Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory That Self-Restraint Promotes Federalism

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BRIDGING THE ENFORCEMENT GAP IN CONSTITUTIONAL LAW: A CRITIQUE OF THE SUPREME COURT'S THEORY THAT SELF-RESTRAINT PROMOTES FEDERALISM

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The Supreme Court has crafted numerous doctrines, such as justiciability and abstention, that enable federal judges to decline to exercise the jurisdiction Congress has granted them over all constitutional cases. The result is that constitutional law is often left to state judiciaries, which almost always have the last word because Supreme Court review has become so rare. State judges sometimes creatively expand or contract constitutional rights, thereby producing enforcement gaps.

Although the Justices have tried to close some of these holes, most remain unfilled. The Court has insisted, however, that its jurisdictional rules of self-restraint promote the original understanding of federalism, which purportedly viewed state tribunals as highly autonomous and as equal partners with federal courts in enforcing federal constitutional law.

I will argue that, on the contrary, the Founders established an independent federal judiciary to ensure the supremacy and uniformity of federal law, not to carve out exceptions to federal question jurisdiction that ultimately entrust such law to state courts. I will further contend that, if the vast modern increase in federal dockets has made it a practical necessity to create restrictive jurisdictional doctrines, federalism suggests that such limits should be imposed on controversies involving state law (most obviously diversity), not cases arising under the Federal Constitution.

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I. JURISDICTIONAL DOCTRINES AND FEDERALISM

A. The Mandatory Nature of Federal Jurisdiction

Article III, Section 1 of the U.S. Constitution vests "[t]he judicial Power of the United States" in one Supreme Court and any inferior courts Congress establishes, with all federal judges guaranteed life tenure and non-reducible salaries. Section 2 provides that "the judicial Power shall extend" to two areas. The first is "all Cases" involving certain subjects of peculiar national importance: federal questions (those arising under the Constitution, Acts of Congress, and treaties); admiralty; and cases affecting foreign ministers, which raise delicate international law issues. The second category consists of "Controversies" between enumerated parties, such as two states, a state and a citizen of another state, citizens of different states, and a state (or its citizens) and a foreign nation (or its citizens). Finally, Article III gives the Supreme Court original jurisdiction over "all Cases" affecting foreign ministers or state parties, as well as appellate jurisdiction over "all the other Cases," subject to Congress's "Exceptions" and "Regulations."

Since the mid-nineteenth century, the Court has interpreted Article III as granting Congress plenary control over federal jurisdiction. In the seminal case of Ex Parte McCordle, the Court recognized absolute legislative discretion to make "Exceptions" to its appellate jurisdiction. Similarly, the constitutional provisions authorizing Congress to create inferior courts have long been read as implying complete control over their jurisdiction. By combining these two powers, Congress can remove the Court's appellate jurisdiction and not assign that jurisdiction to lower federal courts, effectively leaving the matter to state tribunals.

2. Id.
4. 74 U.S. (7 Wall.) 506 (1868).
5. Id. at 513-14.
7. See, e.g., Lockerty v. Phillips, 319 U.S. 182, 187-88 (1943). I reject the "plenary power" model and instead take the position that Congress can eliminate the Court's appellate jurisdiction over Article III federal question "Cases" only if such jurisdiction is given to inferior federal courts. See infra notes 94-98 and accompanying text.
Congress's plenary authority would be frustrated if federal judges could ignore its statutory commands. In the memorable words of Chief Justice Marshall: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." The Court has continued to cite this language of absolute duty regarding jurisdiction.

B. Doctrines of Jurisdictional Restraint

Notwithstanding the foregoing precedent, the Court has also held that Article III sometimes allows federal judges to decline their federal question jurisdiction, particularly when doing so would promote traditional principles of federalism. Examination of these jurisdictional doctrines, however, raises serious doubts about their fidelity to federalism as originally understood.

1. Justiciability

In the late 1930s, Franklin Roosevelt's judicial appointees, most notably Felix Frankfurter, began to develop various "justiciability" principles to determine the appropriate occasions for the exercise of federal question jurisdiction. These doctrines rested on the

8. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). In this Essay, I will not consider the second half of Marshall's equation: situations in which federal courts arguably "usurp [jurisdiction] which is not given," such as pendent jurisdiction.
10. See infra notes 22-37, 41-52, 65-70, 74-75, 77-82 and accompanying text.
11. In this Symposium Essay, I can merely summarize these doctrines and the major academic commentary on them. Two scholars deserve special acknowledgment for systematically analyzing the myriad rules of judicial restraint in light of structural constitutional principles such as federalism. See MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER (1991) (arguing that the Court, by creating prudential doctrines like abstention that enable federal judges to refuse to exercise their statutory federal question jurisdiction, has violated its own—and constitutionally correct—tenet that all jurisdiction conferred must be exercised); David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. REV. 543 (1985) (contending that courts have always inherently possessed reasoned discretion to decide whether or not to assume jurisdiction based upon consideration of federalism, comity, separation of powers, equity, and efficient judicial administration).

I have relied upon the work of Professors Redish and Shapiro in raising questions about jurisdictional doctrines based upon federalism. Ultimately, however, I do not follow either of their approaches. See infra Parts II, IV.
debatable notion that Article III's extension of "judicial Power" to "Cases" and "Controversies" had always confined the judiciary to adjudicating live disputes between adverse parties with private law interests at stake.\textsuperscript{12} Most importantly, "standing" required constitutional claimants to demonstrate an individualized injury to an interest recognized by the common law.\textsuperscript{13} In the early 1970s, the Burger Court added two elements to standing: that the defendant must directly have caused the plaintiff's injury and that the court can remedy it.\textsuperscript{14} The injury, causation, and redressability requirements preclude a citizen or taxpayer from alleging generally that a government official has disobeyed the Constitution; rather, this violation must have caused a personal injury that is legally cognizable.\textsuperscript{15}


Justice Frankfurter asserted that the justiciability doctrines were required by the Constitution's text, history, political theory, and early precedent. See, e.g., Coleman, 307 U.S. at 460-64 (Frankfurter, J., concurring). On the contrary, the Court since its inception had treated justiciability as a matter of equitable discretion, guided (but not dictated) by constitutional structural principles such as separation of powers and federalism. See Robert J. Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 CORNELL L. REV. 393, 436-63, 494-95 (1996). Moreover, the early Court often decided cases involving public rights, not merely private disputes. See id. at 438, 441, 445-46, 449, 481-83 (citing examples).

\textsuperscript{13} See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150-60 (1951) (Frankfurter, J., concurring); Coleman, 307 U.S. at 460-64, 468-70 (Frankfurter, J., concurring). Although the Court denied general assertions of standing under both the Constitution and the Administrative Procedures Act, it deferred to Congress's explicit grant of a right to sue in a particular regulatory statute, even if the legal interest at issue had no common law antecedent. See, e.g., Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14-15 (1942) (Frankfurter, J.) (sustaining the Communications Act of 1934 provision giving citizens standing to vindicate "the public interest in communications," even if they had no private rights at stake). Absent such a specific statutory conferral of standing, however, the Court demanded a showing of individualized private injury. See Tracey E. George & Robert J. Pushaw, Jr., How Is Constitutional Law Made?, 100 MICH. L. REV. 1265, 1285-86 (2002).

\textsuperscript{14} See, e.g., Linda R.S. v. Richard D., 410 U.S. 614, 617-19 (1973) (holding that a mother did not have standing to demand the prosecution of her child's father for non-support because such a criminal enforcement action would result in jailing the father, not in obtaining the remedy she sought—payment of child support); see also Pushaw, supra note 12, at 475-76 (summarizing the development of these requirements).

\textsuperscript{15} See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (rejecting the standing of citizens who alleged that the service of congressmen in the military reserves ran afoul of the constitutional clause prohibiting legislators from simultaneously
The New Deal Court also created the Article III doctrine of "ripeness," which bars judicial review until the factual and legal issues have been sufficiently developed. Ripeness addressed the need to prevent premature judicial intervention into the proceedings of administrative agencies, which began to proliferate in the 1930s.

Finally, the Court borrowed from its standing and ripeness rationales to conclude that Article III prohibited the decision of "moot" cases (i.e., those in which the parties' dispute had ended).

holding executive offices); United States v. Richardson, 418 U.S. 166, 166-79 (1974) (denying standing to a taxpayer who claimed that a federal law authorizing secret CIA expenditures violated the constitutional provision requiring Congress to account for all expenses).

16. For a brief history of ripeness, see Pushaw, supra note 12, at 494-96. I will focus here on unripe constitutional challenges to regulatory statutes and proceedings, not claims that an administrative agency has exceeded its statutory authority.

17. Congress recognized that its burgeoning regulatory legislation often forced Americans to choose between either obeying a statute they thought was unconstitutional or violating it and risking serious liability if it were upheld. See S. REP. No. 73-1005, at 2-3 (1934). Therefore, the Declaratory Judgment Act of 1934 (DJA), ch. 512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. §§ 2201-2202), authorized a plaintiff who could show an "actual controversy" with a defendant who was credibly threatening to enforce such a law to obtain a decision on its validity.

The Court upheld the constitutionality of the DJA in Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937). The Court then developed ripeness standards to help federal judges determine when to issue declaratory relief. Early decisions relied upon Justice Frankfurter's Article III rationale to avoid premature judicial review, particularly in constitutional challenges to statutes. See, e.g., United Pub. Workers of Am., 330 U.S. at 89-91 (holding unripe federal employees' First Amendment attack on the Hatch Act, which banned them from political campaigning, on the ground that the Act had not yet been applied to them and hence that any opinion would be advisory and exceed Article III limits); Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222, 224 (1954) (refusing to consider resident aliens' challenge to an INS regulation that threatened their ability to work seasonally in Alaska).

The Warren and early Burger Courts adopted a more candidly discretionary approach to ripeness. See Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967) (holding that ripeness entailed a prudential evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration"); see also Buckley v. Valeo, 424 U.S. 1, 117 (1976) (ruling that a constitutional attack on a federal election law "is a question of ripeness, rather than lack of case or controversy under Art. III"). Within a few years, however, the Court reversed course and reasserted that ripeness was an Article III requirement. See Gene R. Nichol, Jr., Ripeness and the Constitution, 54 U. CHI. L. REV. 153, 162-64 (1987) (citing cases). More recently, the Court has reverted to treating ripeness as discretionary. See, e.g., Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-39 (1998).

18. This claim was first made in Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964). See Pushaw, supra note 12, at 490-93 (summarizing the major cases, and noting the Court's inconsistency in insisting that mootness is an Article III jurisdictional mandate, yet recognizing that the doctrine is flexible and subject to numerous exceptions).
Previously, mootness had been treated as a matter of prudential discretion.\textsuperscript{19}

The Court has maintained that standing, ripeness, and mootness define[] with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines ... are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." ... "All of the doctrines that cluster about Article III ... relate ... to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."\textsuperscript{20}

\textsuperscript{19.} See, e.g., Mills v. Green, 159 U.S. 651, 653-58 (1895) (holding that an appeal seeking the right to vote in a particular election was moot once the election had occurred); see also Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 HARV. L. REV. 603 (1992) (arguing that mootness should be a discretionary rather than constitutional matter).

Another justiciability doctrine limits the federal judiciary to deciding "legal" rather than "political" questions. I will not discuss the political question doctrine at length because the modern Court has asserted that it is not based on either Article III or federalism, but rather on separation of powers (i.e., declining jurisdiction to avoid interfering with the rightful constitutional prerogatives of Congress or the President). See Baker v. Carr, 369 U.S. 186, 192-237 (1962).

It is worth noting, however, that the \textit{Baker} Court's characterization of the political question doctrine as based entirely on separation of powers cannot be squared with many previous cases in which the Court invoked this doctrine because of federalism concerns. See Robert J. Pushaw, Jr., Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis, 80 N.C.L. REV. 1165, 1172-74, 1177-78, 1181, 1192-96, 1199-1201 (2002) (citing precedent). \textit{Baker}'s creative reinterpretation of the doctrine has allowed federal courts to intrude deeply into affairs previously committed to the states, most notably legislative districting and apportionment. See Robert J. Pushaw, Jr., Bush v. Gore: Looking at \textit{Baker v. Carr} in a Conservative Mirror, 18 CONST. COMMENT. 359, 372-79 (2001). This pattern of interference indicates that \textit{Bush v. Gore}, 531 U.S. 98 (2000) (per curiam), which second-guessed a state's resolution of a controversy over its presidential electors, was hardly the aberration that its critics have suggested. See Robert J. Pushaw, Jr., \textit{The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane}, 29 FLA. ST. U. L. REV. 603 (2001).

\textsuperscript{20.} Allen v. Wright, 468 U.S. 737, 750 (1984) (citations omitted); see also Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2308 (2004) (quoting Allen). Although Congress can assign jurisdiction as it sees fit, subject only to Article III limits, the Court ultimately defines those limits. Thus, if the Court interprets Article III and separation of powers as requiring doctrines like standing, ripeness, and mootness, it can strike down statutes that ignore those constitutional principles without undermining its overarching theory of plenary congressional control over jurisdiction. See \textit{supra} notes 1-19 and accompanying text; \textit{infra} notes 26, 87-89 and accompanying text.

Nonetheless, the Court itself has acknowledged that certain aspects of the justiciability
As this quote illustrates, the Court's justiciability opinions have focused primarily on separation of powers—specifically, avoiding judicial interference with the elected coordinate branches. Nonetheless, the Court's vision of federal judges as uniquely limited in our democratic system has significant implications for the Constitution's other great structural principle, federalism.

As federal courts increasingly have invoked justiciability doctrines in refusing to decide federal law cases, litigants have been forced to go to state tribunals. State judges are not bound by Article III and therefore can apply more lenient justiciability rules—for doctrines reflect prudential judicial self-governance. See Allen, 468 U.S. at 750. A good illustration is the ban against granting standing to third parties. See Newdow, 124 S. Ct. at 2309-12 (holding that a father who did not have custody of his daughter lacked prudential standing to bring a federal suit on her behalf challenging the constitutionality of a public school's policy requiring all students to recite the Pledge of Allegiance). Another example is the Court's creation of numerous policy exceptions to mootness. See Pushaw, supra note 12, at 490 (citing cases). These discretionary doctrines conflict with the Court's own rule that it must exercise jurisdiction granted by Congress in conformity with Article III.

More generally, I have argued that modern justiciability rules are almost wholly discretionary, with the only true Article III doctrines being the bans on formal advisory opinions, non-final judgments subject to political branch review, and genuine political questions (i.e., those committed by the Constitution to the elected branches for resolution). See id. at 395-99, 436-511. Thus, all of these doctrines, when invoked to deny federal question jurisdiction, raise serious constitutional problems. See id. at 486-511; see also Redish, supra note 11, at 64, 88-109, 141 n.5 (contending that justiciability principles are not Article III requirements but rather are judge-made limits on the federal courts' mandatory statutory jurisdiction to adjudicate constitutional questions, and therefore violate separation of powers).

21. Unfortunately, the Court has inverted the original understanding, for reasons I have detailed elsewhere. See Pushaw, supra note 12, at 397-99, 412-35, 451-52, 455. To summarize, the Framers and Ratifiers based the Constitution upon the sovereignty of "We the People," who delegated certain powers to their legislative, executive, and judicial agents. Hence, all government officials are constitutionally limited, and federal courts have power coextensive with—not inferior to—that of Congress and the President. Moreover, federal judges are not "unrepresentative" because they are "unelected." Rather, they represent the People indirectly by exercising judicial power and were removed from electoral politics deliberately to guarantee their independence in upholding federal law, especially the Constitution. Therefore, separation of powers demands that federal courts assert federal question jurisdiction, unless Congress has attempted to require opinions that are advisory, non-final, or political.

Other scholars have similarly maintained that the justiciability doctrines undermine the Constitution's system of separation of powers and limited government by allowing independent federal courts to abdicate their duty of exercising judicial review, which leaves the political branches as the final interpreters of the constitutional limits on their own power. See, e.g., Redish, supra note 11, at 3-7, 75-100, 103-09, 124-26, 131-39; Erwin Chemerinsky, Interpreting the Constitution 1-24, 86-105 (1987).

22. See, e.g., Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized
instance, by allowing taxpayer standing and by deciding moot cases that raise legal questions of great public importance. The state court can then assert jurisdiction and resolve all questions presented, state and federal. When such state judgments have been appealed to the U.S. Supreme Court, it has taken inconsistent approaches.

Initially, the Court dismissed these cases on the logical ground that they were still non-justiciable under Article III and that therefore jurisdiction was absent. Such dismissals left state court opinions on federal constitutional law intact. Some state judges exploited this insulation from review by creatively under-enforcing or over-enforcing federal constitutional norms, depending upon their ideology.

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 ...."). For an exhaustive summary and trenchant analysis of state justiciability doctrines, see Helen Hershkoff, State Courts and the "Passive Virtues": Rethinking the Judicial Function, 114 HARV. L. REV. 1833 (2001).

23. See, e.g., Doremus v. Bd. of Educ., 342 U.S. 429, 433-34 (1952) (recognizing that New Jersey, like many other states, permits taxpayers to challenge expenditures that allegedly violate the federal Constitution, even though federal courts do not permit such standing).

24. For example, in DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam), a state trial court ruled that the University of Washington Law School's affirmative action program had violated the federal Fourteenth Amendment rights of a white applicant, and ordered him admitted. Id. at 314-15. The Washington Supreme Court found that the case, although possibly moot because the student was attending law school and would be allowed to graduate, fell within the exception authorizing decision of moot cases raising issues of "great public interest." Id. at 315-16 (citation omitted). On the merits, the court reversed and upheld the constitutionality of the law school's program. Id. at 315.

The U.S. Supreme Court stayed this judgment pending its final disposition, and later held that the case was moot under Article III because a ruling adverse to the student would have no effect, as he was in his third year and the law school intended to let him graduate. Id. at 315-20. The Court vacated the state court judgment and remanded. Id. at 320.


26. In Doremus v. Bd. of Educ., a New Jersey court issued a declaratory judgment that taxpayers had standing under state law to bring a federal constitutional challenge to a state statute providing for Bible reading in public schools, but then upheld the law on the merits. 342 U.S. at 430-32. The United States Supreme Court recognized the state judiciary's right to decide the case under its own standing rules, but held that "because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." Id. at 434. The Court dismissed the appeal for want of jurisdiction on the ground that plaintiffs had no Article III standing because they had failed to show a direct and particular financial injury flowing from the assertedly unconstitutional practice. Id. at 434-35.

27. To illustrate, in Doremus the New Jersey Supreme Court upheld a statute
To curb such abuses, the Court ruled that dismissal of the appeal would not bar the same parties from litigating the identical claims in a federal forum (for example, in a declaratory judgment action). The Court justified this exception to the ordinary preclusive effect of state court judgments on federal questions as necessary to preserve the uniformity of federal law. But this exception effectively foisted federal justiciability requirements on state tribunals that sought to render a binding decision on federal questions, contrary to the Court's longstanding precedent that state judiciaries had independent authority to fashion their own jurisdictional doctrines and then decide any federal issues presented.

In 1974, the Court tried a new tack: vacating and remanding state judgments rendered in cases that would have been non-justiciable under federal standards. Left unexplained was how a court which lacked jurisdiction had the power to vacate.
In the 1989 case of *ASARCO, Inc. v. Kadish*, the Court admitted its error and abandoned this practice:

> If we were to vacate the [state court] judgment below on the ground that respondents lacked federal standing when they brought suit initially, that disposition would render nugatory the entire proceedings in the state courts. The clear effect would be to impose federal standing requirements on the state courts whenever they adjudicate issues of federal law, if those judgments are to be conclusive on the parties. That result, however, would be contrary to established traditions and to our prior decisions recognizing that the state courts are not bound by Article III and yet have it within both their power and their proper role to render binding judgments on issues of federal law, subject only to review by this Court.

In addition, we doubt it would be a proper exercise of our authority to vacate the state court's judgment in these circumstances. It would be an unacceptable paradox to exercise mandatory appellate jurisdiction. See William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 272-80 (1990). Pursuant to legislation dating back to 1789, the Court had a duty to review judgments of a state's highest tribunal that either struck down a federal statute or rejected a federal challenge to a state law. See Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-87. Nonetheless, the Court developed exceptions to this jurisdiction, such as the justiciability doctrines described previously and the requirement that the federal question presented be "substantial." See Zucht v. King, 260 U.S. 174, 176 (1922). In 1914, Congress expanded the scope of appellate review to include discretionary certiorari jurisdiction over state judicial decisions that either upheld a federal law or invalidated a state law on federal grounds. See Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. In 1988, Congress made virtually all of the Court's appellate jurisdiction discretionary. See Pub. L. No. 100-352, 102 Stat. 662. Accordingly, the Court no longer needs to rely on justiciability rules to decline to review state judgments denying federal claims. See Fletcher, *supra*, at 279-80.

33. 490 U.S. 605 (1989). In that case, Arizona courts granted standing to taxpayers and a teachers' association to claim that an Arizona law, under which the state leased mineral lands to Asarco and others, violated a federal statute governing such leases. The Arizona Supreme Court resolved this federal question by invalidating the state law, and the defendants (the state and the lessees) petitioned the U.S. Supreme Court for review. *Id.* at 609-10.

In his majority opinion, Justice Kennedy acknowledged that in the original state trial, neither of the plaintiffs (the taxpayers or the association) had satisfied federal standing requirements. *Id.* at 612-17. Yet he reaffirmed the state court's power to apply its own justiciability rules and to render binding decisions on federal law as properly flowing "from the allocation of authority in the federal system." *Id.* at 617. Ultimately, the Court concluded that petitioners (defendants below) had Article III standing to invoke the Court's appellate jurisdiction because the state court judgment had inflicted a direct, concrete injury to their legal interests. *Id.* at 617-19, 623-24.
jurisdiction to confirm that we lack it and then to interfere with a State's sovereign power by vacating a judgment rendered within its own proper authority.... We have no authority to grant a writ only to announce that, solely because we may not review a case, the state court lacked power to decide it in the first instance.\(^{34}\)

The Court further conceded that its other approach—dismissing the appeal, but refusing to give preclusive effect to the state tribunal's judgment on federal questions—similarly ran afoul of its ordinary principles of judicial federalism by pressuring state judges to apply federal justiciability standards.\(^{35}\)

The Court therefore announced a new model of review: treating a state supreme court's decision that adversely altered the legal rights of a defendant as an "injury in fact" sufficient to confer Article III standing in the U.S. Supreme Court, even though the plaintiff below still did not have standing.\(^{36}\) Despite consistently reaffirming ASARCO,\(^{37}\) the Court has never justified its departure from the standing analysis it has applied in every other context, which asks whether the plaintiff (not the defendant) has suffered an actual injury in an *out-of-court* transaction.\(^{38}\)

But how can ordinary justiciability rules be twisted beyond recognition if they are bedrock requirements of Article III subject

\(^{34}\) Id. at 620-21.

\(^{35}\) Id. at 621-24.

\(^{36}\) Id. at 617-18.

\(^{37}\) The most recent instance is *Virginia v. Hicks*, 539 U.S. 113, 120 (2003).

\(^{38}\) The ASARCO approach cannot be reconciled with the Court's premise that justiciability is a *constitutional* restriction on its jurisdiction. If an Article III court originally had no subject matter jurisdiction because plaintiffs failed to demonstrate a concrete "injury in fact" as evidence of a genuine dispute, and no facts changed during the litigation process, then logically the plaintiffs continued to lack standing on appeal and the federal court (the Supreme Court) still had no jurisdiction. *See* ASARCO, 490 U.S. at 634-36 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that the case should have been dismissed for lack of standing because the state court's action adverse to defendants could not create an Article III "injury" and thus did not cure the jurisdictional defect that had existed since the outset: the challenged state government conduct did not actually and specifically injure the plaintiffs); Fletcher, *supra* note 32, at 280-81 (stressing that at the appeals stage the parties were no more adverse, and their dispute was no more concrete, than at the beginning). In my view, the intervening *legal* decision against the defendant was doubly irrelevant: A *legal* judgment is not a "fact," and the Court's standing inquiry had previously always focused exclusively on the plaintiff, not the defendant.
matter jurisdiction, which cannot be waived? This question, and the Court’s more general failure to develop a coherent approach to reviewing state judicial opinions on federal constitutional law rendered in cases that would have been federally non-justiciable, casts doubt on its underlying theory of federalism. These uncertainties grow when we turn to abstention.

2. Abstention

The New Deal Court authorized federal district judges to use equitable discretion to abstain from exercising their federal question jurisdiction because of federalism concerns. In the landmark case of Railroad Commission of Texas v. Pullman Co., the commission ordered that railroad sleeping cars be operated by conductors (all of whom were white) rather than porters (all of whom were black). A railroad company and its employees complained in federal court that this order exceeded the commission’s power under state law and also violated the Fourteenth Amendment. The Supreme Court held that the district court

39. See ASARCO, 490 U.S. at 636 (Rehnquist, C.J., concurring in part and dissenting in part) (accusing the majority of distorting Article III jurisprudence to achieve the goal of ensuring Supreme Court review of state decisions on federal questions, which the Constitution does not require). The Court made a policy exception to its justiciability rules, guided by general federalism principles of preserving its review of state judgments on federal law. Although such a ruling is eminently defensible, the Court’s refusal to admit explicitly that it was acting on policy rather than constitutional grounds resulted in further analytical confusion.

40. Several scholars have recommended that federal and state courts follow the same justiciability rules in deciding federal question cases, thereby preserving the Court’s vital constitutional role in reviewing all federal law issues to ensure uniformity. See, e.g., Fletcher, supra note 32, at 265, 282-304; Murphy, supra note 27, at 490-99. This proposal would promote intellectual consistency and preserve the Court’s appellate jurisdiction over all federal law cases, but would allow violations of federal rights to go unremedied. Ideally, federal judges would always adjudicate federal law claims, but if they decline to do so, it seems better for a plaintiff to have a state court available than no court at all.

Professor Hershkoff rejects the idea that state judges should blindly follow federal standards of self-restraint. See Herschkoff, supra note 22, at 1876-77. Instead, she urges them to develop differing approaches to justiciability that reflect each state’s unique constitutional conception of the appropriate role of its judiciary vis-à-vis other government institutions in addressing state and local needs. Id. at 1836-40, 1877-1941.

41. 312 U.S. 496 (1941).
42. Id. at 497-98.
43. Id. at 498.
should have stayed its hand until the Texas judiciary had decided the dispute over the unclear state law, because a resolution favorable to the plaintiffs would obviate the need for a federal forum to decide the constitutional challenge. In his opinion, Justice Frankfurter endorsed

a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary.... This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.

The Court also created two other major abstention categories. First, it has required dismissal—and not merely postponement—of constitutional challenges in federal court to state laws in complex areas of great importance to the states where they have provided for specialized decision-making tribunals, such as energy and tax regulation. These decisions have reiterated Pullman's federalism rationale. Second, Younger v. Harris involved a defendant's request for a federal injunction against a pending California criminal prosecution that allegedly violated his First Amendment rights. The Court conceded that Section 1983 authorized such an injunction but carved an exception for ongoing

44. Id. at 498-502.
45. Id. at 501. Later cases clarified that the plaintiff could either (1) reserve the right to return to the federal court for a decision on the federal question, or (2) voluntarily forego the federal forum and submit all claims to the state court. See, e.g., England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 419-22 (1964).
46. See Burford v. Sun Oil Co., 319 U.S. 315 (1943) (dismissing a suit attacking an order of a Texas Commission concerning the drilling of oil wells).
47. See Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) (barring a damages action under § 1983 to remedy the allegedly unconstitutional administration of a state tax system).
48. See Burford, 319 U.S. at 332-34 (citing Pullman and concluding that "a sound respect for the independence of state action requires the federal equity court to stay its hand"); see also McNary, 454 U.S. at 107-16 (emphasizing the longstanding principle of comity that counseled against federal judicial interference with state tax systems).
50. Id. at 38-40.
criminal trials. In his opinion, Justice Black stressed that the traditional reluctance of equity courts to restrain criminal proceedings was reinforced by

the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This ... is referred to by many as "Our Federalism." ... What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

The abstention doctrines raise significant constitutional problems, which have been nicely catalogued by Professor Redish.

Most importantly, they conflict with the Court's longstanding position that federal judges have a duty to exercise all jurisdiction conferred by Congress. Congress has given federal district courts original jurisdiction over all civil cases arising under federal law, which may include both federal and state law questions. How can the Court effectively amend that statute by creating abstention

51. Id. at 40-54.
52. Id. at 44. The Justices understandably sought to prevent defendants in state criminal prosecutions from routinely running to federal courts to invoke the Warren Court's freshly minted constitutional rights. Perhaps the Court should have frankly overruled or restricted these cases, not suggested that "Our Federalism" requires federal judges to refuse to hear constitutional claims as directed by Congress.
53. See REDISH, supra note 11, at 47-74. But see Barry Friedman, A Revisionist Theory of Abstention, 88 MICH. L. REV. 530 (1989) (rejecting Redish's thesis and arguing that the abstention doctrines should be refashioned to balance explicitly the federal courts' competing interests in protecting constitutional rights yet respecting state judicial authority).
54. See REDISH, supra note 11, at 47-51 (maintaining that a court may not repeal jurisdictional grants by Congress unless there are constitutional objections); see supra Part I.A (discussing the prevailing theory that federal court jurisdiction is mandatory).
doctrines, which either eliminate the federal trial forum or delay access to it until costly state court remedies have been exhausted?

The Court's answer—that it is exercising "equitable discretion" in light of federalism—begs the question of why its view of appropriate federal-state relations should trump that of Congress. For instance, Section 1983 and similar statutes reflect a considered legislative judgment that plaintiffs should have the option of bringing their federal constitutional claims before an independent federal trial court with expertise in federal law, not state judges who lack such attributes and who historically had proven themselves untrustworthy in such matters. In a case like Pullman, why

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56. See supra notes 46-52 and accompanying text (describing the total abdication of the federal judiciary in cases like Burford, McNary, and Younger).

Professor Friedman disputes that Younger necessarily has this door-slamming effect. See Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 COLUM. L. REV. 1211, 1249-53 (2004). Initially, he argues that a person who believes that a state criminal law is unconstitutional should not violate it (which would trigger the state's vital enforcement interest), but rather should obtain a declaratory judgment in federal court. Id. at 1249-52. To the objection that such potential claimants lack sufficient legal understanding to assert their rights in this way, Friedman responds that we should presume everyone's knowledge of criminal law, that in any event potential lawbreakers are often given warnings, and that they are often sophisticated and seek legal counsel. Id. at 1251-52 n.115 and accompanying text. I would need to see empirical evidence before accepting such claims, which conflict with my assumption that most people who engage in criminal behavior are unsophisticated, are not in contact with lawyers, are unlikely to be aware of the intricacies of federal jurisdiction, and are arrested without warning.

Professor Friedman then contends that, after a defendant has been convicted and sentenced in the state system, he can bring any federal claims in a habeas action in federal court. See id. at 1232, 1253, 1261-63, 1274. But see id. at 1261-63 (acknowledging and lamenting the gaps in habeas review, such as the ban on raising Fourth Amendment issues). In my view, such a later collateral proceeding is an inadequate substitute for an initial federal forum. The most obvious reason is that a successful habeas petitioner has been forced to endure an unnecessary state criminal prosecution, which entails a substantial loss of liberty, time, money, and reputation. See infra notes 59-61, 92, 231-34 and accompanying text.

57. See supra notes 41-45 and accompanying text (discussing Pullman abstention).

58. See REDISH, supra note 11, at 47-60, 71-74. But see Shapiro, supra note 11, at 546-47, 550-52, 558-59, 564-66, 569-70, 579-85 (asserting that federal courts have always had discretion to interpret jurisdictional statutes to make reasonable accommodations for state interests).

59. See REDISH, supra note 11, at 4-6, 48, 50, 53, 56, 58-60, 66-74, 168 n.67 (amplifying this point). The foregoing critique of the Court's treatment of federal question cases—that federal judges should not impose their notions of federalism to negate congressionally conferred jurisdiction—might plausibly be applied to all other jurisdictional categories, including diversity. In theory, separation of powers arguably requires the exercise of all
did the Court undermine that policy determination by forcing victims of racial discrimination to go before elected judges in the segregated state of Texas? It is insufficient to respond that abstention merely postpones federal court decision, because civil rights claimants are especially unlikely to have the resources necessary to handle two separate trials. Therefore, all non-wealthy plaintiffs are often forced to forego the federal forum and litigate both the state and federal issues in state court.

Finally, in its abstention opinions, the Court has often reassured us that federal constitutional rights will be protected because state judges would fairly consider them and, if they erred, the Court would be available to hear the appeal. But does such review substitute for the original federal forum that Congress mandated? Even if it does, is such appellate jurisdiction a meaningful check on state abuses, given that such review is now discretionary and the Court has chosen to hear no more than a dozen such cases a year?

statutory jurisdiction, with Congress making adjustments in the event of an overload. See id. at 47-139.

In practice, however, the Court concluded long ago that this scenario is unrealistic and that it must create doctrines to trim federal dockets to manageable levels. See infra Part III. To the extent that federalism informs this task, I submit that state-law diversity "Controversies" should be cut back, not federal law "Cases." See infra Part IV.

60. Congress and commentators have recognized that civil rights plaintiffs are disproportionately poor. See Note, Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants, 101 HARV. L. REV. 1231, 1231-41 (1988) (summarizing relevant federal legislation and scholarship).


Long after Pullman had been decided, federal courts received statutory authority to certify contested questions of state law to the state's highest court, thereby minimizing delays and costs. See Friedman, supra note 56, at 1214, 1229-30, 1254-56, 1278 (describing and endorsing certification). Nonetheless, federal judges generally remain reluctant to certify. See Guido Calabresi, Federal and State Courts: Restoring a Workable Balance, 78 N.Y.U. L. REV. 1293, 1301-02, 1306-08 (2003) (criticizing this failure to use certification).


63. On occasion, the Court itself has recognized that the answer is no. See England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415-17 (1964).

64. See Michael E. Solimine, Supreme Court Monitoring of State Courts in the Twenty-first Century, 35 IND. L. REV. 335, 350-53 (2002) (documenting the Court's reduction of its annual appellate docket of state judicial decisions from about 37 before the 1990s to about 7-12 in the late 1990s); see also Friedman, supra note 56, at 1218-20 (emphasizing the inadequacy of Supreme Court review to safeguard federal interests).
These unanswered questions invite skepticism about the Court’s assertion that abstention merely implements the design of the original architects of “Our Federalism.”

3. Other Jurisdictional Doctrines

The Court’s “states’ rights” vision of judicial federalism undergirds many other jurisdictional doctrines, which create further gaps in enforcement of constitutional law. Although examples could be multiplied, three are especially pertinent: the well-pleaded complaint rule, the adequate and independent state grounds doctrine, and sovereign immunity.

First, in *Louisville & Nashville Railroad Co. v. Mottley,* an injured passenger sued a railroad in federal court for breaching a contract to give her free lifetime passes, which was a state law matter. She further alleged, in anticipation of the railroad’s defense, that a federal statute prohibiting such passes was unconstitutional. The Court held that no federal jurisdiction existed because the federal question had to be raised in the plaintiff’s properly pleaded cause of action, not in the defense.

This ruling seems counterintuitive, as a case “arising under” federal law would appear to include one that depended upon the interpretation of federal law, whether presented in the complaint or the answer. Nonetheless, this “well-pleaded complaint” rule quickly took root and has shunted many federal question cases to

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65. 211 U.S. 149 (1908).
66. *Id.* at 151.
67. *Id.* at 152-53.
68. *Id.* at 152-54.
69. For elaboration of this theme and a plea to abolish this rule, see Donald L. Doernberg, *There’s No Reason for It; It’s Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction,* 38 HASTINGS L.J. 597 (1987). By contrast, Judge Posner has argued that Supreme Court review works better than federal district court original jurisdiction in dealing with federal law issues contained in a defense, primarily because the Court can distinguish substantial federal questions from those artfully pled to generate a basis for removal. See RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 190-91 (1985). This contention had special force before 1988, when the Court had a duty to hear appeals filed by a party whose federal defenses had been rejected by a state tribunal. See *supra* note 32 (citing statute). Now that the Court’s appellate docket is entirely discretionary and the Justices have radically decreased their review of state judgments, however, the well-pleaded complaint rule has become harder to justify. See *supra* notes 32 and 64 (discussing the Court’s shrinking appellate caseload).
state courts.\textsuperscript{70} Again, losing defendants with federal constitutional claims have been left with only the remote possibility of Supreme Court review.

Second, in \textit{Murdock v. City of Memphis,}\textsuperscript{71} the Justices declined to exercise appellate jurisdiction over a state court judgment on state law.\textsuperscript{72} The Court correctly explained that it aimed solely to ensure the supremacy and uniformity of federal law, and that each state's judiciary had the final word on state law.\textsuperscript{73} In a later case, however, the Court announced it would dismiss even appeals that did raise a contested question of federal law if the state court decision rested on a state law ground that was "independent" of federal law and "adequate" to sustain the outcome—in other words, reversing the federal law ruling would not change the result.\textsuperscript{74} An example would be a state conviction of a criminal defendant who had failed to comply with the state's valid procedural rule requiring contemporaneous objection at trial to allegedly illegal evidence, and who later claimed that this default infringed his federal constitutional rights.\textsuperscript{75}

The Court has justified this "adequate and independent state grounds" doctrine as minimizing its interference with state court decisions and as avoiding unnecessary constitutional rulings. Again, however, this prudential doctrine leaves intact incorrect and

\textsuperscript{70} For reaffirmations of the rule, see Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 830-32 (2002); Franchise Tax Bd. v. Const. Laborers Vacation Trust, 463 U.S. 1, 9-22 (1983).

\textsuperscript{71} 87 U.S. (20 Wall.) 590 (1875).

\textsuperscript{72} Id. at 618-38.

\textsuperscript{73} Id. at 626-36. The lone exception is that the Court can review a state court decision that rests on an interpretation of state law that blocks consideration of a federal issue. See Laura S. Fitzgerald, Suspecting the States: Supreme Court Review of State-Court State-Law Judgments, 101 Mich. L. Rev. 80 (2002) (summarizing these cases and proposing a "proven mistrust" rule: that the Court can intervene only when it sets forth specific evidence that the state tribunal consciously manipulated state law to frustrate federal law and avoid the Court's appellate jurisdiction).

\textsuperscript{74} The seminal case articulating this "adequate and independent state grounds" rule is \textit{Eustis v. Bolles}, 150 U.S. 361, 366 (1893). The Court has developed several exceptions to preserve its opportunity for review. See, \textit{e.g.}, \textit{Lee v. Kemna}, 534 U.S. 362, 375-88 (2002) (reaffirming the general rule, but concluding that the case fell within a narrow exception allowing review because the state court had relied on a procedural rule that effectively deprived the defendant of his due process rights).

inconsistent state judicial interpretations of federal constitutional law, thereby opening further holes in its enforcement.\(^7^6\)

Third, state sovereign immunity has crippled full vindication of constitutional rights. The Eleventh Amendment provides that federal “judicial power” does not extend to any suit against a state brought by citizens of another state. In the landmark case of *Hans v. Louisiana*,\(^7^7\) the Court held that the Eleventh Amendment prohibits a citizen from suing a state in federal court for allegedly violating federal rights.\(^7^8\) *Seminole Tribe v. Florida*\(^7^9\) established that Congress cannot abrogate such immunity by exercising its Article I powers (e.g., under the Commerce Clause).\(^8^0\) The Court maintained that the Eleventh Amendment expressed the broader “postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent.”\(^8^1\) When a plaintiff attempted to vindicate his federal statutory rights by suing a state in *state* court (which the Eleventh Amendment does not cover), the Court barred the action by invoking a global,

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\(^7^6\) See Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291 (1986). These authors correctly reject the Court’s assertion that the “adequate and independent state grounds” doctrine is a jurisdictional restriction imposed by Congress consistently with Article III, and instead characterize the doctrine as a matter of prudential self-restraint to avoid intruding into state courts’ legitimate domain. See id. at 1292-1355.

Congress’s decision in 1988 to make the Court’s appellate docket discretionary (described *supra* note 32) has lessened the impact of the “adequate and independent state grounds” doctrine, because the Court now may simply decline review without providing any reason. As a practical matter, then, the doctrine currently has force mainly when the Court wishes to take jurisdiction because of some exceptional situation, as in *Kemna*.

\(^7^7\) 134 U.S. 1 (1890).

\(^7^8\) Id. at 9-21.

\(^7^9\) 517 U.S. 44 (1996).

\(^8^0\) Id. at 54-73. The Court reasoned that the Eleventh Amendment, ratified in 1793, altered any power Congress may have had under the original Constitution to abrogate state sovereign immunity. Id. at 64-66. By contrast, Section 5 of the Fourteenth Amendment made an exception to the Eleventh Amendment by empowering Congress to enact legislation (including laws authorizing private federal lawsuits) to vindicate federal rights against state deprivations. See id. at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976)).

\(^8^1\) Id. at 68 (citing Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) (footnote omitted)). The Court has extended this holding to rebuff congressional attempts to authorize suits against states in other areas. See, e.g., Fla. Prepaid Post-Secondary Educ. Bd. v. Coll. Savings Bank, 527 U.S. 627, 639-48 (1999) (patent infringement).
nontextual rule of sovereign immunity supposedly derived from originalist principles of federalism. 82

The dissenters in these cases, and many scholars, have exposed the flaws in the majority's reasoning. 83 For present purposes, the salient point is that sovereign immunity renders the federal courts incapable of fully remediying state violations of federal constitutional law. 84 As with justiciability, the Court has made exceptions to try to close the gap. 85 These exceptions, however, seem

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82. See Alden v. Maine, 527 U.S. 706, 728-29 (1999). The Court again relied on "[t]he good faith of the States" in assuming that they would "honor the Constitution" and federal laws. Id. at 755. It is unclear why the Court clung to this assumption in a case in which Maine invoked sovereign immunity to defeat a very compelling claim that the state had violated federal employment laws.

83. The most systematic judicial critique is Seminole Tribe, 517 U.S. at 100-85 (Souter, J., dissenting). Justice Souter relied upon scholars who have demonstrated that the Court's conception of state sovereign immunity has no basis in the Constitution's text, structure, underlying political theory, or history. See id. at 110 n.8 (citing articles by Vicki Jackson, Akhil Amar, William Fletcher, John Gibbons, and Martha Field).

I agree with those professors who have concluded that the Eleventh Amendment was intended to bar suits against states grounded solely in the diverse citizenship of the parties, but not cases that also featured a separate basis of federal jurisdiction—specifically, that the state had violated federal law. See Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1473-92 (1987); William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889 (1983); see also James E. Pfander, History and State Suability: An "Explanatory" Account of the Eleventh Amendment, 83 CORNELL L. REV. 1269 (1998) (arguing that the Constitution and Eleventh Amendment incorporated not state sovereign immunity, but rather a compromise whereby states had autonomy to manage financial obligations that existed at the time they ratified the Constitution yet accepted federal limits on future state fiscal policy); John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 YALE L.J. 1663 (2004) (contending that the Court should closely adhere to the language of the Eleventh Amendment because it is so precisely worded and detailed, rather than interpret the Amendment expansively based on perceived background principles such as broad state sovereign immunity).

84. For an eloquent explanation of this point, see Amar, supra note 83, at 1425-29, 1473-92.

85. Most importantly, a victim whose federal rights have been violated by a state can sue a state official (as distinguished from the state itself), but only for prospective injunctive or declaratory relief, not a monetary award. See Ex Parte Young, 209 U.S. 123 (1908); Edelman v. Jordan, 415 U.S. 651, 662-71 (1974). Furthermore, the Eleventh Amendment has long been construed as inapplicable to state political subdivisions and municipalities. See Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 279-81 (1977) (citing precedent dating back to 1890). Such exceptions have led some scholars to claim that the negative effects of Hans and its progeny have been overstated. See, e.g., Michael Solimine, Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment, 101 MICH. L. REV.
so strained and illogical as to call into doubt the underlying rule of sovereign immunity and its federalism basis.\textsuperscript{86} Put bluntly, why would the Framers draft a Constitution to combat state abuses and defiance of national law under the Articles of Confederation, then exempt states from compliance with the Constitution? This unanswered, and seemingly unanswerable, question indicates that sovereign immunity also is a matter of judicial discretion, not constitutional compulsion.

In sum, the Court has fashioned numerous doctrines that allow federal judges to refuse to exercise their jurisdiction to decide all constitutional cases, based on its interpretation of Article III and the original understanding of federalism. Unfortunately, these doctrines have raised analytical problems that the Court has never adequately resolved.

C. Scholarly Approaches

Nearly all legal academics have accepted the Court's teaching that the Constitution grants Congress plenary power over federal jurisdiction.\textsuperscript{87} Taking this position to its logical extreme, Martin Redish argues that the Justices have violated Article III and separation of powers by crafting prudential doctrines that allow federal judges to refuse the jurisdiction that Congress has validly granted.\textsuperscript{88} He rejects the Court's justification that it must sometimes exercise equitable discretion to promote harmony between the federal and state judiciaries.\textsuperscript{89}

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1463, 1483-84 (2003).

86. See Amar, \textit{supra} note 83, at 1473-84; see also CHEMERINSKY, \textit{supra} note 61, at 409-62 (cataloguing the multiple exceptions and permutations of Eleventh Amendment jurisprudence).


88. See REDISH, \textit{supra} note 11, at 3-7, 47-139.

89. See \textit{id.} at 47-74. More recently, Professor Redish has acknowledged that the Court
David Shapiro has attacked Redish's premise that statutory jurisdiction must invariably be asserted. Rather, Professor Shapiro argues that federal courts have always exercised reasoned discretion to decline jurisdiction in appropriate cases to accommodate countervailing interests such as equity, federalism, comity, separation of powers, and efficient judicial administration. He does not, however, attempt to set forth specific principles of federalism that should guide the exercise of discretion over jurisdiction.

has not accepted his argument and is unlikely to do so, and that therefore he would recommend abstention as the best practical alternative in certain circumstances. Martin H. Redish, Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem, 75 NOTRE DAME L. REV. 1347, 1350, 1370, 1375-76 (2000). Specifically, he suggests that a federal court should abstain whenever it refuses to enjoin a parallel state judicial proceeding in order to foster the important goal of avoiding duplicative concurrent litigation in federal and state courts. See id. at 1361-76.

90. See Shapiro, supra note 11, at 543-74.
91. See id. at 547.
92. Rather, he maintains that federalism concerns should continue to inform the exercise of discretion, with particular standards to be worked out in common law fashion depending on the facts and context. See id. at 581-85. For a similarly flexible and organic conception, see Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 NW. U. L. REV. 1 (1990) (contending that federal jurisdiction reflects a continuing dialogue between Congress and the Court over the appropriate contours of such jurisdiction, which evolve along with ideas about the proper role of the judiciary in the constitutional system).

In a recent article, Professor Friedman argues that jurisdictional doctrines have become overly complex and uncertain because of the assumption that a case must be litigated in either a federal court or a state tribunal. Friedman, supra note 56, at 1216-26. He criticizes the Court's attempt to resolve the problems caused by such "either/or" thinking through two untenable theories: that state judges are as sensitive to federal interests as their federal counterparts (the "parity" thesis), and that Supreme Court review of state judgments sufficiently preserves the supremacy and uniformity of federal law. See id. at 1218-26, 1248, 1259-60, 1275. Instead, Friedman recommends a "multijurisdictional" approach: Cases should proceed in both state and federal courts when both state and federal interests are involved. Id. at 1226-79. He emphasizes that this approach already exists in several areas, such as abstention, federal habeas review of state criminal convictions, and federal court certification of state law questions. See id. at 1229-35. Friedman contends that this multijurisdictional framework should be expanded and that federal judges should more candidly engage in an interest analysis that balances competing federal and state concerns. Id. at 1236-61.

I agree with Professor Friedman that the Court's rhetoric about parity and appellate jurisdiction fails to grapple with significant holes in the interpretation and enforcement of federal law. Furthermore, I find that his proposal intelligently blends a concern for protecting the legitimate interests of state tribunals with the imperative of assuring meaningful consideration of federal questions. Nonetheless, the costs of his multijurisdictional solution may sometimes outweigh the benefits. For instance, someone
To formulate such principles, it is helpful first to summarize the major revisionist scholarship on Article III's text, structure, history, political theory, and early precedent. Initially, Robert Clinton resurrected an argument made by Justice Story in *Martin v. Hunter's Lessee*.\(^9\) that the Framers sought to require Congress to allocate to the federal judiciary every "Case" and "Controversy" listed in Article III, and hence that Congress could make exceptions to the Supreme Court's appellate jurisdiction only if that jurisdiction was given to an inferior federal court.\(^4\)

Refining this idea, Akhil Amar has contended that the drafters of Article III, by deliberately using the modifier "all" before "Cases" but omitting it before "Controversies," created two jurisdictional tiers.\(^5\) In the first, "mandatory" tier of "all Cases" defined by subject matter, Congress "shall" (i.e., must) grant some federal court jurisdiction, either original or appellate.\(^6\) By contrast, in the second, "permissive" tier of "Controversies" defined by parties, Congress may—but need not—confer such jurisdiction.\(^7\) Hence, Professor Amar challenged the prevailing wisdom that Congress can deprive the entire federal judiciary of jurisdiction over "all Cases" raising federal questions.\(^8\)

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93. 14 U.S. (1 Wheat.) 304 (1816).
95. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985). Through a "Neo-Federalist" methodology, Professor Amar aimed to recover the original meaning of the Constitution's language, structure, and political theory based primarily upon evidence from the Philadelphia Convention, the ratification debates, and early federal statutes and cases. He then sought to apply these Federalist principles, with appropriate sensitivity to intervening legal and political developments, to help solve modern constitutional problems. See id. at 207-09, 230-31 n.86.
96. Id. at 209-12, 215-19, 229-34, 239-45, 255-69, 272.
97. Id. at 209-10, 221-30, 233-38, 247-59, 262-63, 266.
98. For a response to critics of Professor Amar's theory, see Robert J. Pushaw, Jr., *Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. Rev. 847; see also Lawrence Gene Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981) (arguing that various constitutional provisions and
I adapted Amar's two-tier framework to explore the federal courts' role after Congress has granted them jurisdiction.99 My central conclusion was that Article III's distinction between "Cases" and "Controversies" denoted the different principal function that federal judges were expected to perform: expounding laws having national importance in "Cases," while acting primarily as neutral umpires in resolving "Controversies," which typically involved state substantive law.100 I further suggested that federal courts must exercise their jurisdiction over "all Cases," including those arising under the Constitution, but not necessarily over all "Controversies"—especially when the dispute turns on state law and the state court will likely be impartial.101

To develop this thesis more fully, I will try to recapture the original understanding of judicial federalism. I will then explain how this Federalist vision has been distorted over the past century, and how its revival could usefully clarify the major doctrines of jurisdictional restraint.

II. ORIGINALIST PRINCIPLES OF JUDICIAL FEDERALISM

The most relevant historical evidence concerns the Supreme Court's role vis-à-vis the state tribunals. To understand this relationship, it is helpful first to describe generally the federal judiciary's structure, powers, and limits.

A. The Nature of Federal Judicial Power

1. Historical Background

The Articles of Confederation formed an alliance of sovereign states, whose legislatures retained all real power and often passed

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101. See id. at 518-31.
unjust laws. The Articles established a weak central government, in which a Congress controlled the executive and judiciary. State actions contrary to national laws and treaties could not be checked by state judges, who usually depended upon their legislatures for their tenure and salary. Nor could the national tribunals enforce judgments against the states in those rare cases when they had jurisdiction.

The resulting chaos in the 1780s prompted Federalist thinkers to relocate “sovereignty”—absolute and final lawmaking authority—from the legislature (the English model) to “the People” collectively. In the new Federal Constitution, “We the People” gave their federal government agents increased power to address matters that concerned more than one state or Americans collectively, such as foreign affairs. To prevent the federal government from becoming oppressive, however, the People distributed its powers among the three branches, thereby making the executive and judiciary coordinate rather than subordinate.

Of special importance here, Article III vests federal “judicial Power”—the rendering of a final judgment after applying the law


103. See Articles of Confederation art. IX (empowering Congress to appoint temporary executive committees and judicial tribunals). For criticisms of this arrangement, see The Federalist No. 38, at 247 (James Madison) (Jacob E. Cooke ed., 1961); 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 458-59 (James Wilson) (Jonathan Elliot ed., 1901) [hereinafter Elliot’s Debates].


105. See Pushaw, supra note 99, at 468-70.


107. See, e.g., 1 Elliot’s Debates, supra note 103, at 497-98 (John Jay); The Federalist No. 23 (Alexander Hamilton); The Federalist No. 41 (James Madison); Pushaw, supra note 12, at 413-15.

108. See 1 Elliot’s Debates, supra note 103, at 496-97 (John Jay); 2 Elliot’s Debates, supra note 103, at 257 (Alexander Hamilton); 1 Farrand, Records, supra note 104, at 147 (James Wilson); id. at 124 (James Madison); see also Pushaw, supra note 12, at 397-99, 415-19, 427, 451, 469-72, 478 (setting forth the pertinent history, and concluding that the modern Court’s approach to justiciability weakens the coordinate role of the judiciary and commensurately increases the political branches’ power).
to the facts\textsuperscript{109}—in independent federal courts\textsuperscript{110} in two main categories. The first is "all Cases" involving subjects of unique national concern, most crucially those "arising under [the] Constitution."\textsuperscript{111} This provision, read in conjunction with the Supremacy Clause\textsuperscript{112} and in the context of a written Constitution based upon popular sovereignty, authorizes federal judges to examine the constitutional validity of government actions.\textsuperscript{113} Federal judges would develop special expertise in federal law, as well as in admiralty and the law of nations.\textsuperscript{114} The second Article III category consists of six types of "Controversies" in which parties (such as different states or their citizens) needed a neutral federal forum, regardless of whether the applicable law was federal or state.\textsuperscript{115}

"Cases" and "Controversies" came in several established forms at law or in equity.\textsuperscript{116} Most common was the civil cause of action, initiated by an ordinary writ (e.g., trespass or debt) to resolve a private dispute involving property, a contract, or a tort.\textsuperscript{117}

\begin{thebibliography}{99}
\bibitem{110} See U.S. Const. art. III, § 1 (guaranteeing judges tenure during "good Behaviour" and compensation that could not be reduced); see also \textit{The Federalist} No. 51, at 348-49 (James Madison) (Jacob E. Cooke ed., 1961) (praising such protections as necessary to ensure the judges' independence). All federal courts are equally autonomous and structurally superior to state judges, who lack similar independence and national accountability and therefore cannot be trusted with ultimate power to decide federal cases. See Amar, \textit{supra} note 95, at 221-30, 233-38, 247-58, 262-63.
\bibitem{111} U.S. Const. art. III, § 2.
\bibitem{112} U.S. Const. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.").
\bibitem{113} Hamilton made the classic argument: (1) courts must resolve cases impartially according to the law; (2) the written Constitution is the fundamental and supreme law in which the People explicitly limited the political branches; (3) therefore, judges must follow the Constitution instead of a clearly contrary ordinary law. \textit{The Federalist} No. 78, at 523-26 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Gordon Wood has masterfully traced the intellectual development of the idea of judicial review during the 1770s and 1780s. See Wood, \textit{supra} note 102, at 259-63, 273-82, 291-343, 383-89, 433-63, 549. For a detailed summary of the original understanding that the Constitution authorized judicial review to disregard clearly unconstitutional laws, see Pushaw, \textit{supra} note 12, at 422-25.
\bibitem{114} See Pushaw, \textit{supra} note 99, at 496-502 (citing historical sources).
\bibitem{115} U.S. Const. art. III, § 2, cl. 1. For a detailed discussion of "Controversies," see Pushaw, \textit{supra} note 99, at 504-11.
\bibitem{116} See Pushaw, \textit{supra} note 99, at 472-82 (citing supporting historical materials).
\bibitem{117} When such common law disputes either pitted parties who had been granted a federal forum by Article III (e.g., citizens of different states) or raised legal questions identified in
frequently, citizens brought public actions to enforce government compliance with the law through either extraordinary writs (e.g., mandamus, prohibition, certiorari, and quo warranto)\(^{118}\) or informer and relator actions.\(^{119}\) Finally, higher courts could review decisions of inferior tribunals through a writ of error or an appeal.\(^{120}\)

In this framework, what we today call "standing" existed if a plaintiff had an action or appeal under one of these traditional forms.\(^{121}\) The Constitution allowed Congress significant discretion to determine which parties had standing\(^{122}\) and to distribute jurisdiction among federal courts.\(^{123}\)

2. Early Supreme Court Precedent Concerning Jurisdiction

Federal courts unfailingly exercised their statutory jurisdiction over "all Cases." Indeed, the Marshall Court expansively interpreted such jurisdiction, especially as it concerned federal ques-
tions. For example, Osborn v. Bank of the United States held that federal trial courts had jurisdiction whenever federal law "forms an ingredient of the original cause." Similarly, at the appellate level, the Court broadly asserted jurisdiction to ensure the supremacy and uniformity of federal law.

The Court identified only three exceptions to the rule of exercising federal question jurisdiction, each of which reflected the Framers' understanding of "judicial power" in our constitutional system based upon separation of powers. First, the Justices declined to issue formal advisory opinions on legal questions submitted by the political branches outside the litigation context. Second, Congress could not require federal judges to render decisions that could be revised by the political branches. Third,

124. See, e.g., Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819 (1824) ("This clause enables the judicial department to receive jurisdiction to the full extent of the [C]onstitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.").

125. 22 U.S. (9 Wheat.) 738 (1824).

126. Id. at 823. Specifically, the Court ruled that because a federal statute created the Bank of the United States, any cause of action it brought would require proof of the Bank's capacities and thus would arise under federal law, even if the underlying basis of the claim was state law. Id. at 818-28; see Anthony J. Bellia, Jr., Article III and the Cause of Action, 89 IOWA L. REV. 777, 778, 800-17 (2004) (arguing that Osborn incorporated a formal, rigid conception of a "cause of action" focusing on the form of proceeding that provided the remedy, and rejecting the prevailing view that the Marshall Court flexibly recognized federal court jurisdiction whenever either a federal right had been asserted or a question of federal law potentially might arise in litigation).

127. For an account of the constitutional and statutory framework for Supreme Court review of federal question cases, see supra notes 32, 69, 110-12 and accompanying text and infra notes 149-55, 157-66 and accompanying text.

128. I have substantiated this point in Pushaw, supra note 12, at 436-52.

129. See Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), reprinted in STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES app. at 179-80 (1997) (refusing to answer President Washington's abstract questions about treaties and international law because of separation-of-powers concerns); see also Robert J. Pushaw, Jr., Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective, 87 GEO. L.J. 473, 473-74, 477-83, 490-91 (1998) (arguing that this Letter faithfully implemented the intent of the Framers, who had deliberately authorized the President to obtain written advice exclusively from his executive subordinates and had limited the Court to issuing opinions only after the President had acted and a litigated case had arisen).

130. See Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); see also Pushaw, supra note 12, at 403-04, 438-41 (demonstrating that the Justices faithfully adhered to the Framers' and Ratifiers' understanding that finality of judgments was a crucial aspect of true judicial power).
the Court could decide only "legal" issues, not "political" questions that the Constitution left to the discretion of the President or Congress, such as the conduct of foreign affairs. 131

The Court's three seminal decisions establishing these jurisdictional limits all involved the coordinate federal branches and rested upon a prudential balancing of factors guided mainly by separation of powers. Hence, the Justices had no need to discuss federalism. Moreover, in these three cases it did not occur to anyone that state courts could then seize jurisdiction and reach a different result that would alter the balance among the three federal departments. 132

Hence, the Court's original justiciability doctrines did not create any gap in the enforcement of federal law that the state courts filled.

By contrast, the Court did make several exceptions to its "Controversies" jurisdiction. 133 Most notably, in Strawbridge v. Curtiss, 134 the Court held that statutory diversity jurisdiction should be exercised only when each plaintiff was a citizen of a state different from each defendant. 135 Such disputes would necessarily be relegated to state tribunals. 136 Moreover, the Court interpreted "United States party" jurisdiction narrowly to exclude controversies

131. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164-71, 173-80 (1803); see also Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801); Pushaw, supra note 12, at 446-51 (showing that Chief Justice Marshall's analysis of judicial review and justiciability exactly tracked Hamilton's argument during Ratification).

132. Put differently, these three cases involved congressional attempts to authorize federal courts to make decisions that would upset the Constitution's separation-of-powers scheme. In none of these instances did state courts have concurrent jurisdiction to apply federal law as part of their exercise of state judicial power.

133. These cases are summarized in Pushaw, supra note 99, at 506-11.

134. 7 U.S. (3 Cranch) 267 (1806).

135. See id. at 267-68; see also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15-20 (1831) (ruling that an Indian Tribe was not a "foreign state" within the meaning of the jurisdictional statute implementing Article III and hence was unable to bring suit); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 303-04 (1809) (construing a federal statute and Article III as extending jurisdiction only to controversies between foreigners and American citizens, not between two foreigners); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 85-87 (1809) (holding that a federal bank corporation was not a "citizen" and thus could not sue in diversity).

136. Later in the nineteenth century, the Court created federalism-based exceptions to diversity jurisdiction involving subjects deemed to be of special importance to the states. See Byers v. McAuley, 149 U.S. 608, 618-19 (1893) (probate); In re Burrus, 136 U.S. 586, 593-94 (1890) (divorce and custody).
in which the federal government was a defendant rather than a plaintiff.\textsuperscript{137}

B. The Relationship Between the Supreme Court and State Tribunals

1. The Constitutional and Statutory Framework

Although "We the People" increased the national government's authority, they hardly made it monolithic. Rather, states remained autonomous governments that retained all their preexisting jurisdiction, unless the Constitution expressly withdrew such power or granted it exclusively to the federal government.\textsuperscript{138} Each state controlled its own legal development through a form of government that reflected its unique history and political traditions.\textsuperscript{139} Many states followed an English model of separation of powers that was far more flexible than that of the federal Constitution, especially regarding the role of the judiciary.\textsuperscript{140}

To illustrate, state judges performed various administrative tasks, reflecting the British notion that "judicial" power was part of

\textsuperscript{137} See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335-36 (1816). The Founders understood the same limitation as applying to "Controversies" involving foreign nations, who could sue in federal court but could not be sued without their consent under established immunity principles. See, e.g., 3 Elliot's Debates, supra note 103, at 593 (James Madison); id. at 557 (John Marshall). State courts would likewise decline to decide such suits against the federal government or foreign countries, thereby leaving potential claimants to political remedies. Hence, an unavoidable gap in judicial enforcement of the Constitution would arise in these few cases.

\textsuperscript{138} See, e.g., The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961); The Federalist No. 32, at 200-03 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); 1 Farrand, Records, supra note 104, at 60 (Rufus King); id. at 153-54, 157 (James Wilson and John Dickinson); 3 id. at 99 (letter of Roger Sherman and Oliver Ellsworth); 4 Elliot's Debates, supra note 103, at 286 (Charles Pinckney). The Tenth Amendment confirmed this principle by providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

\textsuperscript{139} See Wood, supra note 102, at 125-467.

\textsuperscript{140} See Hershkoff, supra note 22, at 1882-98, 1905-06 (noting that states have always had diverse, and often changing, approaches to separation of powers); id. at 1880-81 ("Colonial charters, which said little about courts, established functionally ambiguous institutions that blended executive, legislative, and judiciary activities--institutions that the Framers are thought to have specifically rejected in adopting Article III.").
the "executive" power to enforce the law.141 Several state courts rendered formal advisory opinions,142 even though federal judges could not do so,143 and the Framers could reasonably have foreseen that such opinions might concern whether a proposed state action comported with the federal Constitution.144

To take another example of a unique English practice, certain state legislatures, like the House of Lords, served as the highest court of appeal.145 Again, the Framers and Ratifiers were aware that, contrary to practice under the new federal Constitution, some states would allow the political branches to review judicial judgments (which could include interpretations of federal law).146

141. See, e.g., WOOD, supra note 102, at 154-61; Hershkoff, supra note 22, at 1871. Although the English did not conceive of a separate judicial power, they did recognize that courts exercised a distinct function (adjudication) and required independence from the King and Parliament to perform this function properly. See W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 5-7, 101-03 (1965).

142. See, e.g., MASS. CONST. of 1780, pt. II, ch. 3, art. 2; Fletcher, supra note 32, at 267-68 (describing early American advisory opinion practice).

143. Convention delegates unsuccessfully proposed a provision for such opinions modeled on the one in the Massachusetts Constitution. See 2 FARRAND, RECORDS, supra note 104, at 334. Numerous other schemes to involve federal judges in advising the political branches also failed. See PUSHAW, supra note 129, at 478-80.

144. See Fletcher, supra note 32, at 269 n.27 (citing examples where such advice was sought). In giving advisory opinions, state judges have always acted as objective legal experts providing non-binding recommendations to the political branches, not as courts of law rendering final judgments. See id. at 268-69, 285 (making this point, and noting that state advisory opinions have never been treated as precedent or been given preclusive effect).

Hence, advisory opinions, even if they concern matters of federal law, never assume a judicial form capable of being appealed to any higher court. Nonetheless, if state political officials take the action for which they requested an advisory opinion, and if litigation arises in which the state judges adhere to their prior opinion on federal law, the Supreme Court can then exercise appellate jurisdiction. In this way, its ultimate review over all federal law remains intact.

145. Some state constitutions specified that appeals courts would be composed of members of the political branches. See, e.g., DEL. CONST. of 1776, art. 17; N.J. CONST. of 1776, IX; N.Y. CONST. of 1777, art. XXXII. In most states, the legislature reigned supreme and either directly wielded all types of government power (including judicial) or indirectly influenced the exercise of judicial power by controlling judges' appointment, tenure, and salary. See WOOD, supra note 102, 154-61, 407-08, 451-54.

146. See Hershkoff, supra note 22, at 1880-81.
Moreover, the Supremacy Clause\textsuperscript{147} recognizes that state courts, in exercising state judicial power in litigated cases, will sometimes have to apply federal law (including the Constitution), and the Clause admonishes them to do so faithfully. Therefore, the Framers gave state tribunals the opportunity, in the first instance, to exercise concurrent jurisdiction over all Article III matters, unless Congress made a particular subject exclusive to the federal judiciary.\textsuperscript{148} Nonetheless, recent history had demonstrated that state judges could not always be trusted with national laws because of their susceptibility to direct political pressure and their parochial bias in favor of state interests.\textsuperscript{149} Thus, only independent Article III courts with expertise in federal law would be given final interpretive authority.\textsuperscript{150} Ultimately, the Supreme Court would ensure the supremacy and uniformity of federal law.\textsuperscript{151} As Alexander Hamilton explained, absent the possibility of an appeal from state tribunals to the Supreme Court, the local courts [would have to] be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the union may be eluded at the pleasure of every [state] plaintiff or prosecutor[,] ... [which] would defeat some of

\textsuperscript{147} This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI (emphasis added).


\textsuperscript{149} Several Framers stressed this state court failure. See, e.g., THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); 2 FARRAND, RECORDS, supra note 104, at 46 (Edmund Randolph); 1 id. at 124 (James Madison); id. at 125 (James Wilson); Pushaw, supra note 99, at 497 n.247 (citing statements to similar effect during Ratification, the debates over the Judiciary Act of 1789, and early Supreme Court decisions).

\textsuperscript{150} For a persuasive explanation of why federal rather than state judges must have ultimate power to decide federal question cases, see Amar, supra note 95, at 221-30, 233-38, 247-58, 262-63, 266.

the most important and avowed purposes of the proposed government .... [T]he national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the union, and an appeal from them will as naturally lie to that tribunal [the U.S. Supreme Court], which is destined to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of the convention is, that all the causes of the specified classes [in Article III], shall for weighty public reasons receive their original or final determination in the courts of the Union. 152

The Judiciary Act of 1789153 implemented the foregoing Federalist notion of judicial federalism. Congress provided for original federal jurisdiction over many issues of federal law, but rarely made that jurisdiction exclusive.154 Because the vast majority of American trial courts were state rather than federal, state judges initially decided most federal (including nearly all constitutional) questions. Section 25 of the Judiciary Act, however, authorized Supreme Court review of the state's highest court over any decision that denied federal rights.155

In sum, the Constitution and its implementing legislation allowed state courts to apply federal law, but preserved review by the Supreme Court if they failed to discharge their duty.

152. THE FEDERALIST NO. 82, at 555-56 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The last sentence of this quote reveals Hamilton's understanding that federal judges, either trial or appellate, would decide all the cases and controversies listed in Article III. He did not suggest any discretion, either legislative or judicial, to make exceptions to Article III jurisdiction. Thus, Hamilton would not have accepted either the Court's creation of doctrines to decline to hear federal question cases or my suggestion to curtail diversity jurisdiction.

153. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

154. Although the orthodox view is that federal courts did not receive general federal question jurisdiction until the Judiciary Act of 1875, Professor Engdahl has argued that the 1789 Act provided for federal jurisdiction over all cases that could have been contemplated as arising under federal law. See David E. Engdahl, Federal Question Jurisdiction Under the 1789 Judiciary Act, 14 OKLA. CITY U. L. REV. 521 (1989) (citing sources). What is undisputed is that state courts have always had concurrent power to decide federal questions. It was not until the 1875 amendment, however, that the Supreme Court ruled definitively that Article III permits such concurrent jurisdiction. See Claflin v. Houseman, 93 U.S. 130, 136 (1876).

2. Early Precedent

The Supreme Court quickly recognized that states had ultimate power over their own law. Yet it emphatically repudiated their attempts to assert similar authority over federal law, particularly the Constitution.

In *Martin v. Hunter's Lessee,* the Court rejected the claim that Section 25 of the Judiciary Act had unconstitutionally extended its appellate jurisdiction to state tribunals. In his opinion, Justice Story noted that Article III granted the Court appellate jurisdiction over "all Cases" arising under the federal Constitution and laws, without making any exception for cases decided in the states. Justice Story then stressed that the Supremacy Clause contemplated that state judges would adjudicate federal questions, and that such judgments had to be reviewed by the Court to ensure federal supremacy.

The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice .... If there were no revising authority to control these jarring and discordant [state court] judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.

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156. See, e.g., *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 392 (1798) (Chase, J.) ("[T]his court has no jurisdiction to determine that any law of any state Legislature, contrary to the Constitution of such state, is void.").

157. Advocates of "states rights" argued that the people of each state were sovereign and retained the final power to determine, through the "interposition" of their judges, whether the federal Constitution had been breached. Amar, *supra* note 83, at 1451-55.

158. 14 U.S. (1 Wheat.) 304 (1816).

159. *Id.* at 323-52.

160. *Id.* at 337-39; *see also id.* at 339-40 (reasoning that, if Congress had not established inferior federal tribunals, the Court's appellate jurisdiction could only have acted on state courts).

161. *Id.* at 340-42.

162. *Id.* at 347-48.
Chief Justice Marshall reprised these themes in *Cohens v. Virginia*,\(^{163}\) which affirmed the Court's power to examine state judgments on federal law, even where the state itself was a party and claimed sovereign immunity.\(^{164}\) He explained that the states, by ratifying the Article III provision authorizing appellate jurisdiction over "all" federal question cases, had given up any prior sovereign immunity they may have had.\(^{165}\) Chief Justice Marshall stressed that the Constitution would be frustrated by allowing each state, with the approval of its politically dependent courts, to resist or defeat legitimate federal laws—especially the Constitution, the People's fundamental and supreme law.\(^{166}\)

Finally, the Supreme Court did not make any exceptions to its appellate review when a state court had entertained a case that would have been non-justiciable under federal standards. For instance, in *Calder v. Bull*,\(^{167}\) the Connecticut Legislature set aside the judgment of a probate court, which promptly reversed its decree (a decision upheld by the state's appellate courts) despite the claim that this procedure violated the federal Constitution's Ex Post Facto Clause.\(^{168}\) The Supreme Court affirmed,\(^{169}\) emphasizing that Connecticut's legislature had always exercised the "judicial" function of setting aside court judgments.\(^{170}\) Hence, if the legislature's action was characterized as "judicial," it complied with state law (as the Connecticut courts had found) and raised no issues under the federal Constitution.\(^{171}\)

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\(^{163}\) 19 U.S. (6 Wheat.) 264 (1821).

\(^{164}\) *Id.* at 375-430.

\(^{165}\) *Id.* at 379-404.

\(^{166}\) *Id.* at 383-92, 414-15. The Court held that the Eleventh Amendment, which prohibited construing federal "judicial power" to extend to "any suit ... commenced or prosecuted" against a state by a citizen of another state, did not apply for two reasons. *Id.* at 405-06. First, the case did not involve a "suit" (i.e., a plaintiff's claim of a remedy for the violation of a legal right), but rather was brought by a "writ of error" (i.e., an appeal on a single point of law). *Id.* at 405-12. Second, the Cohens were citizens of Virginia, not "another State." *Id.* at 412.

\(^{167}\) 3 U.S. (3 Dall.) 386 (1798).

\(^{168}\) *Id.* at 386-87, 393 (Chase, J.).

\(^{169}\) At that time, the Court consisted of five Justices. The Chief Justice did not participate, and the remaining four Justices delivered their opinions *seriatim*.

\(^{170}\) *Id.* at 395-96 (Paterson, J.); see also *id.* at 387 (Chase, J.) (alluding indirectly to this practice); *id.* at 400-01 (Cushing, J.); *id.* at 398 (Iredell, J.).

\(^{171}\) *Id.* at 395-96 (Paterson, J.); *id.* at 400 (Cushing, J.). Alternatively, if the legislature had acted in its "legislative" capacity, it had not passed an ex post facto law in violation of
Calder is critical because the Supreme Court exercised its appellate jurisdiction even though the state court's original decision had been rendered under circumstances that would have made it non-justiciable under federal standards. Calder indicates that state courts could validly do so and could decide any federal issues presented, but that the Supreme Court would be available to make sure federal law had been correctly expounded. None of the four Justices who wrote opinions in Calder suggested that a state trial court's application of a lenient justiciability standard had any bearing on the Supreme Court's ability to review the case.

In sum, within three decades the Court had settled two bedrock principles of judicial federalism. First, state courts have general jurisdiction, which includes final authority over their states' laws and concurrent jurisdiction over cases involving federal law. Second, the Supreme Court can always exercise appellate jurisdiction to ensure that federal rights have been enforced.

III. THE NEW JURISDICTIONAL DOCTRINES AS DEVICES TO CONTROL FEDERAL DOCKETS

In the late nineteenth century, the Court began to depart from originalist principles of federalism by carving exceptions to congressionally granted jurisdiction over federal question cases.
The reason is that Reconstruction began a never-ending process of federal law expansion, which inexorably displaced preexisting state regulation. Initially, Congress spearheaded passage of the Thirteenth, Fourteenth, and Fifteenth Amendments and enacted implementing legislation.\textsuperscript{175} Congress then exercised its power under the Commerce Clause to regulate both business (e.g., antitrust) and public morals (e.g., by prohibiting the interstate transportation of lottery tickets and prostitutes).\textsuperscript{176} Most significantly, the establishment of the Interstate Commerce Commission in 1887 ushered in modern administrative agencies, which exploded during the New Deal.\textsuperscript{177}

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)). Third, the presumption favoring judicial review could be rebutted when the constitutional question presented was "political." See Luther v. Borden, 48 U.S. (7 How.) 1, 34-46 (1849) (deferring to the determination of Congress and the President that Rhode Island's established government, which had declared martial law to suppress a revolutionary new regime, had the "Republican Form of Government" required by Article IV). \textit{Luther} is of special interest because the Court emphasized two federalism concerns: protecting state governments from instability and respecting their own political question doctrine (here, the Rhode Island courts' determination that the legitimacy of the established state government was a matter for "political" rather than "judicial" resolution). \textit{Id.} at 13-14, 38-40. As \textit{Luther} illustrates, the states developed their own justiciability doctrines. Indeed, states could deviate from federal standards, as reflected in advisory opinion practice in several states. See \textit{supra} notes 142-44 and accompanying text.

The other justiciability rules remained relatively static. In both federal and state courts, standing continued to be a question of whether the law granted a particular plaintiff a cause of action, and mootness was still a matter of judicial discretion. See, e.g., Mills v. Green, 159 U.S. 651 (1895). Ripeness did not exist. Similarly, no cases mentioned doctrines such as abstention, the well-pleaded complaint rule, or state sovereign immunity.

175. The key law was the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. The promise of equality quickly faded, however, because the Court interpreted this statute—and the Fourteenth Amendment which it implemented—very narrowly. The major decisions, in chronological order, were: \textit{The Slaughter-House Cases}, 83 U.S. (16 Wall.) 36 (1873) (interpreting the Privileges and Immunities Clause as allowing states to discriminate against their citizens as to rights under state law, but not as to rights that attached to United States citizenship); \textit{The Civil Rights Cases}, 109 U.S. 3 (1883) (striking down the Civil Rights Act's prohibition of race discrimination in privately owned public accommodations such as inns and theaters on the ground that the Equal Protection Clause reached only state action); and \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896) (holding that the Equal Protection Clause permits states to provide "separate but equal" accommodations for blacks and whites).


After spending half a century vacillating on the constitutionality of such legislation, the Supreme Court embraced virtually unlimited federal power. Moreover, the Warren Court and its successors have upheld broad civil rights and environmental regulation, and have expanded judicial review to dizzying heights.

As federal statutory, regulatory, and constitutional law grew exponentially, so did federal caseloads. A main cause was the

be reconciled with the Constitution's original design of separated, balanced, and checked federal power, but that similar structural safeguards could be achieved through active and coordinated inter-branch review of the work of these agencies.

178. The landmark cases were NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding Congress's power under the Commerce Clause to pass the National Labor Relations Act) and Helvering v. Davis, 301 U.S. 619 (1937) (sustaining the Social Security Act as a valid exercise of the Spending Power). See also Wickard v. Filburn, 317 U.S. 111 (1942) (allowing Congress to rely upon the Commerce Clause to regulate non-commercial activities that occurred entirely within a state as long as such activities, when considered in the aggregate, "substantially affected" interstate commerce). Simultaneously, the Court abandoned its precedent striking down progressive state economic legislation as violating Substantive Due Process. See W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding a state minimum wage law).

179. The key decisions sustained the provisions of the Civil Rights Act of 1964 that prohibited discrimination by public accommodations such as restaurants and hotels. See Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

180. See, e.g., Hodel v. Indiana, 452 U.S. 314 (1981) (approving federal laws regulating the environmental impacts of mining). As with most modern federal legislation, environmental and civil rights laws have been based upon a broad reading of the Commerce Clause. See Robert J. Pushaw, Jr. & Grant S. Nelson, A Critique of the Narrow Interpretation of the Commerce Clause, 96 Nw. U. L. Rev. 695, 715-17 (2002).

181. The Warren Court created an ever-increasing variety of constitutional rights based on a generous interpretation of the Fourteenth Amendment. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (discovering a right to use contraception lurking in penumbras emanating from the Due Process Clause and various other provisions of the Bill of Rights); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that the Equal Protection Clause prohibited states from operating racially segregated schools); see also LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000) (analyzing the Warren Court's major decisions in the larger American social and political context). Although the pace of judicial activism has slowed, it has not ended. See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (reversing precedent in striking down a state law prohibiting homosexual sodomy as violating the Due Process right to liberty).

Furthermore, the Rehnquist Court has expanded judicial review by applying more exacting scrutiny to congressional legislation passed under the Commerce Clause and Section 5 of the Fourteenth Amendment. For a keen analysis, see Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. CHI. L. REV. 429 (2002).

182. See Fletcher, supra note 121, at 224-28; William M. Wiecek, The Reconstruction of Federal Judicial Power, 1863-1876, 13 AM. J. LEGAL HIST. 333 (1969); Winter, supra note
1875 statute granting federal trial courts general federal question jurisdiction, which reflected Congress's judgment that such a forum was needed to ensure proper enforcement of federal law.\textsuperscript{183} Congress attempted to alleviate the resultant docket congestion by increasing the number of federal judges and by creating numerous non-Article III adjudicators, such as administrative law judges.\textsuperscript{184}

Under originalist principles, federal district courts had a duty to exercise their federal question jurisdiction whenever it was invoked.\textsuperscript{185} Nonetheless, the Court apparently concluded that the judiciary could not handle all the cases now within their jurisdiction.

Accordingly, the Justices fabricated many new doctrines to lessen federal question jurisdiction. It is no coincidence that these doctrines began to appear in the last part of the nineteenth century. Examples include the adequate and independent state grounds doctrine (first suggested in 1875 and firmly endorsed in 1893),\textsuperscript{186} state sovereign immunity in 1890,\textsuperscript{187} and the well-pleaded complaint rule in 1908.\textsuperscript{188} The New Deal regulatory leviathan begat the justiciability and abstention doctrines, which were later expanded to meet the renewed docket crunches caused by the Great Society and the Warren Court constitutional revolution.\textsuperscript{189}

The Supreme Court, however, did not candidly acknowledge that these doctrines rested on practical and prudential considerations.\textsuperscript{190} Rather, it constructed a story of continuity. In particular, the Court asserted that its jurisdictional doctrines implemented the Founders'}
conception of Article III and judicial federalism, which purportedly recognized state judges as equally capable and trustworthy in enforcing federal constitutional law.\textsuperscript{191} Although it is true that the Framers recognized that state tribunals inevitably would have to decide constitutional questions, they understood that only federal courts had the independence and expertise to do so conclusively.

Whether right or wrong, however, the Court shows no signs of retreating from its vision of federalism, probably because of the fear that doing so would overwhelm the federal judiciary. But can we formulate a constitutional theory that comports with basic principles of judicial federalism, yet allows federal courts to keep their dockets at manageable levels? I will attempt to sketch such an approach.

IV. IMPOSING JURISDICTIONAL LIMITS ON STATE LAW
"CONTROVERSIES," NOT FEDERAL LAW "CASES"

The Founders' cardinal rule of judicial federalism, which applies with undiminished force today, is that independent Article III courts have an indispensable role in ensuring the supremacy and uniformity of federal law, especially the Constitution.\textsuperscript{192} Therefore, federal judges should never decline to exercise their jurisdiction over federal question cases.\textsuperscript{193} If performing this vital duty creates intolerable docket pressures, then they should sharply limit their

\textsuperscript{191} See Pushaw, supra note 99, at 447-65. For the classic refutation of the Court's claim that federal and state courts are interchangeable in their ability and willingness to enforce federal law, see Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105 (1977).
\textsuperscript{192} See supra notes 109-14, 124-27, 150-55, 157-66 and accompanying text.
\textsuperscript{193} See Pushaw, supra note 99, at 523-31.
jurisdiction over controversies involving state law. 194 Article III provides two possible textual bases for such discretion.

First, it expressly confers "judicial" power, which has always been understood as adjudicating cases deliberatively by ascertaining the law, applying it to the facts, and rendering a judgment. 195 If federal courts lack the time and resources to consider fairly and reasonably every matter that falls within their jurisdiction, then to avoid arbitrary rulings they must establish a principled method to decide what to decide. 196 Federalism dictates that cases involving federal constitutional law receive top priority.

Second, as explained above, Article III requires federal courts to decide "all Cases," but not all "Controversies." 197 In prudentially determining which "Controversies" to punt, federal judges should

194. Indeed, the Court already has made several such exceptions, such as the rule against complete diversity, but has justified them in terms of statutory interpretation rather than docket management. See Pushaw, supra note 99, at 506-11. I am aware of only one instance in which a federal court has articulated the latter rationale. In Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), a federal district judge in Kentucky conceded the existence of diversity jurisdiction, but remanded the case to state court on the ground that his heavy docket would unjustly delay the trial. Id. at 339-44. The judge issued many similar orders for the purpose of giving priority to the massive number of pending cases arising under federal laws concerning crime and black-lung disease. Id. at 340-41 nn.3-4. The Supreme Court reversed and held that the pertinent federal jurisdictional statute did not give the district court discretion to decline to proceed because of a crowded docket. Id. at 343-46.

It is equally true, however, that the statute conferring federal question jurisdiction does not grant any judicial discretion to abstain. Nonetheless, federal courts routinely do so by invoking doctrines such as justiciability, abstention, and the well-pleaded complaint rule. The Court's countenancing of such discretion in federal law cases, but not in state law controversies, is precisely backwards.

195. See Pushaw, Inherent Powers, supra note 109, at 746, 789, 805-06, 809, 827, 844-46 (documenting the Founders' understanding of "judicial power," which reflected centuries of evolution in England and America).

196. The Due Process Clause supplies a separate constitutional basis for prohibiting hasty and unreasoned judicial decisions. Moreover, both Article III "Judicial Power" and the Due Process Clause suggest that judges cannot decline jurisdiction merely because they would prefer not to hear a matter—especially if such reluctance reflects ideology, such as a hostility to civil rights or environmental claims. Many have argued that the Burger and Rehnquist Courts have engaged in such political manipulation of the justiciability doctrines. See, e.g., Gene R. Nichol, Jr., Abusing Standing: A Comment on Allen v. Wright, 133 U. PA. L. REV. 635, 635-37, 639-47, 649-52, 656-59 (1985); Richard J. Pierce, Standing: Law or Politics?, 77 N.C. L. REV. 1741 (1999); see also George & Pushaw, supra note 13, at 1278-80 (evaluating such accusations).

consider several interrelated factors. The most crucial is whether state or federal law applies. Federal courts should never decline jurisdiction when the latter law is at issue—for example, the federal common law that typically governs “Controversies” between states and those involving foreign nations and their citizens.

However, most “Controversies” (e.g., diversity) turn on state substantive law, in which state courts are more competent. In such matters, the sole justification for federal jurisdiction is that state judges lack the same independence as their federal counterparts, and thus have personal and political incentives to favor their home state parties and interests. Although this fear

198. Initially, federal courts should dismiss any “Controversies” that do not satisfy justiciability standards. Because Article III “Controversies” are disputes involving one of the enumerated parties, they are appropriately subject to the justiciability doctrines, all of which focus on whether there is a live dispute between adverse parties. See Pushaw, supra note 99, at 519. By contrast, this dispute-resolution paradigm makes little sense as applied to Article III “Cases,” which depend on the interpretation of substantive law, regardless of party status. Id. at 523-31.

Even if a federal court concludes that a plaintiff has standing and presents a ripe, non-moot claim, it should still decline jurisdiction if it concludes that another forum (most obviously, a state court) would be impartial and competent to decide the dispute as an original matter. Id. at 520-22. This section identifies the considerations that are relevant in making this judgment call.

199. See, e.g., Kansas v. Colorado, 206 U.S. 46, 48, 86 (1907) (applying federal judge-made rules to help resolve a dispute over riparian rights).

200. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (using federal common law to determine whether Cuba could invoke the “act of state” doctrine); see also Pushaw, supra note 109, at 746-47 (citing cases applying federal common law). Surprisingly, the Court has declined to exercise its statutorily mandated exclusive original jurisdiction over “Controversies” between states when it concludes that they raise trivial issues and/or that another forum would be more convenient. See, e.g., California v. West Virginia, 454 U.S. 1027, 1027-28 (1981) (refusing to adjudicate a breach-of-contract claim between state universities over a cancelled football game).

201. See Pushaw, supra note 99, at 504-11, 519-23 (providing numerous examples of such controversies and describing historical exceptions where federal rather than state common law has been applied). Professor Shapiro is one of the few scholars who candidly acknowledges that federal courts may legitimately exercise discretion to decline jurisdiction to protect themselves from being overburdened. Shapiro, supra note 11, at 587-88. However, he specifically rejects the idea that federal judges can refuse to adjudicate diversity suits on the ground that they have more important functions (such as deciding federal question cases) and that state courts are the more appropriate forums for the state law issues involved. Id. at 587. By contrast, I believe that federal judges can legitimately prioritize federal law cases over state law controversies.

of bias against non-residents originally animated diversity jurisdiction, it has lessened over the years as we have evolved into truly "United" States.²⁰³ Hence, rather than simply assuming such partiality, perhaps federal courts should require the party invoking their jurisdiction to make a colorable showing that a state judge or court is likely to be biased against either her personally or out-of-staters generally.²⁰⁴ As Herbert Wechsler observed over a half-century ago:

What is needed is a total reconsideration of [diversity] jurisdiction, guided by the principle that federal judicial energy should be preserved for vindication of those interests which ... have become the subject of the federal substantive law .... There is ... a solid case for preservation of the jurisdiction in any instance where a concrete showing of state prejudice can be established.²⁰⁵

²⁰³. Indeed, some Framers predicted that the need for such federal jurisdiction would decrease as our national identity developed. See Akhil Reed Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. PA. L. REV. 1499, 1555 (1990) (citing sources); see also CHEMERINSKY, supra note 61, at 292-93 (summarizing scholarly arguments that diversity jurisdiction is no longer necessary because there is no empirical evidence that state courts are biased against out-of-staters).

²⁰⁴. Admittedly, such a showing would present two dangers. First, it places a federal judge in the delicate position of evaluating the impartiality of his or her state counterpart. Second, a party who fails to gain access to the federal court incurs the wrath of the state judge. See James E. Pfander, The Tidewater Problem: Article III and Constitutional Change, 79 NOTRE DAME L. REV. 1925 (2004) (contending that federal statutory regimes linking federal jurisdiction to a demonstration of bias have worked poorly in practice). These very risks, however, would give parties incentives to litigate their state law claims in state court, unless they were confident that a federal court would take jurisdiction.

²⁰⁵. Herbert Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 LAW & CONTEMP. PROBS. 216, 238-39 (1948) (footnote omitted). I should point out that Professor Wechsler directed his argument to Congress rather than the judiciary; he thought Congress had plenary control over federal jurisdiction and thus would not have endorsed my proposal for judicial discretion to limit diversity controversies. See Wechsler, supra note 87, at 1005-06.

Arguably, my claim that we should not presume state court bias in diversity applies with equal force to federal question cases. These two categories of jurisdiction, however, implicate quite different federal interests. In diversity controversies, the concern is possible prejudice against out-of-state parties in private disputes arising under state law. By contrast, in federal question cases, the problem is state court ignorance of, or hostility to, federal law (especially constitutional rights). See CHEMERINSKY, supra note 61, at 265 (citing the ALI's conclusion that such jurisdiction "protect[s] litigants relying on federal law from the danger
Another relevant consideration is the federal government's interest. This federal stake is strongest in "Controversies" where the United States or a foreign nation is a party. Conversely, the federal government qua government has little interest in diversity jurisdiction, which exists merely to ensure that private out-of-state parties get a decisionmaker whose impartiality cannot be doubted.\textsuperscript{206}

A final factor is the percentage of "Controversies" on a particular federal court's docket. For instance, diversity disputes consume about twenty-five percent of federal judicial resources, which seems grossly disproportionate to their national significance.\textsuperscript{207} Federal courts might reasonably reduce the number of their state law "Controversies" to increase, or speed disposition of, their federal law "Cases."

An obvious objection to my proposal is that such judicially crafted exceptions to diversity jurisdiction would be radical innovations and would defy Congress's will.\textsuperscript{208} All doctrines of judicial restraint were novel when they were created, however, and they too frustrate Congress's intent to grant general federal question jurisdiction. Hence, the pivotal question is not whether the Court should develop rules to limit jurisdiction (an irreversible \textit{fait accompli}), but rather what restrictions make the most sense.

Indeed, the Court has adopted a pragmatic approach similar to the one I recommend in restricting its own original jurisdiction over controversies involving state parties.\textsuperscript{209} For instance, in \textit{Ohio v. Wyandotte Chemical Corp.},\textsuperscript{210} the Court declined to hear a state's tort suit against out-of-state defendants, even though it concededly

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that state courts will not properly apply that law, either through misunderstanding or lack of sympathy") (footnote omitted). In my view, the federal government's interest in ensuring the supremacy and uniformity of federal law is of paramount importance.

\textsuperscript{206} See Pushaw, \textit{supra} note 99, at 504-11, 519-23.

\textsuperscript{207} \textit{Id.} at 522. This misallocation of federal judicial resources has prompted many prominent Justices, lawyers, and scholars to recommend the abolition of diversity jurisdiction. \textit{See} CHEMERINSKY, \textit{supra} note 61, at 290-91 (citing sources).

\textsuperscript{208} Indeed, the Supreme Court made exactly this argument in rebuffing a federal district judge who had dismissed diversity controversies in order to adjudicate pressing federal law cases. \textit{See supra} note 194 and accompanying text.

\textsuperscript{209} \textit{See} 28 U.S.C. § 1251 (1993) (giving the Court original but not exclusive jurisdiction over controversies involving states as parties).

\textsuperscript{210} 401 U.S. 493 (1971).
had original jurisdiction.\textsuperscript{211} The Court reasoned that it should devote its resources to appellate review of federal questions, not trials that required intensive fact-finding and that primarily involved state law issues that could be handled more competently by state judges.\textsuperscript{212} Moreover, the Court declared that it would not presume the bias of the Ohio judiciary, but rather would consider such a possibility only if and when the parties raised this issue on appeal.\textsuperscript{213} In my view, lower federal courts should have similar discretion to cull their dockets of "Controversies" involving state law.

I should emphasize that my argument rests on Article III's text and general principles of federalism. I am not contending that the Framers explicitly endorsed judicial discretion to decline jurisdiction (although such discretion may have been implicit, as David Shapiro has maintained).\textsuperscript{214} Rather, I am saying that if such discretion becomes a practical necessity, federalism suggests it

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\item \textsuperscript{211} Id. at 494-97.
\item \textsuperscript{212} Id. at 497-505.
\item \textsuperscript{213} Id. at 500-01. Of course, proving state court bias or wrongdoing is exceedingly difficult. See Fitzgerald, supra note 73, at 93-99. Moreover, the odds against obtaining certiorari have become lottery-like. The Court has thus effectively asserted discretion to wash its hands of all jurisdiction, original and appellate, over disputes involving state parties.
\item \textsuperscript{214} See Shapiro, supra note 11. The existence of such implied discretion seems especially likely as to "Controversies," because the early Court carved many limitations on that jurisdiction. See supra notes 133-37 and accompanying text. On the other hand, Professor Holt has claimed that the Framers and Ratifiers considered diversity to be the most important head of jurisdiction. See Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421. From this historical perspective, federal courts should be particularly reluctant to decline diversity jurisdiction. I disagree with Holt's conclusion, however, for reasons set forth in Pushaw, supra note 99, at 508-09 n.296 and accompanying text.
\end{itemize}

Nonetheless, I would add that history cannot provide the definitive answer to the problem of jurisdictional discretion, for the simple reason that the Framers could not have imagined that state judges would ever apply federal law more vigorously than federal courts. See Pushaw, supra note 98, at 880 n.141. The Framers' concern was exactly the opposite: reining in state courts that defied federal law. See supra notes 104-05, 109-14, 149-55 and accompanying text. A recurring theme of the Convention and ratification debates was that states (abetted by their courts) might thwart national laws, as they had before the Constitution was ratified. See supra notes 104-14 and accompanying text. The Constitution, especially Article III and the Supremacy Clause, was designed to rectify the problem of state courts refusing to apply federal law. One searches the historical record in vain for any evidence that the Framers thought, much less feared, that state courts would be more hospitable to federal law claims than federal courts.
should be exercised to enable federal courts to hear more cases involving federal (especially constitutional) law. This goal can be achieved by commensurately reducing the number of state-law "Controversies," which can appropriately be decided by state courts. The Court's current approach—reflected in all its doctrines of restraint—cuts out jurisdiction over federal question "Cases" while leaving state law "Controversies" untouched, thereby turning judicial federalism on its head.

In short, these jurisdictional doctrines should be revised to increase the adjudication of federal constitutional cases. I will now offer some tentative thoughts about how each particular doctrine might be reworked.

A. Justiciability

The Court's stringent justiciability doctrines effectively leave many federal law cases for final decision in state tribunals that apply more lenient access rules. The Court has tried to bridge that gap through several different approaches: dismissing the appeal but denying preclusive effect to the state court's judgment in subsequent federal litigation; vacating the state tribunal's decision; and, most recently, asserting that state courts have inflicted an "injury" on a losing defendant sufficient to confer standing on appeal.

These intellectual gymnastics would be unnecessary if the Court candidly acknowledged that justiciability is, and always has been, based primarily on prudential considerations rather than Article III compulsion. Such discretion is not unbridled, however, but must be guided by standards drawn from the Constitution's structure. In reviewing state court cases that originally would have been non-justiciable under federal law, the Court should apply two bedrock principles of federalism.

215. See supra notes 22-25 and accompanying text.
216. See supra notes 28-38 and accompanying text.
217. Indeed, I would go further and abolish the modern justiciability doctrines, which improperly deny the federal district and circuit court access granted by Congress. Rather, the Court should return to the true original understanding by accepting all statutory standing and exercising all federal question jurisdiction, unless requested to render formal advisory opinions, judgments reviewable by the political branches, or decisions on political questions. See Pushaw, supra note 12, at 397-99, 454-512.
First, state courts exercise "judicial power" as part of autonomous governments possessing general jurisdiction over all subjects that the Constitution does not withdraw from them. Therefore, state tribunals can apply their own justiciability rules to any cases within their jurisdiction, including those involving federal law, except in those limited instances where Congress has made federal jurisdiction exclusive. If state courts adjudicate federal questions that would have been non-justiciable in federal courts, however, they should be limited to applying existing federal substantive law. A state court's control over its justiciability doctrines does not, and should not, carry with it power to create novel federal (particularly constitutional) law.

Second, the Supreme Court must be available, in the last resort, to ensure the supremacy and uniformity of federal law. Thus, the Court must have the power to review any state judicial decision based on substantive federal law, even one rendered where federal justiciability rules would have warranted dismissal. As a practical matter, such appellate jurisdiction would typically be unnecessary if state judges adhered to my proposed limit of faithfully applying existing federal substantive law.

In short, my suggested approach would appropriately balance the autonomy of state judiciaries against the Court's special role in superintending federal law. Far from being a wild-eyed academic scheme, my proposal has a distinguished historical pedigree.

Before Justice Frankfurter transformed the justiciability doctrines into Article III jurisdictional requirements, the Court considered them to be matters of equitable discretion and sound judicial self-governance guided by a mix of constitutional and

218. See supra note 138 and accompanying text.
220. In other words, a federal court located in the same jurisdiction, or a higher federal appellate court, must have already interpreted the federal law at issue. I recognize that it is sometimes difficult to distinguish between "existing" and "new" law, especially given that courts strive to present doctrinal innovations as consistent with precedent. Nevertheless, I do not think that such line-drawing is impossible. For example, the Court has successfully reined in federal judges who had been creating novel rules of constitutional law in habeas petitions by restricting them to considering only rights extant at the time of conviction. See Teague v. Lane, 489 U.S. 288 (1989). For a good summary of Teague and its progeny, see Chemerinsky, supra note 61, at 896-905.
221. See supra notes 29, 39, 73, 124-27, 151-52, 155, 157-66 and accompanying text.
pragmatic considerations. For example, in Leser v. Garnett, Justice Brandeis followed precedent in holding that standing to appeal to the Supreme Court existed simply because a state court had decided a federal constitutional issue in a citizen suit authorized by state law. It did not matter that if the same plaintiff had brought the identical constitutional claim in federal court based merely on his status as a United States citizen, he would lack standing (both originally and on appeal) under federal standards. Similarly, in Coleman v. Miller, Kansas courts granted standing to state legislators who had voted against a federal constitutional amendment in 1938 and who claimed that their legislature's procedures for ratifying it failed to comply with Article V of the Constitution. On appeal, the Supreme Court upheld standing on the ground that the plaintiffs "ha[d] an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, [was] sufficient to give the Court jurisdiction to review that decision." The Court stressed the need

222. The most comprehensive historical treatment of the Court's transformation of justiciability (especially standing) from a prudential to a constitutional doctrine is Winter, supra note 119. He built upon the work of Professors Jaffe and Berger. See Berger, supra note 118; Louis L. Jaffe, Standing to Secure Judicial Review: Public Actions, 74 HARV. L. REV. 1265 (1961).
223. 258 U.S. 130 (1922).
224. Id. at 137 (accepting a Maryland law authorizing suit by a qualified voter to challenge ratification of the Nineteenth Amendment as a basis for standing on appeal to the Supreme Court); see also Hawke v. Smith, 253 U.S. 221 (1920) (exercising appellate jurisdiction after an Ohio court determined that a citizen had standing to contest the state's decision to submit ratification of the Eighteenth Amendment to a referendum); Heim v. McCall, 239 U.S. 175 (1915) (taking review where a state law gave a taxpayer standing and the state court rejected the plaintiff's federal constitutional challenge). The Court continued to follow this approach in Smiley v. Holm, 285 U.S. 355 (1932), by asserting appellate jurisdiction where a Minnesota law had allowed a citizen/taxpayer to bring a constitutional challenge to a state statute establishing congressional districts.
225. See Fairchild v. Hughes, 258 U.S. 126 (1922) (rejecting the standing of a plaintiff, suing generally as a United States citizen and taxpayer, to challenge the adoption of the Nineteenth Amendment). Fairchild was decided on the same day as Leser, and Justice Brandeis wrote the Court's opinion in both cases. Hence, the only material difference was the status of plaintiffs as state or U.S. citizens.
227. They argued that the amendment had not been ratified within a reasonable time after its proposal in 1924, and had lost its vitality because the Kansas legislature had rejected it in 1925. Id. at 435-36.
228. Id. at 446 (emphasis added). Chief Justice Hughes wrote an opinion, joined in its entirety by two other Justices, concluding that the plaintiffs had standing but that the case presented political questions. Id. at 434-56. The two dissenting Justices agreed with the
to preserve its "opportunity ... for the review of the decisions of state courts on constitutional questions however the state court might decide them."\textsuperscript{229}

The approach in cases like \textit{Leser} and \textit{Coleman} expresses the fundamental precept of judicial federalism that the Supreme Court must be able to review litigated state cases deciding federal law issues. By contrast, the modern Court has struggled to fulfill this role by distorting its justiciability rules.

\textbf{B. Adequate and Independent State Grounds}

The foregoing principles suggest that the adequate and independent state grounds doctrine should be abolished.\textsuperscript{230} To maintain the

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\item \textsuperscript{229} \textit{Id.} at 470-74 (Butler, J., dissenting).
\item \textsuperscript{230} For a detailed and persuasive argument supporting this position, see Matasar & Bruch, \textit{supra} note 76. Of course, eliminating the "adequate and independent state grounds" doctrine will have a negligible practical effect in expanding the Supreme Court's appellate jurisdiction over state judgments based on federal law if the Court simply exercises its current statutory discretion to deny writs of certiorari. \textit{See supra} note 76. Curiously, Congress's 1988 decision to make the Court's review entirely discretionary has had little discernible impact on the jurisdictional doctrines that the Court developed in part to alleviate its case load during a time of obligatory appellate jurisdiction. \textit{See supra} note 32.
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supremacy and uniformity of federal law, the Supreme Court should correct erroneous decisions on federal law rendered by state tribunals, even if they proffer a state law basis to justify the judgment.

In short, the Supreme Court's "states' rights" vision of federalism has obscured what should be a clear obligation to exercise its appellate jurisdiction over federal questions fully, regardless of whether a state court sets forth an alternative state law ground for the decision or applies lax justiciability rules. This modern view of federalism has also prevented federal district judges from fulfilling their obligation to exercise their original federal question jurisdiction, as illustrated by the abstention, well-pleaded complaint, and state sovereign immunity doctrines.

C. Abstention

The abstention doctrines focus on one side of the federalism coin: protecting the state courts' ability to adjudicate state law issues that are peculiarly important or complex (such as tax and criminal law) or that are unclear.\(^\text{231}\) Although that goal is worthy, so is preserving the power of the federal judiciary to vindicate federal constitutional rights.\(^\text{232}\) Abstention deprives parties of their congressionally granted right to an initial federal forum to litigate their constitutional claims.\(^\text{233}\)

Particularly offensive are those forms of abstention that authorize federal courts to dismiss, rather than merely postpone, adjudication of federal constitutional actions.\(^\text{234}\) But even \textit{Pullman} abstention, which purports only to delay the suit until a state court has decided the state law questions, usually results in the plaintiff's election to litigate the entire case in the state judicial system,

\(^{231}\) See supra notes 41-52 and accompanying text; Friedman, supra note 56, at 1223, 1226-32, 1237-43, 1246-50, 1254-56, 1272-74 (highlighting the importance of the state interests preserved by abstention and other jurisdictional rules).

\(^{232}\) Put differently, federalism counsels against federal judicial interference with states in making, executing, and adjudicating state law—unless such intervention becomes necessary under the Supremacy Clause to vindicate countervailing federal law.

\(^{233}\) See supra notes 55-61, 63 and accompanying text.

\(^{234}\) See supra notes 46-52, 56 and accompanying text (discussing the relevant precedent).
because eventually returning to federal court would be so time-consuming and expensive.  

Of course, the availability of Supreme Court review does provide some relief from state court errors. Nonetheless, this protection seems inadequate for two reasons. First, the original venue often determines the outcome because of the importance of factfinding, procedural determinations, and evidentiary rulings—all of which are subject to a very deferential standard of review. Indeed, if the trial court's identity did not matter, Congress would not have given plaintiffs with federal constitutional claims the option of bringing them in a federal forum. Second, the Court has reduced its annual certiorari docket to a dozen or fewer state cases interpreting the Constitution. Especially as compared to its historical practice, the Court does not appear to be deciding enough of these cases to ensure the supremacy and uniformity of federal law.

D. The Well-Pleaded Complaint Rule

Like the abstention doctrines, the well-pleaded complaint rule eliminates an original federal forum for constitutional questions and leaves the disappointed party with the long shot of obtaining review in the Supreme Court. Nothing in the words or drafting

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235. See supra notes 44-45, 60-61 and accompanying text. Interestingly, the Supreme Court does not apply Pullman-style abstention to the exercise of diversity jurisdiction when there is an unclear issue of state law, with a very narrow exception when the state's sovereign prerogatives are implicated, such as significant exercises of eminent domain. See, e.g., Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 27-28 (1959). In my view, the Court again has it backwards: In "Controversies" federal courts should refer ambiguous state laws to state courts, whereas in federal question "Cases" they should decide federal constitutional questions despite the presence of unclear state laws.

236. See supra note 64.

237. Madison foresaw this problem from the beginning, which is why he insisted on giving Congress discretion to establish lower federal courts. See Pushaw, supra note 99, at 486 n. 200. Madison was also a member of the First Congress, which created such courts and which gave the Supreme Court mandatory appellate jurisdiction over all state judgments denying federal claims. See supra note 32. The original statutory scheme, and the relatively small overall number of cases, provided some assurance of federal judicial availability to consider all federal law issues.

This landscape has been transformed. Most pertinently, the Rehnquist Court's decision to shrink dramatically its docket of appeals from state courts has made it increasingly difficult to assert that the goal of uniformity is being met. See supra notes 64, 236 and accompanying text.

238. See supra notes 65-70 and accompanying text.
history of Article III or the general federal question jurisdiction statute suggests that "Cases ... arising under the Constitution" exclude those in which the constitutional issue is raised by the defendant rather than the plaintiff. Indeed, in many cases the federal constitutional defense will be dispositive. Under classical principles of federalism, it makes little sense to entrust such matters to state courts, which lack the federal judiciary's independence and expertise in federal law.

Ideally, then, the Court should get rid of the well-pleaded complaint rule. At the very least, it should be abandoned in cases where the federal district judge concludes that the decision will turn on a significant question of federal constitutional law raised by the defendant, as distinguished from a situation in which constitutional law is one of many different issues and is relatively unimportant. Alternatively, perhaps Congress could grant appellate review as of right in the lower federal courts over state court judgments that deny federal defenses.

E. State Sovereign Immunity

The Rehnquist Court and scholars have devoted enormous attention to state sovereign immunity. I can add little to this debate, beyond pointing out that the Court's theory of federalism underlying sovereign immunity pervades all its doctrines of jurisdictional restraint. Hence, the same sort of analytical problems emerge.

Most importantly, contrary to the Court's assertions, the Eleventh Amendment did not alter Article III federal question jurisdiction or upend basic principles of judicial federalism. Therefore, federal courts should always decide cases involving a claimed violation of constitutional rights, even (perhaps especially) if the defendant happens to be a state. The Framers and Ratifiers of the Constitution and the Eleventh Amendment did not think they were authorizing states to violate the Constitution and then claim

239. See supra note 69 and accompanying text.
240. See supra notes 109-14, 149-50 and accompanying text.
241. See supra notes 79-86 and accompanying text.
immunity, with the victim's sole remedy being prospective, non-
monetary relief against state officials.

CONCLUSION

I recommend that the Court restructure its jurisdictional
doctrines to ensure that federal judges adjudicate all cases invol-
v ing federal constitutional rights, and correspondingly eliminate
as many state-law controversies as possible. I realize that this
proposal is so radical that it is unlikely to be adopted. Nonetheless,
perhaps those Justices whose main goal is to revive originalist
principles of federalism, or those who otherwise invoke history to
justify their decisions, might be interested in an approach that is
actually based on the Founders' view of the appropriate relationship
between federal and state courts.