoing state-court proceedings. 28 U.S.C. § 2283 (2018). These statutory provisions strengthen our tentative conclusion below that the presumption in favor of concurrent jurisdiction implies that Congress has already directed state courts to hear forumless claims.

301. Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 826 (1990).

302. Tafflin v. Levitt, 493 U.S. 455, 459 (1990) (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)).

303. Bennett, *supra* note 69, at 1217.

Instead of interpreting Congress to have already directed state courts to hear forumless claims by creating a cause of action, state courts might instead require a clear statement from Congress commanding them to exercise jurisdiction over these claims. Such a clear-statement rule might be an appropriate form of constitutional avoidance in light of the Supremacy Clause and due-process considerations raised by these claims.[304] Various scholars have advocated for clear-statement rules where an interpretation "[departs] from a generally prevailing principle or policy of law"[305] as a mechanism for protecting the law's coherence[306] or for forcing deliberation when fundamental values are at stake.[307] Mandatory state-court jurisdiction, in light of state courts' traditional freedom to craft their own justiciability rules, might be a circumstance where a clear statement is appropriate on these views.

On balance, we think that the presumption that Congress directs state courts to hear federal claims any time it creates a private cause of action is more consistent with precedent. Neither *Testa* nor *Felder* required Congress to clearly direct state courts to hear the claims at issue. In those cases, the creation of a cause of action was sufficient to bar state courts from refusing to exercise jurisdiction without a valid excuse, even on the basis of putatively neutral procedural rules. Consistent with these cases, mandatory state-court jurisdiction over forumless federal claims should not require a clear statement. It is enough that Congress created a cause of action.

On either interpretive approach, though, our proposal gives Congress a tool for protecting private rights through private enforcement. Once a state court determines that Congress has directed it to hear a forumless claim and that Article II does not bar that claim because it alleges a particularized injury in law, the court's only task is to proceed to the merits, including the question of statutory standing. It cannot abdicate its constitutional role as the default forum for hearing a valid cause of action.

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304. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 206 (1991) (recognizing the "federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute").

305. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1377 (William N. Eskridge, Jr. & Philip Frickey eds., 1994).

306. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 145-50 (2010) ("[I]t would be inaccurate to characterize the sovereign immunity clear statement rule as having been fashioned from cloth in the twentieth century. It is better understood as a conscious application of a time-honored rule of sovereign exemption . . . .").

307. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 597 (1992).

D. The Uniformity of Federal Law

Others may object that mandatory state-court jurisdiction will result in a patchwork of inconsistent or incorrect interpretations of federal law. In this Section, we first dispute the premise that these concerns are relevant to determining whether the obligation exists. We then argue that, in light of the limitations in our proposal, any dissensus that might result is valuable, manageable, and within the limits of what our law already tolerates.

As a threshold matter, constitutional requirements trump policy considerations in our legal system.[308] Yet the source of law for concern about the uniformity of federal law is unclear and arguably reflects only considerations of policy.[309] As Justice Scalia explained in *Lexmark*, "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates."[310] Of course, in federal court, Article III standing requirements present a threshold hurdle that potential claims must clear. Likewise, in state and federal court alike, a claim must allege a particularized harm to avoid an Article III problem. In state court, though, the inquiry into whether the court must hear a particularized claim ends, on our account, with statutory interpretation. If we are right about the meaning of the Supremacy Clause, then that ought to be the start and end of matters, so far as administrability is concerned.

Second, recent federalism scholarship casts doubt on whether uniformity is even a constitutional principle in our federal system. Even if state-court jurisdiction were not constitutionally mandated, various compelling visions of federalism suggest that the potential for interpretive disagreement among state courts is a feature of our federalism worth embracing.[311] Traditional federalists

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308. *See* TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." (quoting INS v. Chadha, 462 U.S. 919, 944 (1983))).

309. *Cf.* Daniel Lovejoy, Note, *The Ambiguous Basis for* Chevron *Deference: Multiple Agency Statutes*, 88 VA. L. REV. 879, 881, 889 (2002) ("Another prudential reason, which has been suggested for preferring agency interpretation of law to judicial interpretation, is the desire for uniformity in federal law.").

310. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 (2014) (citing Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001)).

311. *See, e.g.*, Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1896 (2014) ("Federalism also provides a much-needed outlet for contestation when issues don't lend themselves to national resolution. . . . [It] is less about state laboratories generating different policy 'solutions' and more about maintaining varied processes for

view states as laboratories of democracy.[312] Many of our affirmative arguments appeal to the constitutional commitments of those within this traditional camp, which includes many members of the Court.

Recent work on the "nationalist school of federalism" moves past the traditional model by emphasizing "[t]he power states enjoy as national government's agents," as well as "[t]he power states exercise in driving national policy and debates" and "in implementing and interpreting federal law."[313] This work shows how federalism can serve nationalist ends by "improving national politics, knitting together the national polity, improving national policymaking, and entrenching national power and national policies."[314]

The authority that states wield in implementing and interpreting federal law allows them to embed state values into federal statutory schemes.[315] Lack of uniformity might reflect the appropriate and valuable responsiveness of state courts to state interests when construing federal statutes. This vision of judicial federalism allows "integration [to] emerge through the achievement of an equilibrium that contains within it the possibility of ongoing debate" by "keep[ing] open the capacity for change," so that law and policy can reflect and channel the variable rather than linear nature of public opinion.[316] In short, "judicial disagreements over the meaning of federal law" might be a feature, rather than a bug, of our federalism.[317] Our proposal prevents state courts from abdicating the vital role they play in contributing to the interpretive under-

working out conflict or dealing with an unraveling consensus." (footnote omitted)); Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 ST. LOUIS U. L.J. 1045, 1055-56 (2015) ("The third common bucket of core 'federalism' values is the value of local variation, the notion that we cannot rely on national-level law because our polity is too diverse for one-size-fits-all policy. . . . [T]he important and primary response here is that national law today not only tolerates policy variation . . . but actively encourages it. Federal legislation today often intentionally incentivizes states to implement federal law in different ways from one another.").

312. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

313. Gerken, *supra* note 311, at 1893.

314. *Id.* at 1894.

315. Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2021-22 (2014).

316. Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2100, 2133 (2014).

317. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570 (2008).

standing of federal law.[318] That role simultaneously serves national and state interests—no uniformity required.

In any event, the consequences of our view for the uniformity of federal law are minimal, manageable, and well within the limits of what the law already tolerates. As an initial matter, the status quo under established doctrine permits states to hear federal claims over which federal courts would lack subject-matter jurisdiction. State courts can thus voluntarily hear a broader suite of claims than those to which our argument applies. Whatever uniformity is secured when state courts decide not to hear such claims is the contingent result of state choices; nothing in existing doctrine prevents states from voluntarily inducing much more drastic nonuniformity than would obtain under our proposal to compel mandatory state-court jurisdiction. Moreover, this superficial uniformity in the *interpretation* of federal law is only achieved through the nonuniform *application* of federal law. Every state has the discretion under the status quo to decide whether to apply federal law and, if so, how to interpret it. Perversely, this has the effect of undermining our constitutional means for regulating interpretive disagreement by making the Supreme Court less likely to resolve competing interpretations on review. And of course, for concrete federal claims under the same statutes over which federal courts could exercise jurisdiction, there is the possibility for disagreement among all of these state courts and the thirteen U.S. courts of appeals, to say nothing of the potential for percolating or unresolved disagreements among the ninety-four federal districts and the several judges of each (more than 670 across all districts) who may further disagree among themselves.

Our solution reduces the space of potential disagreement from application and interpretation to interpretation alone. In doing so, it brings important interpretive disputes about the meaning of federal law to the fore. This facilitates the Supreme Court's ability on review to resolve disagreements arising from competing interpretations of federal law that may have consequences for claims alleging abstract and concrete injuries alike.

Additionally, the Supreme Court can exercise jurisdiction on appeal to resolve inconsistencies even though the claims involved would not suffice for Ar-

318. The importance of this interpretive authority as a vehicle for state values and interests has only grown in relative importance as the Court erodes *Erie*. The Court is constitutionalizing a general, federal common law of torts through standing doctrine, property under the Takings Clause, and contracts under the Spending Clause and various other doctrines. *See* Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 374 (discussing standing's resemblance to tort); Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J. 1010, 1015 (2023) (discussing the Takings Clause); David Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 527 (2007) (discussing the Spending Clause).

ticle III standing in the first instance. The *ASARCO* Court held that an adverse state-court judgment is sufficient to confer standing on a litigant for purposes of Supreme Court review.[319] Defendants in a state-court action may seek Supreme Court review of an otherwise-nonjusticiable federal claim because an adverse state-court judgment creates an Article III case or controversy.[320] The Supreme Court can therefore review a judgment for a plaintiff that rests on an interpretation of federal law that conflicts with how other courts have interpreted that law. Indeed, the Rules of the Court themselves identify conflicts between state high courts and other courts as priorities for review.[321]

This is not a hollow commitment: "[S]eventy percent of [the] Court's plenary docket is devoted to addressing legal issues on which lower courts have differed."[322] This kind of review is the ordinary mechanism for resolving conflicting interpretations of federal law; the same mechanism is how the Court handles splits between the federal courts of appeals or state high courts. State courts are not uniquely vulnerable to disagreement about federal law. Our solution does not risk inducing more disagreement than is already inherent to our judicial system. If anything, mandatory state-court jurisdiction reduces the risk of inconsistency that attends state discretion over whether to hear inconcrete federal claims at all. Supreme Court review serves to resolve those disagreements that do emerge, just as it does under the status quo. The Court's refusal to endorse methodological stare decisis suggests that it views managing interpretive uniformity on review of lower-court disagreements as preferable to an approach that seeks to prevent such disagreements from emerging in the first place.

Professor Bennett raises the concern that Supreme Court supervision will be inadequate to manage dissensus because—under *ASARCO*—review on the merits is only available when the plaintiff prevails.[323] According to Bennett, the asymmetric availability of review "ensures that [the Court's] already-limited supervisory power is also structurally biased against expansive readings of federal law."[324] He argues that this is because a plaintiff's victory is more likely to

319. ASARCO Inc. v. Kadish, 490 U.S. 605, 618-19 (1989).

320. *Id.*

321. SUP. CT. R. 10 (indicating that certiorari is more likely to be granted when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals").

322. Frost, *supra* note 317, at 1569.

323. *See* Bennett, *supra* note 69, at 1249.

324. *Id.*

rest on an expansive reading of federal law, and the Supreme Court is more likely to reverse than affirm when it grants certiorari.[325]

We are more optimistic than Bennett. As a preliminary matter, most questions of statutory interpretation are common to both concrete and abstract claims under the relevant statute. Because both plaintiffs and defendants will prevail on concrete claims, this guarantees symmetric review of most statutory-interpretation issues. An asymmetry only exists for interpretive disagreements that arise uniquely in the context of abstract harms. Even in this setting, the Court's own jurisdictional determinations will offer another avenue for clarity to the extent that they implicate the scope and nature of the relevant statutory rights.

Moreover, Supreme Court review need not be available in every case in order for adequate supervision to take place. If conflicts arise between state interpretations of a law like FCRA, the Supreme Court will have an opportunity to resolve these "state splits" under the jurisdiction provided for in *ASARCO* because consequential disagreements about the law will presumably result in at least some victorious plaintiffs, giving the defendant standing to appeal the unfavorable judgment. In deciding both whether to grant certiorari in these cases and how to resolve them, the Court can canvass the full spread of interpretations among lower courts, including those favorable to defendants. Just because cases where plaintiffs lose cannot be directly heard does not mean that the Supreme Court cannot examine them when deciding cases properly before it. Indeed, because the Court prioritizes review of cases on which the lower courts are split, they must undertake this analysis in considering whether to grant certiorari.[326] Thus, while the Court might grant certiorari more frequently when it is inclined to reverse,[327] that does not imply that it would decide the case differently on a counterfactual appeal from a defendant. Bennett's argument gets the causality backwards. The Supreme Court does not decide to reverse because it granted certiorari; it grants certiorari because it is already inclined to reverse. The Court's propensity to reverse a lower-court judgment in favor of a plaintiff is not a function of the availability of review in cases where the defendant prevails.

Any bias due to asymmetric review would seem to manifest to the extent that no suitable vehicle for review arises because very few plaintiffs prevail. Yet

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325. *Id.* Of course, this observation about rates of affirmance versus reversal is a general rule that may or may not apply if the Court sees more cases in which it is called upon to supervise state-court interpretations of federal law in cases that are not justiciable in federal courts.

326. SUP. CT. R. 10.

327. Bennett, *supra* note 69, at 1249.

this might itself suggest that there is not much lower-court disagreement regarding the proper interpretation of the statute. While this might present a problem of bias insofar as the Supreme Court would otherwise be inclined to reverse an interpretive consensus among the lower courts favoring defendants, it is not a problem of nonuniformity. Such cases seem likely to be few in light of the Court's sympathies and the priority that it affords to hearing splits, so the resulting structural bias would accordingly be minimal. Moreover, these consensuses will often simply reflect the correct construction of the law, and Congress might be especially keen to legislate clarity when state high courts uniformly get the law wrong.

The actual practice of state courts further suggests that our optimism is apt. As we point out above, the Supreme Court's refusal to impose methodological stare decisis arguably recognizes that interpretive disagreement in the lower courts facilitates the quality of review. That said, some version of methodological stare decisis "appears to be a common feature of some states' statutory case law,"[328] at least for now. Professor Abbe R. Gluck has shown the organic emergence of what she terms "modified textualism" as a "consensus methodology."[329] This development, we think, would serve to limit the interpretive disagreements that would emerge among state high courts under our proposal. Remaining disagreements would serve as valuable play in the joints within a common framework—a framework that, as Gluck shows, shares many core features of the Supreme Court's present approach to statutory interpretation while integrating the states' interpretive innovations.[330] As Gluck puts it, this allows state high courts to serve as "laboratories of statutory interpretation."[331]

While our solution proposes a novel application of judicial commandeering, it does not constitute a radical departure from precedent or sound constitutional principles. Mandatory state-court jurisdiction is the natural consequence of the Madisonian Compromise as expressed through the *Testa* line of cases and under the circumstances created by *TransUnion*. The objections we address either themselves repudiate well-established law or are present even under the current paradigm. Even worse, they fail to provide any solution to the interbranch conflicts that we identify.[332]

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328. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010).

329. *Id.* at 1758.

330. *Id.* at 1757-59.

331. *Id.* at 1750.

332. *See supra* Section II.C.2.

CONCLUSION

Article III standing doctrine cannot extinguish an otherwise-valid exercise of congressional power. From the advent of modern constitutional standing doctrine in *Lujan*, through *TransUnion*, the Court has maintained that Congress remains empowered to create private causes of action. For good reason: a private cause of action is often the best tool for the job as Congress takes up thorny issues of informational privacy and private causes of action become increasingly essential to effective enforcement of the law. Even if this were not the case, decisions about the design of enforcement regimes belong to Congress, not the courts.

Despite the Court's reassurances, standing doctrine threatens to erode Congress's power, harming both the legislature and citizens. Under current law, state courts—the last harbor for claims that are abstract or inconcrete—are free to retract standing under their own justiciability doctrines. This leaves litigants unable to bring their case in any court and functionally eliminates a congressionally created right.

We have demonstrated that principles of judicial federalism require state courts to faithfully execute Congress's enforcement design by hearing these claims. Our approach harmonizes existing standing doctrine with the Court's cases on the Supremacy Clause and commandeering to show that states may not refuse to hear federal claims on the basis of their own justiciability doctrines. When states establish courts of general jurisdiction, they consent to performing an important role in enforcing federal law.

Recognizing mandatory state-court jurisdiction defuses a brewing separation-of-powers conflict, vindicates the essential role of state courts in our federal system, and ensures that citizens who have been harmed receive the relief to which they are legally entitled. In short, it enacts the judicial federalism that our Constitution envisions.