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The Federal–State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing

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THE FEDERAL–STATE STANDING GAP: HOW TO ENFORCE FEDERAL LAW IN FEDERAL COURT WITHOUT ARTICLE III STANDING

Peter N. Salib* and David K. Suska**

ABSTRACT

You, too, can sue Donald Trump under the Emoluments Clause!

Since Inauguration Day, several lawsuits have been filed against President Trump because of his refusal to divest certain assets. They assert that Trump’s business interests conflict with the Emoluments Clause of Article I. That arcane provision forbids certain federal officials from accepting any perquisite or gain from a foreign monarch or state. The suits contend, for example, that a foreign dignitary’s booking of a room at the Trump International Hotel in Washington, D.C. would constitute an unlawful emolument.

Most commentators quickly threw cold water on the prospect of any plaintiff prevailing. The trouble, they argued, is that plaintiffs cannot demonstrate a concrete and particularized injury from any putative violation of the Emoluments Clause. In legalese, they lack Article III standing. This skepticism was vindicated in December 2017, when a federal court dismissed one of the lawsuits for lack of Article III standing.

What no one has suggested is that plaintiffs do not need Article III standing to enforce the Emoluments Clause against Trump. Everyone assumes that these suits must live or die under federal standing doctrine. But, as we argue, Article III standing is essentially never a barrier to enforcing federal law. Indeed, plaintiffs may even win a merits ruling from the U.S. Supreme Court without ever possessing the elements of Article III standing.

If we are right, it is a big deal. Federal standing doctrine is understood to restrain federal courts from performing an advisory function. It also checks congressional power, preserving the Executive’s constitutional prerogative to enforce federal law. We challenge this received wisdom and argue that the Supreme Court has—perhaps unwittingly—created a route by which litigants may circumvent Article III’s standing requirements, diminishing the doctrine’s force. This has implications far beyond the Emoluments Clause; many constitutional and statutory provisions have long been thought effectively unenforceable because of the strictures of Article III standing.

This Article charts the course that no-standing plaintiffs may follow to enforce federal law and land in the U.S. Supreme Court. It also introduces a new term to the

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legal lexicon: the Federal–State Standing Gap. This term describes the space between Article III standing doctrine and the comparatively lax doctrine of many states. We did not discover this space; everyone who has taken or taught a course on federal jurisdiction knows about it. But we do think it has gone underappreciated. And that is the gap in the literature that this Article begins to fill.

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INTRODUCTION

This year is shaping up to be unprecedented in terms of popular familiarity with obscure constitutional provisions. Following Donald Trump's November 2016 win

in the Electoral College, many anti-Trump voters discovered an appreciation for the convoluted mechanism by which the President is selected.¹ Some engaged in a last-ditch effort to take advantage of it, urging electors to vote faithlessly and deny Trump the presidency.² Once that effort failed, attention shifted to the Emoluments Clause of Article I, which forbids any “Person holding any Office of Profit or Trust” from “accept[ing] . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”³ The word “emolument” is an archaic way of saying “perquisite, advantage, profit, or gain.”⁴ Even before Election Day, experts speculated that if President Trump did not divest from his estimable business holdings, he might be in violation of the Emoluments Clause from his first day in office.⁵ Some have contended, for example, that any foreign dignitary’s booking of a room at the Trump International Hotel in Washington, D.C., would constitute an unlawful emolument.⁶ Trump’s refusal to divest has thrust the issue into the headlines.⁷

Immediately after Inauguration Day, a group of ethics advocates and legal scholars sued President Trump in federal court, hoping to put this Emoluments

¹ See U.S. CONST. art. II, § 1, cls. 2–4; U.S. CONST. amend. XII; 3 U.S.C. §§ 1–21 (2012).

² See Ed Pilkington, *Electoral College’s ‘Faithless Electors’ Fail to Stop Trump but Land Democratic Blow*, GUARDIAN (Dec. 19, 2016, 18:37 EST), <https://www.theguardian.com/us-news/2016/dec/19/electoral-college-revolt-faithless-electors-analysis> [<https://perma.cc/Z63J-ML2V>].

³ U.S. CONST. art. I, § 9, cl. 8. The Constitution also contains a so-called “Domestic Emoluments Clause,” see U.S. CONST. art. II, § 1, cl. 7, but it is not our focus.

⁴ *Emolument*, BLACK’S LAW DICTIONARY (6th ed. 1990). We would agree with anyone who objects that “perquisite” is itself archaic. And we don’t mean to imply that *Black’s* provides the singular, accepted definition of the term. For historical context, see *Emolument*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Emolument*, BLACK’S LAW DICTIONARY (1st ed. 1891). For a rundown of the possibilities, see John Mikhail, *The Definition of “Emolument” in English Language and Legal Dictionaries, 1523–1806* (June 30, 2017) (unpublished manuscript), <http://ssrn.com/abstract=2995693>.

⁵ See, e.g., Erwin Chemerinsky, *Op-Ed, Trump May Violate the Constitution on Day One*, L.A. TIMES (Jan. 12, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-trump-emoluments-20170111-story.html> [<https://perma.cc/3QH4-QNSQ>]; *Trump Conflicts Could Violate the Constitution on Day 1, Lawyers Say*, NPR (Dec. 23, 2016, 5:07 AM), <https://www.npr.org/2016/12/23/506686937/conflicts-could-have-trump-violating-the-constitution-on-day-1-lawyers-say> [<https://web.archive.org/web/20170630071202/https://www.npr.org/2016/12/23/506686937/conflicts-could-have-trump-violating-the-constitution-on-day-1-lawyers-say>].

⁶ See Jim Zarroli, *Ethics Experts File Lawsuit Saying Trump’s Overseas Interests Violate Constitution*, NPR (Jan. 23, 2017, 9:19 AM), <https://www.npr.org/sections/thetwo-way/2017/01/23/511183740/ethics-experts-to-file-lawsuit-saying-trumps-overseas-interests-violate-constitu> [<https://web.archive.org/web/20180107021941/https://www.npr.org/sections/thetwo-way/2017/01/23/511183740/ethics-experts-to-file-lawsuit-saying-trumps-overseas-interests-violate-constitu>].

⁷ See Chase Peterson-Withorn, *Trump Refuses to Divest Assets, Passes Control to Sons*, FORBES (Jan. 11, 2017, 11:41 AM), <https://www.forbes.com/sites/chasewithorn/2017/01/11/donald-trump-will-hand-over-business/#599c6d7460d7> [<https://perma.cc/PTV7-DB4M>].

Clause theory to the test.⁸ In doing so, they dragged yet another arcane constitutional provision into the spotlight: Article III's limit of federal jurisdiction to "Cases" and "Controversies,"⁹ as embodied in the Supreme Court's jurisprudence on standing.¹⁰

The group who brought the lawsuit was Citizens for Responsibility and Ethics in Washington (CREW).¹¹ Most commentators doubted CREW's prospects for success, arguing that the organization cannot obviously show a "concrete and particularized"¹² injury from any violation of the Emoluments Clause.¹³ In legalese, CREW seems to lack Article III standing. CREW argued that its diversion of resources to combat the President's alleged violations constitutes the injury.¹⁴ At least one commentator agreed.¹⁵ But to improve its prospects, CREW joined D.C. hoteliers to the lawsuit,¹⁶ in the hope that they will have standing to sue. In December 2017, the U.S. District Court for the Southern District of New York dismissed the suit, concluding that neither CREW nor the hoteliers had Article III standing.¹⁷ That is not the end of the matter, though. CREW has hinted at an appeal.¹⁸ Maryland and the District of Columbia have

⁸ See Zarroli, *supra* note 6. We take no position on this lawsuit's wisdom or likelihood of success. Our interest here is academic and relates only to the question of standing.

⁹ U.S. CONST. art. III, § 2.

¹⁰ See discussion *infra* Section I.A.

¹¹ Complaint, Citizens for Responsibility & Ethics in Washington v. Trump, No. 1:17-cv-00458-RA (S.D.N.Y. Dec. 21, 2017); First Amended Complaint, Citizens for Responsibility & Ethics in Washington v. Trump, No. 1:17-cv-00458-RA (S.D.N.Y. Dec. 21, 2017); Second Amended Complaint, Citizens for Responsibility & Ethics in Washington v. Trump, No. 1:17-cv-00458-RA (S.D.N.Y. Dec. 21, 2017).

¹² Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (making a "concrete and particularized" injury a standing requirement).

¹³ See, e.g., Josh Blackman, *CREW's Self-Inflicted Injury in the Emoluments Clause Challenge*, JOSH BLACKMAN'S BLOG (Jan. 22, 2017), <http://joshblackman.com/blog/2017/01/22/crews-self-inflicted-injury-in-the-emoluments-clause-challenge/> [<https://perma.cc/48WJ-9TN5>]; Andrew Hessick, *Standing and the Emoluments Clause*, YALE J. ON REG.: NOTICE & COMMENT BLOG (Jan. 23, 2017), <http://yalejreg.com/nc/standing-and-the-emoluments-clause/> [<https://perma.cc/66TK-X643>].

¹⁴ See Blackman, *supra* note 13.

¹⁵ See Jonathan Taylor, *There's Unquestionably Standing in the CREW Case. Here's Why.*, TAKE CARE (Apr. 19, 2017), <https://takecareblog.com/blog/there-s-unquestionably-standing-in-the-crew-case-here-s-why/> [<https://perma.cc/D5DW-2FAM>].

¹⁶ See David A. Fahrenthold & Jonathan O'Connell, *Two Plaintiffs Join Suit Against Trump, Alleging Breach of Emoluments Clause*, WASH. POST (Apr. 17, 2017), https://www.washingtonpost.com/politics/two-plaintiffs-join-suit-against-trump-alleging-breach-of-emoluments-clause/2017/04/17/1d4aaa70-238a-11e7-a1b3-faff0034e2de_story.html?utm_term=.e48a9f1dd0e6 [<http://perma.cc/T8L5-NAU2>].

¹⁷ Citizens for Responsibility & Ethics in Washington v. Trump, No. 1:17-cv-00458-GBD (S.D.N.Y. Dec. 21, 2017).

¹⁸ See Press Release, CREW, CREW Statement on Emoluments Ruling (Dec. 21, 2017), <https://www.citizensforethics.org/press-release/crew-statement-emoluments-ruling/> [<https://perma.cc/Y4SH-TM3T>].

filed similar suits in federal court.¹⁹ They may hope to avoid CREW’s difficulties by taking advantage of the “special solicitude” states are afforded in the standing analysis.²⁰ The implication is clear: lawyers everywhere doubt that regular citizens can sue the President to stop him from violating the Emoluments Clause.²¹

What *no one* has suggested, as far as we can tell, is that plaintiffs like CREW *do not need standing* to enforce the Emoluments Clause against Trump. Everyone assumes that these plaintiffs must live or die under the federal rules of standing.²² But, as we argue in this Article, lack of Article III standing is essentially never a barrier to enforcing federal law. Indeed, plaintiffs may gain a merits ruling from the U.S. Supreme Court without ever possessing the elements of standing.

If we are right, it is a big deal. Federal standing doctrine has long been thought to restrain federal courts’ power, preventing the judiciary from performing an advisory function.²³ It also operates as a check on congressional power, preserving for the Executive the prerogative to enforce federal law.²⁴ We take issue with this received wisdom and argue that the Supreme Court has—perhaps unwittingly—created a route by which litigants may circumvent standing requirements, diminishing the doctrine’s force.²⁵

¹⁹ See Aaron C. Davis & Karen Tumulty, *D.C. and Maryland AGs: Trump ‘Flagrantly Violating’ Emoluments Clause*, WASH. POST (June 12, 2017), https://www.washingtonpost.com/investigations/dc-and-marylands-lawsuit-trump-flagrantly-violating-emoluments-clause/2017/06/12/8a9806a8-4f9b-11e7-be25-3a519335381c_story.html?utm_term=.f4bc23b84e10 [<https://perma.cc/4J2M-Z4LK>]. Bracket the question whether the District of Columbia is entitled to special solicitude as a nonstate.

²⁰ See *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

²¹ See Blackman, *supra* note 13; Hessick, *supra* note 13; see also Cristian Farias, *‘Emoluments’ Lawsuit Against Trump May Get Kicked Out of Court*, HUFFPOST (Jan. 23, 2017, 9:11 PM), https://www.huffingtonpost.com/entry/donald-trump-emoluments-lawsuit-crew_us_58866248e4b096b4a233ceed [<https://perma.cc/244G-DELN>]; Daniel Fisher, *Why the Constitutional Lawsuit Against Trump Is Likely to Fail*, FORBES (Jan. 22, 2017, 10:00 PM), <https://www.forbes.com/sites/danielfisher/2017/01/22/sure-trumps-foreign-customers-are-a-problem-but-lawsuits-arent-the-solution/>; Jeremy Venook, *The Case(s) Against Trump*, ATLANTIC (Mar. 27, 2017), <https://www.theatlantic.com/business/archive/2017/03/the-search-for-standing/520467> [<https://perma.cc/VWQ6-H4XM>].

²² See, e.g., Jonathan H. Adler, Opinion, *Why CREW’s Emoluments Clause Lawsuit Against President Trump Still Has Standing Problems*, WASH. POST: VOLOKH CONSPIRACY (Apr. 19, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/19/why-crews-emoluments-clause-lawsuit-against-president-trump-still-has-standing-problems/?utm_term=.0e42c1e0c88e [<https://perma.cc/9WQG-GN9V>]; Farias, *supra* note 21.

²³ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 598 n.4 (1992) (Blackmun, J., dissenting).

²⁴ If Congress could confer standing to sue on any private litigant, it would arguably impinge on the Executive’s authority to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3. For a discourse on Article III standing as a separation of powers mechanism, see Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

²⁵ See discussion *infra* Section II.A.

Perhaps more importantly, many putative violations of federal law go unexamined because it is unclear whether anyone has standing to sue in federal court.²⁶ Examples include certain violations of the Establishment Clause,²⁷ Statement and Account Clause,²⁸ and Incompatibility Clause.²⁹ Scholars have reflected on this problem, characterizing these and other provisions, such as the Take Care Clause, as functionally unenforceable.³⁰ And the problem may extend to certain federal statutes such as the Fair Credit Reporting Act³¹ and Telephone Consumer Protection Act.³²

Our thesis therefore has implications far beyond CREW, Trump, and the Emoluments Clause. We propose that, under current doctrine, standing is essentially *never* a hurdle to enforcing *any* federal law—constitutional or otherwise. Almost any litigant can bring almost any federal claim, obtain relief, and, if the matter is sufficiently important, obtain a judgment from the U.S. Supreme Court. This means two things. First, federal laws traditionally regarded as unenforceable are almost certainly enforceable by *someone*. Second, the pool of plaintiffs who can sue under federal laws *not* traditionally considered difficult to enforce is broader than previously thought. Parties who would normally be kicked out of federal court for lack of standing have a path to federal review and, possibly, victory.

How can this be? The answer appears simple at first, especially to anyone who has ever taken or taught a course on federal jurisdiction: litigants should migrate to state court. State courts are not subject to Article III and its standing requirement.³³ Many states consequently decline to require anything like Article III standing to sue in their courts,³⁴ creating what we call the Federal–State Standing Gap.

Here, in brief, is how our method works. We use CREW’s Emoluments Clause suit as an example. As noted, a federal court dismissed CREW’s lawsuit for lack of

²⁶ See, e.g., John M. Bickers, *Standing on Holy Ground: How Rethinking Justiciability Might Bring Peace to the Establishment Clause*, 60 CLEV. ST. L. REV. 415, 449 (2012) (“The disputes are literally of only academic interest, however, as no one appears to have standing to complain.”); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984).

²⁷ See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

²⁸ See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974).

²⁹ See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

³⁰ See, e.g., Bickers, *supra* note 26, at 449; David R. Dow, *The Equal Protection Clause and the Legislative Redistricting Cases—Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123, 1128 (1997) (“When a constitutional violation injures a significantly large number of citizens, no one has standing to sue.”).

³¹ Gavin Rooney et al., *State Courts May Become Sole No-Injury Class Action Forum*, LAW360 (Jan. 8, 2016, 10:54 AM), <https://www.law360.com/articles/743588/state-courts-may-become-sole-no-injury-class-action-forum> [<https://perma.cc/ERK9-LXZ6>].

³² *Id.*

³³ See *id.*

³⁴ See *id.*

standing.³⁵ Dismissals for lack of standing amount to dismissals for lack of jurisdiction and are without prejudice, so the group is free to appeal and perhaps refile elsewhere.³⁶ Instead of appealing or scrounging around for plaintiffs more likely to have standing in federal court, CREW should refile under its own name in some state court with relaxed standing requirements. State standing requirements, including those states with the most relaxed rules, are discussed in Section I.B. The defendant—Trump—will doubtless attempt to remove the case to federal court,³⁷ anticipating another dismissal for lack of standing. As we explain in Section II.A.1, removal is unlikely. The case is, for now, stuck in state court.³⁸

CREW can seek in state court precisely what it would have sought from the lower federal courts. It can obtain relief—perhaps including a national injunction barring Trump from violating the Emoluments Clause.³⁹ It may win appeals up to the highest state court, which can issue a precedential opinion in its favor.⁴⁰ CREW might be quite pleased at this point, despite never having appeared in federal court. But the case is not over yet. The President will almost certainly petition the U.S. Supreme Court for a writ of certiorari, and the Supreme Court will likely grant it.

What happens next? One might assume that the Supreme Court is required to dismiss for lack of standing. But that is not our law. In *ASARCO Inc. v. Kadish*,⁴¹ the U.S. Supreme Court held that it had the authority to review an Arizona Supreme Court decision regardless of whether the plaintiffs had Article III standing.⁴² Employing a kind of legal jiu jitsu, the Court flipped the standing inquiry on its head.⁴³ It found that there was federal jurisdiction because the *defendants*, not the plaintiffs, had standing.⁴⁴ The Court then ruled on the merits in the plaintiffs' favor, affirming the judgment of the Arizona Supreme Court.⁴⁵ We describe the *ASARCO* decision in Part II.

There you have it. The *ASARCO* plaintiffs were able to obtain victory in the U.S. Supreme Court without ever having to satisfy the standing requirement of Article III.⁴⁶

³⁵ *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 1:17-cv-00458-GBD (S.D.N.Y. Dec. 21, 2017).

³⁶ *See, e.g.*, *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

³⁷ *See* 28 U.S.C. § 1442(a)(1) (2012).

³⁸ *See* discussion *infra* Section II.A.1; *see also* *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989).

³⁹ *See* discussion *infra* Section III.A.

⁴⁰ *See ASARCO*, 490 U.S. at 612–24.

⁴¹ 490 U.S. 605 (1989).

⁴² *See generally id.*

⁴³ *See generally id.*

⁴⁴ *Id.* at 618. More puzzlingly—and as discussed at length in Section IV.A—the standing-conferring injury identified by the Court was the state-court judgment entered against the defendant *in the very case under review*.

⁴⁵ *Id.* at 633.

⁴⁶ *Id.*

CREW could do the same. So might nearly anyone who wished to enforce a federal law previously thought unenforceable. The Federal–State Standing Gap allows *almost anyone* to bring a suit under *almost any* federal law. *ASARCO* clears a path to bring that victory to the highest federal court in the land.⁴⁷

If *ASARCO*'s reasoning seems peculiar, we agree. In Section IV.A, we consider whether the decision is likely to be overturned. If it were, the Supreme Court would be obliged to dismiss the CREW suit for lack of jurisdiction, leaving the state-court judgment unmolested. As we discuss in Section IV.B, this would lead to another strange result. It would mean that many state-court decisions resolving important federal-law questions would be unreviewable by any federal court. Such a regime could allow—and perhaps invite—state courts to defy holdings of the U.S. Supreme Court.

What should we think of all of this? Impact litigators may be ecstatic to find that federal violations previously thought irremediable can, under *ASARCO*, be litigated before the U.S. Supreme Court. One might wonder why they aren't already taking advantage of the rule, a question we consider in Part III. Others may be less enthusiastic. To them, it might appear that we are caught between Scylla and Charybdis—a world either with or without *ASARCO*. In the former, Article III's standing requirement is subverted. In the latter, many state decisions become immune from federal review, perhaps inviting state courts to ignore the U.S. Supreme Court. How worried should we be about either possibility? Should we prefer one to the other? Section IV.B takes up these questions. And if one is unenthusiastic about *both* outcomes, one might wonder whether anyone—Congress, the Supreme Court, the President—might fashion a third way. We discuss this possibility in Section IV.C.

I. THE FEDERAL–STATE STANDING GAP

Many people care about the law's enforcement—or at least they should. This is especially so when constitutional values are at stake. They should care very much, for example, about whether the government is promulgating laws respecting an establishment of religion, discriminating on the basis of race, or employing individuals ineligible for office. But if the provisions relevant to those questions are violated, often no one can do anything about it—at least not in federal court.⁴⁸

The case-or-controversy requirement of the Article III places strict limits on who can sue in federal court.⁴⁹ Those whom Article III permits to sue are said to have “standing.”⁵⁰ In many cases, the class of individuals who have standing is dwarfed by the class of those who would like it.⁵¹ In some cases, it is unlikely that *anyone*

⁴⁷ *Id.*

⁴⁸ See Rooney et al., *supra* note 31.

⁴⁹ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–62 (1992); see also *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

⁵⁰ See Scalia, *supra* note 24, at 882; see also *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972) (defining “standing”).

⁵¹ See Scalia, *supra* note 24, at 891–92.

can sue.⁵² And even when *someone* has the right to sue in federal court, standing doctrine often weeds out those most interested in doing so.⁵³ Thus, for many litigants on both sides of the political divide, federal standing doctrine has long appeared an insurmountable barrier to enforcing the law.⁵⁴

Contrast Article III’s limit on who has standing to sue in federal court with the absence of any such limit on who has standing to sue in state court. Standing to sue in state court is a matter of state law.⁵⁵ Many states have taken advantage of this autonomy to throw their courthouse doors open to just about anyone.⁵⁶ The result is a gap between a litigant’s standing to sue in federal court and that same litigant’s standing to sue about the same alleged wrongdoing in state court. Call it the Federal–State Standing Gap.

Part I begins with an overview of federal standing doctrine and illustrations of how federal standing doctrine impedes the enforcement of federal law. Readers familiar with this material may prefer to skip to the discussion of state standing doctrine that follows. Part I concludes with reflection on the magnitude of the Federal–State Standing Gap, its consequences, and its opportunities for litigants.

A. Federal Standing

1. Doctrine

Try to explain federal standing doctrine to a non-lawyer, or even to a lawyer who never took a class on federal jurisdiction. You are sure to get strange looks. Something is counterintuitive about the proposition that someone could disregard federal law, even in an obvious way, and yet remain practically immune from suit in federal court. It does not clarify much to explain that standing doctrine comes from Article III, as an implicit limitation on “the judicial Power” that extends to “Cases” and “Controversies.”⁵⁷ Some have therefore taken to a historical explanation that focuses on a gradual shift in the federal docket.⁵⁸

To make a long story short: Courts once were primarily in the business of private dispute resolution, but with the rise of the administrative state during the last century, they increasingly met the claims of citizen-plaintiffs seeking to calibrate and wield federal power.⁵⁹ Tough questions then arose about the propriety of private

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See, e.g.,* Fallon, *supra* note 26, at 3–4.

⁵⁵ *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *see also Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

⁵⁶ *See, e.g.,* Rooney et al., *supra* note 31.

⁵⁷ U.S. CONST. art. III, § 2.

⁵⁸ *See, e.g.,* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 165–68 (1992).

⁵⁹ *See id.* at 194–95; *see also* Frank H. Easterbrook, Foreword, *The Court and the*

enforcement of the law.⁶⁰ Private enforcement seems fine when the citizen-plaintiff resembles a traditional litigant, alleging that some legal wrong has inflicted harm.⁶¹ But what if the allegation is that a federal agency misread a federal statute and thereby increased the rate of extinction of endangered species in Egypt and Sri Lanka?⁶² It is this sort of nontraditional claim that has caused the Supreme Court to define and reinforce boundaries on who can sue in federal court.⁶³

Under current case law, plaintiffs must demonstrate three things to have standing to sue in federal court.⁶⁴ First is an injury in fact.⁶⁵ This means concrete and particularized harm, even intangible harm, but not harm in the abstract.⁶⁶ And the harm must be actual or imminent, not speculative or conjectural.⁶⁷ Second is that the injury is fairly traceable to the defendant.⁶⁸ This is a causation requirement—plaintiffs cannot sue defendants to recover for the acts of third parties not before the court,⁶⁹ nor can their theory of the case depend on an attenuated chain of events.⁷⁰ Third is that the injury is redressable by a favorable ruling from the court.⁷¹ The requirement of redressability is grounded in the federal judiciary’s longstanding aversion to advisory opinions.⁷² If a favorable judgment can bring only psychic satisfaction, then it is thought to be nothing more than a conclusion that one side had the better of an argument in the “rarified atmosphere of a debating society.”⁷³

Economic System, 98 HARV. L. REV. 4, 4 (1984) (“Once, the Court was principally an arbiter of disputes among private parties.”).

⁶⁰ See Fallon, *supra* note 26, at 1–8.

⁶¹ In the argot of legal theory, such a litigant is styled “Hohfeldian,” following Wesley Newcomb Hohfeld’s *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). See, e.g., Fallon, *supra* note 26, at 3 n.12 (“The terms ‘Hohfeldian’ and ‘non-Hohfeldian’ plaintiff have become terms of art in modern literature on standing.”).

⁶² See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992).

⁶³ Such a claim is nontraditional in the sense of being non-Hohfeldian. See discussion *supra* note 61; see also Scalia, *supra* note 24, at 881–82; Sunstein, *supra* note 58, at 194–95.

⁶⁴ Together these are “the irreducible constitutional minimum of standing.” *Lujan*, 504 U.S. at 560.

⁶⁵ *Id.*

⁶⁶ See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (2016).

⁶⁷ See *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013).

⁶⁸ See *Lujan*, 504 U.S. at 560.

⁶⁹ See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976).

⁷⁰ See *Allen v. Wright*, 468 U.S. 737, 759 (1984).

⁷¹ *Lujan*, 504 U.S. at 561; *Simon*, 426 U.S. at 38, 41–46.

⁷² See 13 CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3529.1 (3d ed. 2017) (“The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.”); see also Correspondence of the Justices (1793), in RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50–52 (7th ed. 2015).

⁷³ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

2. How the Doctrine Impedes Enforcement of Federal Law

This triad of federal standing doctrine—*injury in fact*, *traceability*, and *redressability*—has bite. Standing is a jurisdictional prerequisite to suing in federal court,⁷⁴ and the absence of any one of the triad deprives a court of power to adjudicate a plaintiff’s claims.⁷⁵ It is also a constitutional doctrine, deriving from Article III.⁷⁶ Congress therefore cannot be sure that any statutory effort to expand a class of potential plaintiffs will hold up to judicial review.⁷⁷

Courts regularly invoke standing doctrine to deny parties redress of alleged harms.⁷⁸ While such decisions matter a great deal to the plaintiffs denied a judicial forum, they are usually of little significance to anyone else. That is because, in most cases, even though some plaintiffs lack standing to challenge allegedly lawless conduct, there will be others who possess it.⁷⁹ Assuming some such alternative plaintiff brings suit, the law may be enforced.⁸⁰

But standing does not only operate to bar particular plaintiffs from litigating putative violations of federal law. In some areas of public concern, it operates to shield violations from any remedy at all.⁸¹ These are not isolated cases. Often, a court’s ruling that no one has standing to enforce a *particular* violation renders an *entire category* of federal law unenforceable.⁸² Sometimes this is because, under the relevant doctrine, literally no one has standing to sue.⁸³ In other cases, it is possible to imagine facts under which someone might have standing, but such plaintiffs will

⁷⁴ See, e.g., *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998).

⁷⁵ See *Lujan*, 504 U.S. at 560–61.

⁷⁶ See *id.* at 560; Scalia, *supra* note 24, at 882 (“The requirement of standing has been made part of American constitutional law through (for want of a better vehicle) the provision of Art. III, Sec. 2, which states that ‘the judicial Power shall extend’ to certain ‘Cases’ and ‘Controversies.’”).

⁷⁷ See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.”).

⁷⁸ See generally, e.g., *Lujan*, 504 U.S. 555.

⁷⁹ See discussion *supra* Section I.A.1.

⁸⁰ See, e.g., *Wikimedia Found. v. Nat’l Sec. Agency*, 857 F.3d 193, 200 (4th Cir. 2017) (holding that a complaint alleging harm from government surveillance survives a facial challenge to standing under *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), because the allegation of harm is not as speculative as it was in *Clapper*).

⁸¹ See, e.g., *United States v. Richardson*, 418 U.S. 166, 179 (1974) (holding that in some cases, no citizen will have standing to bring a constitutional claim and therefore relief may be obtained in the judicial process).

⁸² See, e.g., *Bickers*, *supra* note 26, at 448–49.

⁸³ See *Clapper*, 568 U.S. at 420–21 (acknowledging the possibility that no citizen may have standing to challenge a particular federal law).

either be rare or disinclined to litigate.⁸⁴ Either way, standing doctrine works toward ensuring that certain violations of federal law go without a judicial remedy.⁸⁵

Establishment Clause case law is rich in examples of irremediable violations. In *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,⁸⁶ the Supreme Court held that taxpayers had no standing to challenge the federal government's gift of land to a Christian college.⁸⁷ Taxpayers sometimes have standing to bring Establishment Clause challenges to federal expenditures made under the Spending Clause, but the land transfer was made under the Property Clause.⁸⁸ The plaintiffs, the Court held, had no standing *qua* taxpayers to challenge the transfer under the Property Clause.⁸⁹ Their injury was therefore a mere "generalized grievance," shared equally by all.⁹⁰ Such complaints cannot support a lawsuit in federal court.⁹¹

The Third Circuit wrote in its opinion below that the plaintiffs in *Valley Forge* were "likely to be the best available."⁹² "If they [did] not have standing," the court thought, "it [was] probable that . . . [i]n respect to such [property transfers], the Establishment Clause would be rendered virtually unenforceable."⁹³ It is possible to imagine the occasional individual uniquely affected by the government's gift of land—perhaps someone holds a contingent remainder defeated by the gift.⁹⁴ But such individuals are rare enough as to be negligible.⁹⁵ As things stand, it is unlikely that anyone can stop the government from giving gifts of property, no matter how preferential, to a religious (or anti-religion) group.

Roughly the same goes for many monetary subsidies of religious groups. The Supreme Court held in *Flast v. Cohen*⁹⁶ that taxpayers have standing to mount

⁸⁴ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 592–93 (1992) (Blackmun, J., dissenting) (noting the burden the court has placed on future plaintiffs in meeting the "imminence" factor of the Article III standing test).

⁸⁵ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 493 (1982) (Brennan, J., dissenting) (noting that the Court "employ[s] the rhetoric of 'standing' to deprive a person, whose interest is clearly protected by the law, of the opportunity to prove that his own rights have been violated").

⁸⁶ 454 U.S. 464 (1982).

⁸⁷ See generally *id.*

⁸⁸ *Id.* at 470.

⁸⁹ *Id.* at 482.

⁹⁰ *Id.* at 469 (noting that the district court held that respondents merely alleged a "generalized grievance" (citation omitted)).

⁹¹ See *id.* at 474–75.

⁹² *Ams. United for Separation of Church & State, Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 619 F.2d 252, 268 (3d Cir. 1980) (Rosenn, J., concurring), *rev'd*, *Valley Forge*, 454 U.S. 464.

⁹³ *Id.*

⁹⁴ As Judge Rosenn notes in *Americans United for Separation of Church & State*, it is possible that the economic interests of one plaintiff may be sufficient to constitute standing in an Establishment Clause action, but it would be very rare. *Id.*

⁹⁵ See *id.*

⁹⁶ 392 U.S. 83 (1968).

Establishment Clause challenges to appropriations earmarked for religious groups.⁹⁷ But it subsequently limited that decision in *Hein v. Freedom from Religion Foundation, Inc.*⁹⁸ There, it held that *Flast* does not apply to discretionary spending paid for by general, religiously neutral, appropriations.⁹⁹ Discretionary subsidies of religious organizations affect the public in almost the same way as the gift of property in *Valley Forge*.¹⁰⁰ The injuries they might cause are just as generalized.¹⁰¹ Thus, as with *Valley Forge*, no one is likely to be able to sue for redress of the kind of violation at issue in *Hein*.

At least one federal circuit court has doubted whether anyone has standing to challenge government speech either praising or disparaging religion. In *Freedom from Religion Foundation, Inc. v. Obama*,¹⁰² plaintiffs alleged that President Obama’s address on the National Day of Prayer violated the Establishment Clause.¹⁰³ The court held that the feeling of being excluded or made unwelcome by government speech failed to constitute a cognizable injury.¹⁰⁴ “[H]urt feelings,” Judge Easterbrook wrote for the court, “differ from legal injury.”¹⁰⁵ The opinion went on to muse that, because no one reasonably alters his behavior in response to mere speech, perhaps no one was harmed more seriously than the plaintiffs.¹⁰⁶ “If this means that no one has standing,” the court wrote, “that does not change the outcome.”¹⁰⁷

Standing doctrine might also operate to render putative violations of the Equal Protection Clause unenforceable. If the government’s religious speech fails to generate a cognizable injury, so might its racial speech—even if overtly hostile. The Fifth Circuit recently took that position in *Moore v. Bryant*.¹⁰⁸ There, it held that when the government uses racially insensitive or disparaging language, the “stigma” caused by such speech “alone [is] insufficient to satisfy the injury-in-fact requirement.”¹⁰⁹

There is also probably no one with standing to enjoin violations of the Incompatibility Clause.¹¹⁰ That provision forbids anyone from simultaneously holding a

⁹⁷ *Id.* at 105–06.

⁹⁸ 551 U.S. 587, 597–615 (2007) (plurality opinion).

⁹⁹ *Id.* at 593.

¹⁰⁰ *See id.* at 608–09.

¹⁰¹ *Id.* at 637 (Souter, J., dissenting) (arguing that the harms alleged in *Flast* are no greater than those alleged in *Hein*).

¹⁰² 641 F.3d 803 (7th Cir. 2011).

¹⁰³ *Id.* at 805.

¹⁰⁴ *See id.* at 807.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 808; *see also* *Harris v. City of Zion*, 927 F.2d 1401, 1421 (7th Cir. 1991) (Easterbrook, J., dissenting) (arguing that a de minimis change in behavior, such as looking away from the offending speech, is not a cognizable injury), *cert. denied*, 505 U.S. 1229 (1992).

¹⁰⁷ *Freedom from Religion Found.*, 641 F.3d at 808.

¹⁰⁸ 853 F.3d 245 (5th Cir. 2017), *cert denied*, 138 S. Ct. 468 (2017).

¹⁰⁹ *Id.* at 251–52.

¹¹⁰ U.S. CONST. art. I, § 6, cl. 2.

seat in the federal legislature and “holding any Office under the United States.”¹¹¹ There is, at least, no standing *qua* citizen or taxpayer.¹¹² And the Supreme Court has acknowledged the possibility that, if citizens and taxpayers “have no standing to sue, no one [has] standing.”¹¹³ The Court has said much the same about the Statement and Account Clause, which requires the federal government to publicly report “Expenditures of all public Money.”¹¹⁴ Taxpayers have no standing to enforce it.¹¹⁵ There, too, the Court contemplated the likelihood that, if taxpayers are “not permitted to litigate this issue, no one can do so.”¹¹⁶ It found the possibility acceptable, writing that “the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”¹¹⁷

Even where standing doctrine fails to render a violation of federal law completely irremediable, it can often make enforcement substantially more difficult. This occurs when the courts rule that the parties most interested in enforcement lack standing.¹¹⁸ Other plaintiffs with standing may exist, but they will be comparatively difficult to find and unwilling to sue.¹¹⁹

In *Warth v. Seldin*,¹²⁰ a coalition of plaintiffs brought suit to challenge the zoning laws of Penfield, New York, which allegedly discriminated on the basis of income and, by extension, race.¹²¹ The Court assumed that the zoning laws “had the purpose and effect of excluding” poor minorities by keeping housing prices high.¹²² But, it held that the low-income minority plaintiffs lacked standing because they could not prove that an injunction against the laws would lower prices so that they could afford housing.¹²³ Nor did residents of Penfield have standing based on their desire to live in an integrated community.¹²⁴ Developers of low-income housing lacked standing because they could not point to any project being held up by the regulations.¹²⁵

¹¹¹ *Id.*

¹¹² *See* *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 209–10 (1974) (holding that a citizen’s claim under Incompatibility Clause did not constitute a concrete injury).

¹¹³ *Id.* at 227.

¹¹⁴ U.S. CONST. art. I, § 9, cl. 7.

¹¹⁵ *See* *United States v. Richardson*, 418 U.S. 166, 170 (1974).

¹¹⁶ *Id.* at 179.

¹¹⁷ *Id.*

¹¹⁸ *See* *Sierra Club v. Morton*, 405 U.S. 727, 739–40 (1972) (noting that a special interest in a subject was not sufficient to render an individual aggrieved or adversely affected, significantly narrowing the pool of potential plaintiffs).

¹¹⁹ *See id.*

¹²⁰ 422 U.S. 490 (1975).

¹²¹ *Id.* at 495.

¹²² *Id.* at 502.

¹²³ *Id.* at 503–04.

¹²⁴ *Id.* at 512–13.

¹²⁵ *Id.* at 516.

After *Warth*, who is left to challenge discriminatory zoning laws? The set is not null, but it is constrained. A developer who initiated a project but was blocked by the regulations would likely have standing. But a developer reckless enough—or committed enough to providing low-income housing—to commence a project it knows to be doomed is a rare bird. *Warth* does not render the Equal Protection Clause toothless as applied to zoning law.¹²⁶ But it certainly makes litigation harder.

This is but a sampling of the cases where standing doctrine shields putative violations of federal law from being challenged in court. Others likely exist.¹²⁷ As the standing problems in suits against Donald Trump demonstrate, violations of the Emoluments Clause might be among them. If standing were no object, these provisions of federal law could be given their full effect, rather than evading review on procedural grounds.

B. State Standing

State courts are not bound by Article III,¹²⁸ a feature of our federalism with two implications. First is that plaintiffs who sue in state courts need not worry about the strictures of federal standing doctrine.¹²⁹ Indeed, many states have adopted a comparatively lax doctrine that permits citizens to sue for generalized grievances.¹³⁰ Second is that there is heterogeneity in standing doctrine among the states—without the anchor of Article III, states have been free to drift.¹³¹ This heterogeneity probably reflects institutional differences—for example, whether a state’s judiciary is elected, the terms of judges’ tenure, the text of state constitutions and ease of amendment.¹³²

¹²⁶ See *id.* at 522 (Brennan, J., dissenting) (noting that the purpose of the ordinance was to prevent non-white citizens from living in the town).

¹²⁷ Consider, for example, *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997), *cert. denied*, 522 U.S. 927 (1997). It seems to imply that only those on the precipice of death at their doctors’ hands have standing to bring a constitutional challenge to Oregon’s assisted suicide law. If that is right, potential plaintiffs are as likely to end up dead as they are parties to a federal lawsuit.

¹²⁸ See, e.g., *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . .”).

¹²⁹ See *id.*

¹³⁰ For analysis of states’ standing doctrine, see two helpful notes: M. Ryan Harmanis, Note, *States’ Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729 (2015); John DiManno, Note, *Beyond Taxpayers’ Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639 (2008).

¹³¹ See Harmanis, *supra* note 130, at app. 760–63.

¹³² For example, we might expect states with a more democratically accountable judiciary to have a more relaxed standing doctrine. See Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1886–88 (2001); DiManno, *supra* note 130, at 657–63.

It may also reflect historical differences—for example, the traditional role of one state’s judiciary in governing through the common law relative to another,¹³³ or the traditional prominence of a state’s judges relative to its legislators.¹³⁴

The best way to explore state standing doctrines is through sampling.¹³⁵ Below we consider three states, each of which has embraced an approach that makes its courts more hospitable to nontraditional plaintiffs than are the federal courts,¹³⁶ and each of which serves as an example of standing doctrine in other states.¹³⁷

Michigan offers an instructive place to start because the Michigan Supreme Court recently abandoned its faith in federal standing doctrine.¹³⁸ The shift came in *Lansing Schools Educational Ass’n v. Lansing Board of Education*.¹³⁹ Plaintiffs were four teachers and their unions.¹⁴⁰ They sued in state court to force district officials to expel students who had allegedly assaulted the teachers.¹⁴¹ Michigan law then required the expulsion of any student who assaulted a teacher,¹⁴² but district officials had decided that suspensions would be appropriate.¹⁴³ The district moved to dismiss for lack of standing.¹⁴⁴ They contended that the teachers were not injured by the decision to suspend the students, and that any injury would not be redressable with a favorable judgment because discretion is given to the findings of district officials about whether there had been an assault.¹⁴⁵

The Michigan Supreme Court rejected these arguments and endorsed an expansive theory of standing.¹⁴⁶ The court explained that “standing historically developed in Michigan as a limited, prudential doctrine that was intended to ensure sincere and

¹³³ See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977) (explaining how some state judiciaries were once instrumental in governing society).

¹³⁴ Cf. Hershkoff, *supra* note 132, at 1891–92.

¹³⁵ For a fifty-state survey, see Harmanis, *supra* note 130, at app. 760–63.

¹³⁶ Again, we use nontraditional in the non-Hohfeldian sense. See discussion *supra* notes 61, 63.

¹³⁷ For example, standing doctrine in Utah closely resembles that in Ohio. Compare *Gregory v. Shurtleff*, 299 P.3d 1098 (Utah 2013), with *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999). And standing doctrine in Wisconsin closely resembles that in Michigan. Compare *McConkey v. Van Hollen*, 783 N.W.2d 855 (Wis. 2010), with *Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ.*, 792 N.W.2d 686 (Mich. 2010). See also Harmanis, *supra* note 130, at app. 760–63.

¹³⁸ See *Lansing Schools*, 792 N.W.2d at 695–96.

¹³⁹ 792 N.W.2d 686 (Mich. 2010). *Lansing Schools* overruled *Lee v. Macomb County Board of Commissioners*, 629 N.W.2d 900 (Mich. 2001), and later cases that had adopted the requirements set out in *Lujan*.

¹⁴⁰ *Lansing Schools*, 792 N.W.2d at 689.

¹⁴¹ See *id.*

¹⁴² See MICH. COMP. LAWS § 380.1311a(1) (2018).

¹⁴³ See *Lansing Schools*, 792 N.W.2d at 689.

¹⁴⁴ *Id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 688.

vigorous advocacy by litigants.”¹⁴⁷ Following that approach, “a [plaintiff] has standing whenever there is a legal cause of action.”¹⁴⁸ And even when there is not obviously a legal cause of action, a plaintiff may have standing if he demonstrates “a substantial interest [in the law’s enforcement] that is detrimentally affected in a manner distinct from that of the general public.”¹⁴⁹ The court concluded that the teachers and unions fell into this latter category; their interest in the matter would promote sufficient advocacy for the court to arrive at a sound decision.¹⁵⁰ In other words, it did not matter whether they suffered harm from the decision to suspend rather than expel the students. It also did not matter whether they were in fact the ones who had endured the alleged assaults.¹⁵¹ What mattered was that the legal issues would be adequately developed by the individuals and organizations who sued.¹⁵²

The New Jersey Supreme Court has recently explained the proudly relaxed approach that it takes to standing:

Our liberal rules of standing are animated by a venerated principle: In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of just and expeditious determinations on the ultimate merits. And that principle is premised on a core concept of New Jersey jurisprudence, that is, that our rules of procedure were not designed to create an injustice and added complications but, on the contrary, were devised and promulgated for the purpose of promoting reasonable uniformity in the expeditious and even administration of justice.¹⁵³

To have standing to sue in New Jersey, then, a plaintiff must demonstrate only “a sufficient stake and real adverseness with respect to the subject matter of the litigation.”¹⁵⁴ The New Jersey Supreme Court has on occasion stated that a plaintiff must demonstrate “a substantial likelihood of some harm . . . in the event of an unfavorable decision,”¹⁵⁵ and at a glance this resembles the injury-in-fact and redressability requirements of federal doctrine. Yet in the *Mt. Laurel* Cases,¹⁵⁶ the New Jersey

¹⁴⁷ *Id.* at 692 (internal quotation marks omitted).

¹⁴⁸ *Id.* at 699.

¹⁴⁹ *Id.* at 702.

¹⁵⁰ *See id.* at 699–702.

¹⁵¹ *See id.* at 701 (“[T]eachers who work in a public school have a significant interest distinct from that of the general public in the enforcement of MCL 380.1311a(1).”).

¹⁵² *See id.*

¹⁵³ *Jen Elec., Inc. v. County of Essex*, 964 A.2d 790, 801–02 (N.J. 2009) (internal citations and quotation marks omitted).

¹⁵⁴ *Id.* at 801 (citation omitted).

¹⁵⁵ *Id.* at 802 (citation omitted).

¹⁵⁶ *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975)

Supreme Court held that an organization had standing to challenge exclusionary zoning practices because the organization “ha[d] the objective of” ending such practices.¹⁵⁷ This is a near-circular approach that seems to throw open the doors of state courthouses to motivated plaintiffs.

Ohio courts recite standing requirements that mirror the federal triad,¹⁵⁸ but the Ohio Supreme Court has long recognized an exception “when the issues sought to be litigated are of great importance and interest to the public.”¹⁵⁹ This so-called “public-right doctrine” is invoked by plaintiffs who sue to compel government officials to act in compliance with state and federal law, but who cannot show any unique harm from the officials’ alleged wrongdoing.¹⁶⁰ In *State ex rel. Newell v. Brown*,¹⁶¹ for example, the plaintiff sought to forbid a state official from printing and distributing ballots that listed particular candidates for judgeships.¹⁶² The plaintiff contended that these candidates were nominated pursuant to an unconstitutional statutory scheme, but he sued only “as a citizen, taxpayer and elector” who was “interested in the execution of the laws.”¹⁶³ The Ohio Supreme Court concluded that the plaintiff had standing to sue.¹⁶⁴ The court reasoned that “as a matter of public policy, a citizen of a community does have such an interest in his government as to give him capacity to maintain a proper action to enforce the performance of a public duty affecting himself as a citizen and citizens generally.”¹⁶⁵ In its most recent decisions on standing, the Ohio Supreme Court has cautioned that the public-right doctrine applies only in “rare cases” that present “exceptional circumstances,”¹⁶⁶ yet the court continues to rely on the doctrine to permit plaintiffs to sue for generalized grievances.¹⁶⁷

(*Mt. Laurel I*); *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*).

¹⁵⁷ *Mt. Laurel II*, 456 A.2d at 483 (“[W]e hold that . . . any organization that has the objective of[] securing lower income housing opportunities in a municipality will have standing to sue . . .”).

¹⁵⁸ *See, e.g.*, *Moore v. City of Middletown*, 975 N.E.2d 977, 982 (Ohio 2012).

¹⁵⁹ *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1082 (Ohio 1999).

¹⁶⁰ The Ohio Supreme Court has clarified that the doctrine applies only in original actions for a writ of mandamus or prohibition. *See ProgressOhio.org, Inc. v. JobsOhio*, 13 N.E.3d 1101, 1105 (Ohio 2014).

¹⁶¹ 122 N.E.2d 105 (Ohio 1954).

¹⁶² *See id.* at 106.

¹⁶³ *Id.* at 106–07 (citation omitted).

¹⁶⁴ *See id.* at 107.

¹⁶⁵ *Id.*

¹⁶⁶ *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers’ Comp.*, 780 N.E.2d 981, 985 (Ohio 2002) (citation omitted).

¹⁶⁷ *See, e.g., id.* (“We find this case to be one of those rare cases.”); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1084 (Ohio 1999) (“[T]here can be no doubt that the issues sought to be litigated in this case are of such a high order of public concern as to justify allowing this action as a public action.”).

C. *The Standing Gap and Its Consequences*

Now we can see a clear gap between federal and state standing requirements. Federal standing requirements are strict.¹⁶⁸ They erect a barrier to adjudication for litigants who cannot demonstrate injury, traceability, and redressability.¹⁶⁹ But many states take the opposite approach, employing flexible heuristics when deciding who can sue in their courts.¹⁷⁰ What difference does this distinction make?

The states discussed above can be sorted into three rough categories. First, some states have effectively no standing requirement at all.¹⁷¹ New Jersey fits best into this category.¹⁷² Its courts nominally require “a sufficient stake and real adverseness” to bring suit.¹⁷³ But if those requirements are met by any plaintiff who “has the objective of” winning his lawsuit, it is hard to see how standing requirements ever present an obstacle to litigation in New Jersey.¹⁷⁴ States like Michigan add the minimal criterion of sufficient adversity.¹⁷⁵ These states do not require anything like a “concrete and particularized injury” to bring suit.¹⁷⁶ But they do bar plaintiffs who cannot be expected to adequately develop and argue the relevant legal issues.¹⁷⁷ A plaintiff who could demonstrate neither an injury nor a longstanding interest in a case’s subject matter might have difficulty suing in these states.¹⁷⁸ Finally, states like Ohio add a public-interest requirement.¹⁷⁹ We question whether Ohio in particular takes this requirement seriously. But even lax enforcement of a public interest requirement might prevent some plaintiffs without federal standing from suing states like these.

II. USING THE STANDING GAP TO ENFORCE FEDERAL LAW

A. *Bridging the Gap: Enforcing Federal Law in Federal Court Without Article III Standing*

Now we are ready to lay out the details of our method for enforcing federal law in federal court without Article III standing. The gist is this: plaintiffs can initiate

¹⁶⁸ See Rooney et al., *supra* note 31.

¹⁶⁹ See *id.*

¹⁷⁰ See, e.g., *id.*

¹⁷¹ See *supra* notes 153–57 and accompanying text.

¹⁷² See *supra* notes 153–57 and accompanying text.

¹⁷³ *Jen Elec., Inc. v. County of Essex*, 964 A.2d 790, 801 (N.J. 2009) (citation omitted).

¹⁷⁴ *Mt. Laurel II*, 456 A.2d 390, 483 (N.J. 1983).

¹⁷⁵ See *supra* notes 138–52 and accompanying text.

¹⁷⁶ See *supra* notes 64–67.

¹⁷⁷ See, e.g., *supra* notes 146–48.

¹⁷⁸ While the court in *Lansing Schools* held that a plaintiff may still have standing when legal action was not obvious, the plaintiff needed a substantial interest that was unique from the general public. 792 N.W.2d 686, 702 (Mich. 2010).

¹⁷⁹ See *supra* notes 158–67 and accompanying text.

suits in state courts with lax standing requirements. U.S. Supreme Court precedent then works as a bridge to federal review. We continue to use CREW's Emoluments Clause suit against Trump as an example. Any plaintiff worried that he lacks standing to sue in federal court could follow the same path.

1. Step One: Winning in State Court

We suppose for purposes of this example that CREW lacks standing to sue under the Emoluments Clause in federal court. A federal district court has already reached this conclusion,¹⁸⁰ and so we really only suppose that this judgment would be affirmed if appealed. CREW should therefore start fresh in some state court where standing will not be a hurdle. Where? As discussed in Section I.C, even among states with relaxed standing requirements there is variance in who can sue under what law. CREW should face no obstacle to litigation in any of the states we described above. It could sue in a state like New Jersey, which has functionally no standing requirement.¹⁸¹ It could also sue in a state like Michigan, since there is reason to think that CREW—an organization dedicated to policing government ethics—will adequately develop and argue the Emoluments Clause question.¹⁸² Nor should CREW have difficulty suing in a state with a public-interest requirement, such as Ohio.¹⁸³

CREW has options, so it should file suit wherever it feels most confident it can win. As we will discuss below, winning in state court is essential to obtaining federal review. New Jersey may be a promising venue. It is probably the most politically liberal of the lax-standing states discussed above,¹⁸⁴ and CREW might expect the state's judiciary to reflect its population. Or if some other state's judiciary has taken a hard line against corruption, CREW might be inclined to sue there.

Imagine that the CREW suit is now filed in New Jersey state court. What next? One might expect Trump to swiftly remove the case. Under 28 U.S.C. § 1441, a civil action brought in state court may be removed by the defendant to a federal district court with "original jurisdiction" over it.¹⁸⁵ Assume Trump removed the CREW lawsuit under § 1441 to the United States District Court for the District of New Jersey. As

¹⁸⁰ See generally *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 1:17-cv-00458-GBD (S.D.N.Y. Dec. 21, 2017).

¹⁸¹ See Rooney et al., *supra* note 31.

¹⁸² See discussion *supra* Section I.B.

¹⁸³ See discussion *supra* Section I.B.

¹⁸⁴ See, e.g., Frank Newport, *Mississippi, Alabama and Louisiana Most Conservative States*, GALLUP (Feb. 6, 2015), http://www.gallup.com/poll/181505/mississippi-alabama-louisiana-conservative-states.aspx?utm_source=Politics&utm_medium=newsfeed&utm_campaign=tiles.

¹⁸⁵ 28 U.S.C. § 1441(a) (2012) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

above, we assume that CREW cannot meet the requirements for Article III standing in federal court. Standing is a jurisdictional requirement in federal court, so the district court lacks original jurisdiction.¹⁸⁶ By § 1441’s terms, removal is improper, and the case must remain in state court.¹⁸⁷ CREW’s very obstacle to federal adjudication on the merits is thus its anchor allowing for state-court review.

Much more likely, though, is that Trump invokes 28 U.S.C. § 1442, which authorizes removal of any suit “against . . . any officer . . . of the United States or of any agency thereof . . . for or relating to any act under color of such office.”¹⁸⁸ Unlike § 1441, the text in § 1442 does not make jurisdiction in the district court a prerequisite for removal.¹⁸⁹ The Supreme Court has interpreted § 1442’s removal right broadly—going so far as to characterize it as “absolute”¹⁹⁰—to ensure that federal officers have a federal forum in which to assert immunity from state law under the Supremacy Clause.¹⁹¹ This has led some to suggest that a district court should dismiss a no-standing suit removed under § 1442.¹⁹² If CREW’s case were removed and dismissed, it would trigger a Sisyphean cycle. Dismissals for lack of jurisdiction are without prejudice,¹⁹³ so CREW could refile in state court. But Trump would remove again, the suit would be dismissed again . . . and the litigation would die.¹⁹⁴

Happily for CREW, the removal statutes suggest a different outcome. Congress has made clear that a remand to state court, not dismissal, is the appropriate disposition of any no-standing case removed to federal court.¹⁹⁵ Under 28 U.S.C. § 1447(c), “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”¹⁹⁶ Standing is a jurisdictional requirement, so a lack of standing triggers § 1447(c)’s remand provision.¹⁹⁷ The statute applies on its face to all removals, making no distinction between § 1441 and § 1442.¹⁹⁸

The Supreme Court agrees. In *International Primate Protection League v. Administrators of Tulane Educational Fund*,¹⁹⁹ a federal agency removed a suit about

¹⁸⁶ See discussion *supra* Section I.A. Of course, federal courts have jurisdiction to determine if jurisdiction exists in any given case. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

¹⁸⁷ See 28 U.S.C. § 1447(d) (2012) (requiring district courts to remand any previously removed case over which the court determines it lacks jurisdiction).

¹⁸⁸ 28 U.S.C. § 1442(a)(1) (2012).

¹⁸⁹ See *id.*

¹⁹⁰ *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981).

¹⁹¹ See *id.* at 241–42, 241 n.16.

¹⁹² See Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non–Article III Plaintiffs*, 110 YALE L.J. 1003, 1040 (2001).

¹⁹³ See FED. R. CIV. P. 41(b).

¹⁹⁴ See 28 U.S.C. § 1442 (2012).

¹⁹⁵ See 28 U.S.C. § 1447(c) (2012).

¹⁹⁶ *Id.*

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*; see also 28 U.S.C. §§ 1441–1442 (2012).

¹⁹⁹ 500 U.S. 72 (1991).

custody of monkeys used for medical research under § 1442(a)(1).²⁰⁰ The Court held that § 1442(a)(1) does not authorize federal agencies to remove and that the district court lacked jurisdiction to hear the case.²⁰¹ The Court explained its holding with respect to the district court's jurisdiction in a cryptic footnote that seemed to adopt the Fifth Circuit's conclusion that plaintiffs "lack[ed] [Article III] standing to protect the monkeys."²⁰² The Court then remanded the action to state court under § 1447(c), overturning the Fifth Circuit's decision to dismiss.²⁰³ According to the Court, § 1447(c) supplies "no discretion to dismiss rather than remand an action" over which the district court lacks jurisdiction.²⁰⁴

The structure of § 1447 also points toward § 1447(c)'s applicability in § 1442 removals.²⁰⁵ Section 1447(d) makes orders to remand non-appealable, except in cases removed under § 1442.²⁰⁶ The Supreme Court has held that § 1447(d)'s bar on appealability applies only to orders to remand under § 1447(c).²⁰⁷ If § 1447(c) were inapplicable to § 1442 removals, then no orders to remand would fall under § 1447(d)'s exception to non-appealability.²⁰⁸ The exception would be superfluous. Only if § 1447(c) applies to cases removed under § 1442 do all parts of § 1447(d) have effect.²⁰⁹

Such remands under § 1447(c) create no conflict with the Supreme Court's insistence on a broad—perhaps "absolute"²¹⁰—right of removal under § 1442.²¹¹ At least they do not in the cases we care about. Federal officers' right of removal is supposed to give them a federal forum in which to mount a defense of federal law preempting state law.²¹² But this Article is not about enforcing *state* law against anyone. It is about enforcing *federal* law without Article III standing. So the preemption defense simply does not arise. The rationale for a broad right of removal therefore does

²⁰⁰ See *id.* at 89.

²⁰¹ See *id.* at 87.

²⁰² *Id.* at 78 n.4. As we say, footnote four is cryptic. An alternative reading of it is that the district court lacked jurisdiction because there was no statutory grant of jurisdiction. That is true because plaintiffs sued under state law and the Court had just concluded that § 1442(a)(1) does not apply. *Id.* In any event, *Primate Protection* is instructive because the Court ordered a remand rather than a dismissal based on the text of § 1447(c) and a conclusion that the district court lacked jurisdiction. See *id.* Why the district court lacked jurisdiction—no standing or no statutory grant—is less important.

²⁰³ See *id.* at 87.

²⁰⁴ *Id.* at 89 (quoting *Me. Ass'n of Indep. Neighborhoods v. Comm'r, Me. Dep't of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989)).

²⁰⁵ See 28 U.S.C. § 1447 (2012).

²⁰⁶ See *id.* § 1447(d).

²⁰⁷ See *Osborn v. Haley*, 549 U.S. 225, 243 (2007).

²⁰⁸ See 28 U.S.C. § 1447(d).

²⁰⁹ See *id.*

²¹⁰ *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981).

²¹¹ See *id.*

²¹² See *Mesa v. California*, 489 U.S. 121, 136–39 (1989).

not favor dismissal in the CREW case or any other case under federal law. Trump cannot scuttle CREW’s lawsuit in state court through removal under § 1442. The state-court litigation proceeds.²¹³

But staying in state court is not enough; CREW needs to win. As we will discuss below, federal review of federal claims is available to plaintiffs without standing *only* if they win in state court.²¹⁴ CREW’s goal here is to obtain a judgment in its favor either from the Supreme Court of New Jersey or from the New Jersey Appellate Division with the Supreme Court of New Jersey then denying review. Either outcome allows the defendant—Trump in our example—to petition the U.S. Supreme Court for a writ of certiorari.²¹⁵

There is little more to say if CREW immediately wins in the New Jersey trial and appellate courts—at least for now. But what if CREW loses? Suppose it wins at trial and on appeal, but the Supreme Court of New Jersey ultimately rules against it. Is the journey toward federal review over? Happily for CREW, the story does not end here. As discussed above, there are *many* states with lax standing requirements.²¹⁶ So CREW can try again in another state’s system, perhaps in Michigan or Ohio.

One might object here that rules of claim and issue preclusion, along with the Full Faith and Credit Clause,²¹⁷ prevent CREW from relitigating the claim it has just lost. That would be right if CREW were to refile under its own name in another state.²¹⁸ But it does not need to do that. It can recruit any of the numerous other plaintiffs likely to have standing in a state court with lax requirements.²¹⁹ For some states, anyone will do. Once CREW locates a plaintiff, claim and issue preclusion cease to apply because both require some identity of litigants.²²⁰ For claim preclusion to apply, both litigants must be identical to—or in privity with—those in the original litigation.²²¹ CREW’s new plaintiff will be neither. Issue preclusion merely requires that the party against whom preclusion is asserted have been a party to the original litigation.²²² CREW’s new plaintiff, as a non-party to the original suit, will be immune.²²³

The Full Faith and Credit Clause, as relevant here, requires a state to give only as much preclusive effect to the judgment of a sister state as would the state that

²¹³ See 28 U.S.C. § 1447.

²¹⁴ See discussion *infra* Section II.A.2.

²¹⁵ See 28 U.S.C. § 1257 (2012).

²¹⁶ See discussion *supra* Section I.B.

²¹⁷ See U.S. CONST. art. IV, § 1.

²¹⁸ See RESTATEMENT (SECOND) OF JUDGMENTS § 24 (AM. LAW INST. 1982).

²¹⁹ See generally DiManno, *supra* note 130; Harmanis, *supra* note 130.

²²⁰ See RESTATEMENT (SECOND) OF JUDGMENTS § 24.

²²¹ See *id.*

²²² *Id.* §§ 27, 29.

²²³ A court might consider CREW to have had a “sufficient ‘laboring oar’” in the first litigation to be treated as a party for purposes of preclusion. *Montana v. United States*, 440 U.S. 147, 155 (1979) (quoting *Drummond v. United States*, 324 U.S. 316, 318 (1945)).

rendered it.²²⁴ Because neither claim nor issue preclusion would apply in New Jersey against CREW's new plaintiff, they need not apply in other states.²²⁵ Moreover, no state judiciary is required to acquiesce to the legal *reasoning* of its sister states; where one state court finds no Emoluments Clause violation, another state court may find a flagrant one.²²⁶

Assume CREW eventually convinces a state's highest court to rule in its favor. President Trump could give up here. More likely, he will petition the U.S. Supreme Court for a writ of certiorari. Given the magnitude of this hypothetical case, the Supreme Court is almost certain to grant certiorari.

2. Step Two: Reaching the Supreme Court via *ASARCO*

What happens once the U.S. Supreme Court grants certiorari in our illustrative case? As we emphasized above, Article III's case-or-controversy requirement is a limit on the adjudicatory power of *all* federal courts.²²⁷ That includes the Supreme Court. One might therefore expect the Supreme Court to dismiss the CREW suit for lack of standing. If it did so, the state court judgment would stand, rendering a state court the final arbiter of the federal constitutional provision.²²⁸

But the Supreme Court, under current law, need not dismiss CREW's suit for lack of jurisdiction.²²⁹ The precedent is clear on this point. In *ASARCO Inc. v. Kadish*, the Court firmly established its ability to review such cases.²³⁰ In doing so, the Justices—intentionally or not—created a mechanism for litigants who lack Article III standing to nevertheless enforce federal laws in the highest federal court.²³¹

In *ASARCO*, a group of taxpayers and teachers in Arizona sought to challenge the state's mineral-lease scheme under a federal statute and the state constitution.²³² The substance of their challenge is unimportant. Two things do matter. First, these plaintiffs did not have Article III standing to sue in federal court.²³³ Second, although not intentionally trying to avoid the standing requirement, the *ASARCO* plaintiffs

²²⁴ U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”); *see also* *Riley v. N.Y. Trust Co.*, 315 U.S. 343, 349 (1942).

²²⁵ *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24.

²²⁶ Barbara Bintliff, *Mandatory v. Persuasive Cases*, 9 PERSP.: TEACHING LEGAL RES. & WRITING 83, 84–85 (2001).

²²⁷ *See* discussion *supra* Section I.A.

²²⁸ *See* discussion *infra* Sections IV.B–C.

²²⁹ *See generally* *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989) (holding that the Supreme Court may exercise jurisdiction on appeal from a state court even if the plaintiffs would not have had standing to bring suit in federal court).

²³⁰ *See id.* at 624.

²³¹ *See generally id.*

²³² *See id.* at 610.

²³³ *See id.* at 618.

followed the pattern we have laid out so far.²³⁴ They filed their case in state court and won a judgment from the Supreme Court of Arizona.²³⁵

The U.S. Supreme Court ruled that it could review the judgment in a fractured opinion.²³⁶ Justice Kennedy, joined by three others, found that the plaintiffs would have lacked standing had they originally filed in federal court.²³⁷ Justice Brennan, also joined by three others, declined to decide the question.²³⁸ What six Justices agreed upon was that it did not matter whether the plaintiffs had Article III standing.²³⁹ The Supreme Court could review the case either way.²⁴⁰

Turning the traditional standing inquiry on its head, the Court held that it was sufficient to satisfy the strictures of Article III that the *defendants*, rather than the plaintiffs, had standing.²⁴¹ This was because “the defendants in the case and the losing parties below . . . br[ought] the case [to the Supreme Court] and thus [sought] entry to the federal courts for the first time.”²⁴² Under *ASARCO*, the party who needs standing is ostensibly the party who first invokes the power of the federal courts.²⁴³

Once the Court determined that the defendants’ standing would be sufficient to satisfy Article III, it turned to the question of whether the defendants had standing.²⁴⁴ As described above, standing requires an injury-in-fact, traceability, and redressability.²⁴⁵ One might wonder how the defendants could demonstrate an injury. There were no counterclaims by which they might have alleged harm.

Instead of looking outside of the litigation to see whether the defendants in *ASARCO* had suffered an injury, the Court looked within it.²⁴⁶ It held that the state-court judgment against the defendant, *issued in the very litigation under review*, constituted an injury for purposes of Article III.²⁴⁷ The Court held that “as a result of the state-court judgment, the case has taken on such definite shape that [the defendants] are under a defined and specific legal obligation, one which causes them direct injury.”²⁴⁸ Such an injury—if it is indeed a proper injury for purposes of the standing inquiry²⁴⁹—is obviously traceable and redressable. As the Court wrote, “our reversal of the decision below would remove its disabling effects upon [defendants]. In these

²³⁴ See *id.* at 610.

²³⁵ See *id.*

²³⁶ See generally *id.*

²³⁷ See *id.* at 616–17 (plurality opinion).

²³⁸ See *id.* at 633–34 (Brennan, J., concurring in part and concurring in the judgment).

²³⁹ See *id.* at 617–24 (majority opinion).

²⁴⁰ See generally *id.*

²⁴¹ See *id.* at 618.

²⁴² *Id.*

²⁴³ See *id.*

²⁴⁴ See *id.* at 618–19.

²⁴⁵ See discussion *infra* Section I.A.

²⁴⁶ See *ASARCO*, 490 U.S. at 617–18.

²⁴⁷ See *id.* at 618.

²⁴⁸ *Id.*

²⁴⁹ See discussion *infra* Section IV.A.

circumstances, we conclude that [defendants] meet each prong of the constitutional standing requirements.”²⁵⁰ The Court went on to review the case on the merits, ruling in favor of the plaintiffs.²⁵¹

Here we finally have it—federal review of a federal claim without the plaintiffs ever having to demonstrate Article III standing. Under the plainest reading of the *ASARCO* opinion, *no plaintiff ever needs standing* to litigate the merits of a federal claim in the U.S. Supreme Court.²⁵² Anyone can file suit in a state court with lax standing requirements.²⁵³ If the plaintiff wins, the Supreme Court can take the case,²⁵⁴ Article III be damned. This applies to CREW and the Emoluments Clause. But it also applies to other plaintiffs concerned about constitutional and statutory violations commonly thought difficult to enforce.²⁵⁵ Article III’s standing requirement is diminished as a barrier to federal review.

We pause for a moment to make two notes. First, it should now be clear why winning in state court is essential for parties seeking no-standing, federal-court enforcement of federal laws. The injury providing *ASARCO*’s defendants standing was the state-court judgment against them.²⁵⁶ In the absence of such a judgment, there is no injury, no defendant with standing, and no power for the Supreme Court to consider the case on its merits.²⁵⁷ A state-court judgment against the plaintiffs would not be sufficient.²⁵⁸ In that case, the plaintiffs, not the defendants, would be the parties “seek[ing] entry to the federal courts for the first time in the lawsuit.”²⁵⁹ Then, the plaintiffs’ standing, not the defendants’, would be at issue.²⁶⁰ A state-court judgment against the plaintiffs would merely deny them relief.²⁶¹ It would not impose a “defined and specific legal obligation” sufficient to constitute an injury under *ASARCO*.²⁶² Thus, only victorious plaintiffs may obtain Supreme Court review under *ASARCO*, an oddity that the *ASARCO* Court itself acknowledged.²⁶³

Second, we emphasize again that, although the *ASARCO* Court may well have failed to anticipate the consequences of its decision, it is nevertheless the law. The

²⁵⁰ *ASARCO*, 490 U.S. at 618–19.

²⁵¹ *See id.* at 633.

²⁵² *See id.*

²⁵³ *See generally* DiManno, *supra* note 130; Harmanis, *supra* note 130.

²⁵⁴ Of course, the Supreme Court agrees to decide only about 1% of cases it is asked to decide each year. *See Frequently Asked Questions: General Information*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/about/faq_general.aspx [<https://perma.cc/R3CY-QZ4S>] (last visited Apr. 12, 2018) [hereinafter *Frequently Asked Questions*].

²⁵⁵ *See* discussion *supra* Section I.A.2.

²⁵⁶ *ASARCO*, 490 U.S. at 618.

²⁵⁷ *See id.*

²⁵⁸ *See id.*

²⁵⁹ *Id.*

²⁶⁰ *See id.*

²⁶¹ *See id.*

²⁶² *Id.*

²⁶³ *See id.* at 624.

opinions in *ASARCO* do not evince that the plaintiffs there were working strategically to avoid Article III’s strictures.²⁶⁴ The Court therefore may have overlooked the fact that its holding would bridge the Federal–State Standing Gap, providing the possibility of federal review to plaintiffs without Article III standing. Indeed, *everyone* seems to have overlooked it. Since its issuance, *ASARCO* has never been cited by the U.S. Supreme Court to justify review of a case in which the plaintiffs lacked Article III standing.²⁶⁵ Nor is there any case revealing even a hint of plaintiff’s strategic avoidance of the standing requirement.²⁶⁶ The Supreme Court did not appear to anticipate that, post-*ASARCO*, plaintiffs could do what we’ve described.

Here is where the law stands. Because of the Federal–State Standing Gap, almost any plaintiff can sue to enforce almost any federal law. Article III is no impediment. And if a plaintiff wins in state court, it has an opportunity to litigate on the merits in the U.S. Supreme Court. This diminishes Article III as a barrier to litigation in federal court. But it potentially empowers litigants like CREW that wish to enforce provisions of federal law previously regarded as unenforceable in federal court. Plaintiffs do not seem to have caught on to this yet. Case in point: the debate around the CREW litigation is about whether Article III standing is present, not whether it is necessary.²⁶⁷ But once plaintiffs come to appreciate *ASARCO* and the standing gap, the methods by which federal law is enforced may change permanently.

*B. Shooting the Gap*²⁶⁸: *Terminal State Court Review As an Attractive Alternative to Federal Court*

CREW’s case is incendiary. They accuse the President of violating the Constitution and seek an injunction barring him from retaining ownership in his multibillion-dollar

²⁶⁴ See generally *id.*

²⁶⁵ In *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam), the Court dismissed as improvidently granted a petition that had cited *ASARCO* to justify certiorari notwithstanding doubts about plaintiffs’ standing. In opinions accompanying the DIG, some of the Justices debated whether *ASARCO* should extend to cases in which the state court had not yet entered judgment against the defendant. *Id.* at 661–64 (Stevens, J., concurring); *id.* at 670 (Breyer, J., dissenting). In *Virginia v. Hicks*, 539 U.S. 113, 120 (2003), the Justices recognized Virginia’s standing under *ASARCO* in lieu of deciding whether a defendant had standing to mount a facial challenge to a criminal statute.

²⁶⁶ States enforce their criminal laws in their own courts, so there is no possibility that Virginia brought the state-law prosecution in *Hicks* to avoid Article III’s strictures.

²⁶⁷ See Hessick, *supra* note 13.

²⁶⁸ “Shooting the gap” is a phrase used to describe a football player who aggressively defends by exploiting space between the opposing team’s linemen. See, e.g., Gregg Easterbrook, *The All-Unwanted All-Pros, Conference Championship Analysis, and More*, ESPN (Jan. 24, 2008, 4:44 PM), <http://www.espn.com/espn/page2/story?page=easterbrook/080122> [<https://perma.cc/3FUX-9NNV>] (“New England linebacker Junior Seau . . . shot the gap behind the play and tackled the runner for a loss . . .”). If one finds football analogies helpful, consider the tactic discussed *supra* Section II.A as an “end run” around jurisdictional rules. Cf. Burris

business.²⁶⁹ If they were to follow our method, refile in a state court with lax standing requirements, and win, the Supreme Court would almost certainly grant certiorari. They would thus be able to enforce federal law in federal court without Article III standing. Other impact litigators bringing similarly high-profile cases might have a good chance of doing the same. But what about litigants without standing who wish to bring less significant federal-law cases? Given the small percentage of cases in which the Supreme Court grants certiorari,²⁷⁰ they are unlikely to achieve what *ASARCO* makes possible. Does our method leave them in the lurch?

The Federal–State Standing Gap still gives such plaintiffs what they seek. Lax state standing rules create a gap in Article III’s defense against private enforcement of federal law through which litigants can break. Filing in a state court and failing to obtain Supreme Court review is, we argue, almost as good as filing in federal court and achieving the same outcome.

Nearly any federal claim that plaintiffs might want to bring in federal court can be brought in state court.²⁷¹ Most state courts have general jurisdiction.²⁷² They can hear any state-law claim and nearly any federal-law claim.²⁷³ The only exception is for federal claims in areas where Congress has provided for exclusive federal jurisdiction.²⁷⁴ Bankruptcy, antitrust, patent, and copyright cases are the notable examples.²⁷⁵

Plaintiffs can also obtain suitable remedies from a state court. As discussed below, state courts can award declaratory relief and damages to the same extent as federal courts.²⁷⁶ And while some have thought otherwise, we argue below that state courts have equitable power commensurate with that of the federal courts. This includes the power to issue national injunctions binding federal officials.²⁷⁷

Finally, just as would be the case if plaintiffs sued in a lower federal court but failed to obtain Supreme Court review, state-court litigation produces binding precedent.²⁷⁸ True, a decision from a federal court of appeals binds federal courts in

v. Parke, 130 F.3d 782, 784 (7th Cir. 1997) (“[T]he Rule 60(b) motion may be designed as an end run around the appellate court’s gatekeeping function . . .”), *cert. denied*, 522 U.S. 990 (1997).

²⁶⁹ See Zarroli, *supra* note 6.

²⁷⁰ See *Frequently Asked Questions*, *supra* note 254.

²⁷¹ See *Haywood v. Drown*, 556 U.S. 729, 739 (2009) (discussing general jurisdiction in state court).

²⁷² See, e.g., *id.*; *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233–34 (1934).

²⁷³ See, e.g., *Haywood*, 556 U.S. at 739.

²⁷⁴ See, e.g., 28 U.S.C. § 1334 (2012).

²⁷⁵ 28 U.S.C. §§ 1334, 1337, 1338 (2012) (bankruptcy, antitrust, and patent and copyright, respectively).

²⁷⁶ See discussion *infra* Section III.A.

²⁷⁷ See discussion *infra* Section III.A.

²⁷⁸ John M. Walker, Jr., *The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, STAN. L. SCH.: CHINA GUIDING CASES PROJECT (Feb. 29, 2016), <http://cgc.law.stanford.edu/commentaries/15-John-Walker> [https://perma.cc/NC2W-WTBB].

several states, while a state appellate court binds only the state’s judiciary.²⁷⁹ But that does not render state-court decisions less important than federal-court decisions.²⁸⁰ A decision of the Supreme Court of California binds more people than the population within the Tenth Circuit.²⁸¹

III. WHY ISN’T EVERYONE DOING THIS ALREADY?

The preceding discussion demonstrates how the Federal–State Standing Gap, along with *ASARCO*, makes it possible for plaintiffs without Article III standing to enforce federal law in federal court. And even plaintiffs who use our method but fail to obtain Supreme Court review have access to state-court adjudication on a par with that of the federal courts. The upshot is that Article III standing is essentially never an impediment to any plaintiff wishing to enforce federal law. We expect this result to surprise many. But more surprising, we think, is that nobody seems to be wielding the precedent to their advantage. Part III reflects on why that might be the case.

We start from the premise that litigators are rational actors and first consider whether inadequate remedies or onerous procedures drive plaintiffs away from state court. We then relax the assumption of rationality and suggest a more provocative explanation.

A. Are State-Court Remedies Inadequate?

Again, we start from the premise that litigators are rational. Whether their goal in any case is to secure damages, test the constitutionality of state action, or reshape policy, what they need is a judgment on the merits. There ought to be a good reason, then, that the Federal–State Standing Gap is not exploited to elude a dismissal for lack of standing in federal court.

The simplest explanation for litigators’ aversion to state court could be that state-court remedies are inadequate. It would be senseless to litigate in a forum that could not award the relief you desire. Even constitutional lawsuits are not *entirely* academic affairs.

As a general rule, federal courts are empowered to award damages, declaratory relief, and injunctive relief to those with a right of action.²⁸² Declaratory and injunctive

²⁷⁹ *See id.*

²⁸⁰ *See id.*

²⁸¹ *See City and Town Population Totals: 2010–2016*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2016/demo/popest/total-cities-and-towns.html> [<https://perma.cc/FT4Y-N4VJ>] (last updated Dec. 5, 2017) (compare California’s total population from the cities and towns spreadsheet with the total populations of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming).

²⁸² Congress may limit remedies for certain claims. *See, e.g., Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1674–75 (2017). And modern Supreme Court decisions express a reluctance to imply private rights of action. *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–56 (2017).

relief is generally available against federal officials.²⁸³ The power to award damages and injunctions is likely inherent in Article III’s investiture of the “judicial power” in the Supreme Court and inferior courts,²⁸⁴ at least in cases for which the court has subject-matter jurisdiction.²⁸⁵ The power to award declaratory relief is statutorily conferred and of comparatively recent vintage.²⁸⁶ Federal courts also have the authority and obligation to calibrate each form of relief so that it is complete but not more.²⁸⁷

How do state-court remedies compare?

1. Damages

State courts can issue damages judgments for federal claims to at least the same extent as federal courts, including against federal officials.²⁸⁸ The Supreme Court recognized state courts’ authority to award damages against federal officials as early as 1851.²⁸⁹ Plaintiffs suing federal officials in state court have to wrangle with sovereign and official immunities, but that is true in federal court as well.²⁹⁰ And no matter the forum, plaintiffs avoid sovereign immunity when they seek compensation from a federal officer in his individual capacity.²⁹¹ Some may assume that the Westfall Act is an insuperable obstacle to suing federal officials for damages in state court. But that statute preempts certain suits against federal officials under *state* law,²⁹² and this is

²⁸³ Federal courts may order prospective relief against state officials so as to bar those officials from violating federal law. *See, e.g.,* *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *Ex parte Young*, 209 U.S. 123 (1908).

²⁸⁴ *See, e.g., In re Debs*, 158 U.S. 564, 599 (1895) (stating that the power to enjoin is “recognized from ancient times and by indubitable authority”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . .” (citation and internal quotation marks omitted)).

²⁸⁵ *See* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809–10 (2008).

²⁸⁶ Act of June 14, 1934, ch. 512, 48 Stat. 955 (codified at 28 U.S.C. §§ 2201–02 (2012)).

²⁸⁷ *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[R]elief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”). The corollary to this proposition is that a suit becomes moot, and so a federal court loses jurisdiction, when relief would be ineffectual. *See, e.g., Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669–71 (2016).

²⁸⁸ *See, e.g., Teal v. Felton*, 53 U.S. (12 How.) 284 (1851) (holding that state courts have jurisdiction in actions for trover against federal officials).

²⁸⁹ *See generally id.*

²⁹⁰ *See* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PENN. L. REV. 509, 535 (2013) (“The status of official immunity as federal or state law was unclear in the pre-*Erie* period. Today, the immunity is understood to have the status of federal common law, protecting federal officers whether sued under *Bivens* or state common law.”).

²⁹¹ *See* *Lewis v. Clarke*, 137 S. Ct. 1285, 1291–92 (2017).

²⁹² *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 6, 102 Stat. 4563, 4564–65 (amending 28 U.S.C. § 2679(d)). The Westfall Act permits the Attorney General to certify that a federal employee acted within

an Article about how to enforce *federal* law. Moreover, the Westfall Act excepts from its coverage suits “brought for a violation of the Constitution of the United States.”²⁹³

It is even possible that state courts have more power than federal courts to recognize a right of action for damages against federal officials who allegedly violate the Constitution. To understand this counterintuitive proposition, recall that damages are available only if the relevant law provides a private right of action.²⁹⁴ In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,²⁹⁵ the Supreme Court created a private right of action to recover damages from federal officials who violate the Fourth Amendment.²⁹⁶ The Court reasoned that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”²⁹⁷ While such language might have been read to indicate that there is a private right of action for damages whenever *any* constitutional right is violated, the law has not evolved that way.²⁹⁸ Instead, the Court has cabined its holding in *Bivens*, refusing to create a damages action for most other violations.²⁹⁹ Yet it is not at all clear that state courts must be so stingy.³⁰⁰

In *Ziglar v. Abbasi*,³⁰¹ the Court set out its own reasons for cabining *Bivens*.³⁰² It wrote that the primary question in determining whether a private right of action exists is “who should decide.”³⁰³ “The answer most often will be Congress,” because Congress is in the best position to decide whether, on balance, a damages right best balances private and government interests.³⁰⁴ While courts generally have the power to create rights of action, they should “hesitate” to do so in deference to Congress’s expertise.³⁰⁵ And “if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy . . . the courts *must* refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.”³⁰⁶

the scope of his employment in allegedly committing a state-law tort. Certification yields removal of the case to federal court, substitution of the federal government as defendant, and conversion of the suit from a state-law tort to one under the Federal Tort Claims Act. *Id.*

²⁹³ 28 U.S.C. § 2679(b)(2)(A) (2012).

²⁹⁴ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283–84 (1998).

²⁹⁵ 403 U.S. 388 (1971).

²⁹⁶ See *id.* at 397.

²⁹⁷ *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

²⁹⁸ See generally *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

²⁹⁹ See *id.* at 1857.

³⁰⁰ See generally *id.* at 1858 (discussing alternative remedial structures, including recognizing state tort law providing alternative means for relief).

³⁰¹ 137 S. Ct. 1843 (2017).

³⁰² See *id.* at 1857.

³⁰³ *Id.* (citation omitted).

³⁰⁴ *Id.* at 1857–58.

³⁰⁵ *Id.* at 1858.

³⁰⁶ *Id.* (emphasis added).

According to *Ziglar*, there are prudential reasons to cabin *Bivens*, but the only thing that prevents the judicial recognition of rights of action for damages is Article III.³⁰⁷ Article III, of course, does not apply to state courts.³⁰⁸ While Congress may place some questions of federal law in the exclusive hands of federal courts,³⁰⁹ it does not have plenary power over state-court jurisdiction.³¹⁰ State courts therefore need not worry about stepping on congressional power when deciding which remedies they make available to litigants before them.

One might also argue that the Supreme Court's refusal to extend *Bivens* amounts to procedural federal law applicable in federal, but not state, court. If that were right, even if *Ziglar* rested on more than just Article III, its holding would be inapplicable to state courts. Under the Supremacy Clause, state courts must faithfully apply substantive federal law—including federal common law.³¹¹ But states are generally free to create their own procedural rules.³¹² Indeed, much state-court procedure differs from that of the federal courts.³¹³ This arrangement is reminiscent of the *Erie* doctrine,³¹⁴ under which federal courts sitting in diversity apply state substantive but not procedural law.³¹⁵

If the cases restricting *Bivens* are procedural, perhaps state courts need not abide by them. The question of whether cases creating—or declining to create—a remedy are substantive or procedural is knotty. Like *Bivens*, the Declaratory Judgment Act authorizes a remedy—namely the declaratory judgment.³¹⁶ The Supreme Court has characterized the Declaratory Judgment Act as “only procedural . . . leaving substantive rights unchanged.”³¹⁷ It makes sense to view *Bivens* the same way. But, by contrast, the Supreme Court treats punitive damages caps and statutes of limitation as substantive for purposes of the *Erie* doctrine.³¹⁸ And both of those rules, like *Bivens*,

³⁰⁷ See *id.* at 1857.

³⁰⁸ See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . .”).

³⁰⁹ See, e.g., 28 U.S.C. §§ 1334, 1337, 1338 (2012) (bankruptcy, antitrust, and patent and copyright, respectively).

³¹⁰ See *ASARCO*, 490 U.S. at 617.

³¹¹ See U.S. CONST. art. VI, cl. 2; *Felder v. Casey*, 487 U.S. 131, 151 (1988); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962).

³¹² See *Felder*, 487 U.S. at 150–51.

³¹³ See discussion *infra* Section III.B.

³¹⁴ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

³¹⁵ See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

³¹⁶ See 28 U.S.C. § 2201(a) (2012) (“Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”).

³¹⁷ *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 849 (2014) (citations and internal quotation marks omitted).

³¹⁸ See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750–52 (1980).

regulate how and how much litigants can recover in court.³¹⁹ The precedent points in multiple directions.

Perhaps this uncertainty could be resolved by noting the different rationales at issue when federal courts wish to apply their own procedure and when state courts wish to apply theirs. The former situation is regulated by *Erie*, which aims to reduce forum shopping and promote the equitable administration of laws.³²⁰ The *Erie* doctrine also takes account of strong governmental interests, whether state or federal.³²¹ The substance/procedure distinction under *Erie* is therefore shaped by such considerations. By contrast, states' freedom to design their own procedural rules is regulated by the Supremacy Clause.³²² It is subject to the constraint that such rules not impede the vindication of federal rights.³²³ So maybe *Erie* cases are inapposite in determining whether the states must follow the Supreme Court in limiting *Bivens*. Indeed, the Supreme Court has said that, by their procedures, “[s]tates may make the litigation of federal rights as congenial as they see fit.”³²⁴ The expansion of *Bivens* would not undermine federal rights; it would encourage their vindication.³²⁵ This, combined with the fact that the creation of a remedy regulates courts’—not ordinary citizens’—conduct, suggests that a state court’s expansion of *Bivens* might best be categorized as a legitimate procedural move.³²⁶

Whatever the appeal of the forgoing arguments, we think it unlikely that the Supreme Court would uphold a state court’s decision to read *Bivens* liberally. The Court would likely have important policy considerations in mind, and those considerations would dovetail with well-established legal rules. Cases like *Ziglar* make the Court’s policy view clear: unless Congress has decided otherwise, damages awards against federal officers are suspect.³²⁷ As the *Ziglar* Court said, such potential liability imposes significant “burdens on Government employees who are sued personally, as well as . . . [on] the Government itself.”³²⁸

The policy goal of ensuring that the federal government operates free from unwanted burdens carries legal weight. Since *McCulloch v. Maryland*,³²⁹ the Supreme Court has turned a skeptical eye toward states whose laws interfere with federal

³¹⁹ See *Gasperini*, 518 U.S. at 426.

³²⁰ See *id.* at 428.

³²¹ See *id.* at 427 n.7, 431–32.

³²² See U.S. CONST. art. VI, cl. 2.

³²³ See *Felder v. Casey*, 487 U.S. 131, 150–51 (1988).

³²⁴ *Id.* at 151.

³²⁵ Careful readers may object that vindicating federal rights entails optimal rather than maximal enforcement. The objection is sound, but its purchase depends on whether we’re near optimal enforcement of any particular right. If only for the sake of argument, we presume some federal rights are less than optimally enforced.

³²⁶ See, e.g., *Felder*, 487 U.S. at 139–40, 147.

³²⁷ See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857–58 (2017).

³²⁸ *Id.* at 1858.

³²⁹ 17 U.S. (4 Wheat.) 316 (1819).

entities.³³⁰ There, the Court wielded the Supremacy Clause to strike down a Maryland law taxing the national bank.³³¹ The Court reasoned that “the power to tax involves the power to destroy,” and a state had no right to destroy an entity duly created by federal powers.³³² This reasoning hews closely to the *Ziglar* Court’s account of its own inability to read *Bivens* broadly; its doing so would be too burdensome to the federal government and its officers, at least as far as Congress was concerned.³³³ The *Ziglar* Court saw Article III implications in these facts.³³⁴ But we might instead anticipate Supremacy Clause problems of the variety explored in *McCulloch*, should a state judiciary decide to read *Bivens* liberally. The power to award damages may not involve the power to destroy, but it certainly involves the power to annoy.³³⁵ And if the burden of damages goes significantly beyond annoyance, we should expect state lawmakers—including courts exercising their common-law powers—to be forbidden to authorize such actions unilaterally.

So *Bivens* remedies are unlikely to be more readily available in state than federal court. But this is no strike against litigation in state court. It just means that, as far as damages are concerned, state courts are no better for plaintiffs than their federal siblings. But they are also no worse. The damages remedy is most likely available in state courts to the same extent it is available in federal court.³³⁶

2. Injunctions

Injunctions are typically available in state courts for plaintiffs who prevail on the merits of a claim while demonstrating that remedies at law are inadequate and the public interest favors such relief.³³⁷ Apart from its substantive terms, the scope of any injunction is a function of its duration and geography.³³⁸

Like federal courts,³³⁹ state courts may issue short-term injunctions (usually called temporary restraining orders), preliminary injunctions (to preserve the status

³³⁰ See *id.* at 326–30 (describing how Maryland’s statute restrains, limits, and interferes with the functions of the National Bank).

³³¹ See *id.* at 436.

³³² *Id.* at 431.

³³³ See *Ziglar*, 137 S. Ct. at 1858.

³³⁴ See *id.*

³³⁵ See, e.g., *McCulloch*, 17 U.S. at 347–48 (couching such annoyance in an example of the states’ authority to tax and the “inconvenience and embarrassment” it may cause for banks).

³³⁶ See, e.g., *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 262, 264 (2011) (Kennedy, J., concurring).

³³⁷ Some variant of this standard is operative in every state. See *Understanding Injunctions*, ABA, https://www.americanbar.org/publications/insights_on_law_and_society/14/winter-2014/understanding-injunctions.html [<https://perma.cc/C7LG-GH3N>] (last visited Apr. 12, 2018).

³³⁸ See *id.*

³³⁹ See FED. R. CIV. P. 65.

quo pending litigation), and permanent injunctions (as final relief).³⁴⁰ Also like federal courts, state courts occasionally issue nationwide injunctions—those that regulate the defendant’s conduct vis-à-vis the plaintiff throughout the country.³⁴¹ For example, an Illinois court might impose a nationwide ban on a businessman working for his former employer’s competitors,³⁴² or an Ohio court might impose a nationwide ban on three musicians putting on a performance too similar to that of another group.³⁴³ Implicit in these cases is a fundamental principle: a state court may require someone to do or refrain from doing something even outside the court’s territorial jurisdiction so long as there exists personal jurisdiction.³⁴⁴

An especially coveted remedy for some impact litigators suing in federal court is the national injunction.³⁴⁵ As distinguished from the nationwide injunction, the national injunction regulates a defendant’s conduct with respect to everyone, even non-parties.³⁴⁶ For example, plaintiffs have obtained national injunctions from federal courts that barred the Obama³⁴⁷ and Trump³⁴⁸ Administrations from executing their immigration policies in favor of, and against, anyone. A burgeoning literature considers the propriety of federal courts issuing such relief.³⁴⁹ Much of this literature is skeptical.³⁵⁰ Yet much of this skepticism is grounded in Article III considerations,³⁵¹ and Article III considerations of course drop out if a state court is doing the enjoining.³⁵² Thus, counterintuitively, state courts may have a more authentic claim to power to issue national injunctions than do federal courts. Indeed, in states where plaintiffs

³⁴⁰ See *Understanding Injunctions*, *supra* note 337.

³⁴¹ See, e.g., *WM Recycle Am., LLC v. Lavin*, 2011 WL 10457477 (Ill. App. Ct. May 13, 2011); see also *Cesare v. Work*, 520 N.E.2d 586 (Ohio Ct. App. 1987); *Williams v. Powell Elec. Mfg. Co.*, 508 S.W.2d 665 (Tex. Civ. App. 1974).

³⁴² See *Lavin*, 2011 WL 10457477, at *15.

³⁴³ See *Cesare*, 520 N.E.2d at 596–97.

³⁴⁴ See *Lavin*, 2011 WL 10457477, at *15.

³⁴⁵ See generally Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017).

³⁴⁶ On the distinction, see, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418–19, 419 n.4 (2017).

³⁴⁷ See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

³⁴⁸ See *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), *vacated & dismissed as moot*, 874 F.3d 1112 (9th Cir. 2017) (mem.).

³⁴⁹ See Bray, *supra* note 346, at 418; Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL’Y 487, 488 (2016); Siddique, *supra* note 345, at 2096. See generally Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068 (2017).

³⁵⁰ See, e.g., Bray, *supra* note 346, at 419; Morley, *supra* note 349, at 494.

³⁵¹ Morley, for example, argues that individual plaintiffs generally lack Article III standing to secure injunctions barring the government from enforcing a law against third parties (what Morley calls a “Defendant-Oriented Injunction”). See Morley, *supra* note 349, at 523–27.

³⁵² See, e.g., *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (recognizing “that the constraints of Article III do not apply to state courts”).

are not required to demonstrate a concrete and particularized injury to sue,³⁵³ it is difficult to imagine what an injunction would look like if not an order regulating a defendant's conduct generally.

A more complicated and consequential issue is whether state courts can enjoin federal officials based on federal law.³⁵⁴ As a positive matter, nobody knows for sure.³⁵⁵ The Supreme Court has dodged the question.³⁵⁶ In the face of this uncertainty, we pick up where others have left off³⁵⁷ and argue from first principles that state courts should be understood to possess such power. More specifically, we argue that state courts should be understood to possess such power inherently and as an implication of the Supremacy Clause.³⁵⁸

Start with the argument for an inherent power. Article III, § 1 of the U.S. Constitution provides that the judicial power of the United States shall be vested "in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."³⁵⁹ This embodies the Madisonian Compromise, in which the Framers agreed that Congress would retain discretion to establish lower federal courts.³⁶⁰ If lower federal courts need not exist as a constitutional matter, then we ought to think the Framers understood state courts and state-court remedies to be adequate for enforcing federal law against federal officials. Of course, the First Congress exercised its discretion to create a system of lower federal courts.³⁶¹ But that innovation did not detract from the original power of the state courts.³⁶² To the contrary, when the First Congress passed the Judiciary Act of 1789,³⁶³ it chose to withhold from the lower federal courts the general grant of federal-question jurisdiction we now have in 28 U.S.C. § 1331.³⁶⁴ Suits under federal law against federal officers were to commence in state courts except in cases of diversity.³⁶⁵ It may seem

³⁵³ See discussion *supra* Section I.B.

³⁵⁴ Richard Fallon has described this as "one of the most fascinatingly arcane debates in the law and theory of federal courts." Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1202 & n.282 (1988).

³⁵⁵ See *id.* at 1202–07, 1202 n.282.

³⁵⁶ See *Brooks v. Dewar*, 313 U.S. 354, 359–60 (1941) (declining to answer this question of "grave consequence").

³⁵⁷ See, e.g., Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964).

³⁵⁸ See U.S. CONST. art. VI, cl. 2.

³⁵⁹ U.S. CONST. art. III, § 1.

³⁶⁰ FALLON ET AL., *supra* note 72, at 6–8.

³⁶¹ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

³⁶² See FALLON ET AL., *supra* note 72, at 24 (discussing the First Judiciary Act's origination of removal to federal courts as contingent on meeting a minimum amount in controversy and identifying as an out-of-state defendant).

³⁶³ 1 Stat. 73.

³⁶⁴ FALLON ET AL., *supra* note 72, at 22, 25.

³⁶⁵ James L. Bishop, *The Jurisdiction of State and Federal Courts Over Federal Officers*, 9 COLUM. L. REV. 397, 397 (1909).

bewildering to modern minds that the Framers put so much faith in the state judiciaries. To the Framers themselves, it was natural that they should.³⁶⁶

The Supremacy Clause likewise implies an inherent power of state courts to enjoin federal officials based on federal law.³⁶⁷ To be sure, we are not contending that the Supremacy Clause creates a cause of action for injunctive relief—the Supreme Court rejected that argument in *Armstrong v. Exceptional Child Care Center, Inc.*³⁶⁸ Our contention is instead that the Supremacy Clause presupposes a cause of action for injunctive relief—a view consistent with Justice Scalia’s opinion for the Court in *Armstrong*³⁶⁹—and also the requisite authority to enjoin.

Embedded within the Supremacy Clause are two directives.³⁷⁰ First is that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”³⁷¹ Second is that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”³⁷² Splitting the text this way makes clear that it singles out only state judges, commanding them to give unsparing effect to the Constitution and federal law.³⁷³ Such a command apparently presupposes authority to order compliance with federal law.³⁷⁴ And an exception to that authority in cases

³⁶⁶ See, e.g., THE FEDERALIST NO. 27 (Alexander Hamilton) (“[T]he laws of the Confederacy . . . will become the *supreme law* of the land; to the observance of which all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.”); THE FEDERALIST NO. 82 (Alexander Hamilton) (“The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. . . . When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of *one whole*, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.”).

³⁶⁷ Cf. Arnold, *supra* note 357, at 1401.

³⁶⁸ 135 S. Ct. 1378, 1384 (2015).

³⁶⁹ *Id.* (“What our cases demonstrate is that, in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer. The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.” (internal citations and quotation marks omitted)).

³⁷⁰ See U.S. CONST. art. VI, cl. 2.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ There is an extensive scholarly debate about why the Supremacy Clause singles out state judges. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 245 n.60 (2000) (noting the competing views).

³⁷⁴ The Supreme Court has made a similar point with respect to federal courts and state officials. See *New York v. United States*, 505 U.S. 144, 179 (1992) (“[T]he Supremacy

against federal officials would make little sense in a system that trusts state courts to hear cases arising under federal law.

Skeptics of state courts' authority to enjoin federal officials cite nineteenth-century decisions of the U.S. Supreme Court that deny state courts' authority to issue writs of mandamus and habeas corpus directed at federal officials.³⁷⁵ For example, in *McClung v. Silliman*,³⁷⁶ the Justices held that a state court lacked jurisdiction over a suit for mandamus that would have compelled a federal officer to convey real property.³⁷⁷ In *Tarble's Case*,³⁷⁸ the Justices held that a state court lacked jurisdiction to issue a writ of habeas corpus that would have effectively compelled an officer of the United States Army to release an enlistee who had deserted.³⁷⁹ The opinions in these cases deploy vaguely constitutional reasoning and are rooted in the notion that a federal official "can only be controlled by the power that created him."³⁸⁰ Yet nineteenth-century decisions affirm the power of state courts to order specific relief in actions at law against federal officials.³⁸¹ For example, in *Slocum v. Mayberry*,³⁸² Chief Justice Marshall affirmed a state court's order of replevin against a federal customs official.³⁸³ In *Stanley v. Schwalby*,³⁸⁴ the Justices reversed a state court that had concluded it was without jurisdiction to order ejectment against officers of the United States Army.³⁸⁵ Tension between these contrasting lines of precedent is apparent: the difference between an injunction, on one hand, and replevin or ejectment, on the other, is of form rather than substance.³⁸⁶

Perhaps any deep objection to the thought of state courts enjoining federal officials stems from an intuition that the power to enjoin is the power to destroy. More than an intuition, really, this is a takeoff on Chief Justice Marshall's reasoning in *McCulloch v. Maryland*.³⁸⁷ We agree that uneasiness sets in when one thinks about the possibility

Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.").

³⁷⁵ Cf. Fallon, *supra* note 354, at 1202–07; Arnold, *supra* note 357, at 1390–93.

³⁷⁶ 19 U.S. (6 Wheat.) 598 (1821).

³⁷⁷ *See id.* at 603–05. Oddly, the Supreme Court purported to affirm the state court's judgment on the merits after deciding that the state court had been without jurisdiction. *See id.*

³⁷⁸ 80 U.S. (13 Wall.) 397 (1872).

³⁷⁹ *See id.* at 411–12.

³⁸⁰ *McClung*, 19 U.S. (6 Wheat.) at 605; accord *Tarble's Case*, 80 U.S. (13 Wall.) at 406–08; Fallon, *supra* note 354, at 1158–64, 1202–07.

³⁸¹ *See generally* *Stanley v. Schwalby*, 147 U.S. 508 (1893); *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1 (1817).

³⁸² 15 U.S. (2 Wheat.) 1 (1817).

³⁸³ *See id.* at 12–13.

³⁸⁴ 147 U.S. 508 (1893).

³⁸⁵ *See id.* at 520.

³⁸⁶ *See* Arnold, *supra* note 357, at 1394–95.

³⁸⁷ *See* 17 U.S. (4 Wheat.) 316, 327 (1819).

of a state judge taking charge of the commanding heights of the federal government through injunctions. But that uneasiness seems to reflect priors about how federalism should work rather than any legal doctrine. As discussed above, *McCulloch* was about a state interfering with a federal instrumentality through the application of *state* law.³⁸⁸ Nothing in Chief Justice Marshall’s opinion compels the conclusion that state judges must refrain from enjoining federal officials to obey *federal* law.³⁸⁹ Indeed, far from the power to destroy, the power to enjoin federal officials to obey federal law should be understood as the power to preserve a federal government of laws and not men.

3. Declaratory Judgments

Declaratory relief is widely available in state court.³⁹⁰ As of this writing, forty states have adopted the Uniform Declaratory Judgments Act,³⁹¹ which resembles the federal statute.³⁹² The remaining ten states have enacted different statutes that authorize declaratory relief in many cases.³⁹³

Declaratory relief is noncoercive: It does not by itself impose legal obligations on a party as does an award of damages or injunction.³⁹⁴ One might therefore conclude that state courts can award declaratory relief in an action against a federal official even if it seems doubtful that state courts may award damages or injunctive relief against that same federal official.³⁹⁵ Yet jurisdiction to award declaratory relief is usually tied up with jurisdiction to award coercive relief,³⁹⁶ and state courts generally heed a presumption that public officials will follow the law as it is announced in a declaratory judgment.³⁹⁷ So it may be that state courts’ power to award declaratory

³⁸⁸ *Id.* at 319 (“The question submitted to the Court for their decision in this case, is as to the validity of the said act of the General Assembly of Maryland, on the ground of its being repugnant to the constitution of the United States, and the act of Congress aforesaid, or to one of them.”).

³⁸⁹ *See generally id.*

³⁹⁰ *See, e.g.,* Jean E. Maess, Annotation, *Right to Jury Trial in Action for Declaratory Relief in State Court*, 33 A.L.R. 4th 146 (1984).

³⁹¹ *See Declaratory Judgments Act: Enactment Status Map*, NAT’L CONF. OF COMMISSIONERS ON UNIFORM ST. LS., <http://www.uniformlaws.org/Act.aspx?title=Declaratory%20Judgments%20Act> [<https://perma.cc/49AF-4F4A>] (last visited Apr. 12, 2018).

³⁹² *Compare* 28 U.S.C. § 2201(a) (2012), *with* UNIF. DECLARATORY JUDGMENTS ACT § 1 (UNIF. LAW COMM’N 1922).

³⁹³ *See, e.g.,* CAL. CIV. PROC. CODE § 1060 (West 2018); N.Y. C.P.L.R. § 3001 (McKINNEY 2018).

³⁹⁴ *Cf. Powell v. McCormick*, 395 U.S. 486, 517–18 (1969) (“We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment . . .”).

³⁹⁵ *Cf. id.*

³⁹⁶ *See, e.g.,* *City of Austin v. Util. Assocs., Inc.*, 517 S.W.3d 300, 317 (Tex. Ct. App. 2017).

³⁹⁷ *See, e.g.,* *Speicher v. Columbia Twp. Bd. of Trustees*, 860 N.W.2d 51, 64 (Mich. 2014) (Cavanagh, J., dissenting).

relief in an action against a federal official depends on their power to enjoin that same federal official, the thorny issue we evaluated above.³⁹⁸

B. Are State-Court Procedures Burdensome?

Litigants also might rationally prefer to litigate in federal court and risk dismissal for lack of subject-matter jurisdiction if state courts impose unique procedural hurdles. Even if these hurdles are surmountable, the relative difficulty of litigating a case to judgment could be enough to push a cost-conscious or time-sensitive plaintiff into federal court. And even if the marginal costs are low and time plentiful, procedure matters because it often bleeds into substance. This is a highly context-specific inquiry, of course, and here we only sketch some considerations.

Start with a procedural issue related closely to the discussion of remedies. Law and equity merged in the federal system with the adoption of the Federal Rules of Civil Procedure in 1938.³⁹⁹ Until then, a litigant seeking equitable relief in federal court had to adhere to the Federal Equity Rules;⁴⁰⁰ a litigant seeking damages in federal court had to adhere to the forum state's practice, typically rooted in either the common law or Field Code;⁴⁰¹ and a litigant seeking equitable relief and damages had to navigate both.⁴⁰² Merger yielded a single action in the federal system—the “civil action”⁴⁰³—and brought with it simplicity and convenience.⁴⁰⁴

So might the complication from the residual separation of law and equity in states' systems push plaintiffs into federal court? We doubt it. Only three states—Delaware, Mississippi, and Tennessee—formally retain separate courts of law and equity.⁴⁰⁵ New Jersey and Cook County, Illinois—home of Chicago—maintain separate divisions of law and equity within the same court.⁴⁰⁶ And Georgia distinguishes law and equity

³⁹⁸ See *supra* notes 282–397 and accompanying text.

³⁹⁹ See 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1004 (4th ed. 2015).

⁴⁰⁰ See Wallace R. Lane, *Twenty Years Under the Federal Equity Rules*, 46 HARV. L. REV. 638, 638 (1933).

⁴⁰¹ This was a consequence of The Conformity Act, which required that the procedure in the federal district courts conform “as near as may be” with that of the forum state's trial courts. See Act of June 1, 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197.

⁴⁰² See *id.* (applying the forum state's rules of procedure to actions at law); see also Lane, *supra* note 400, at 638 (discussing how Federal Equity Rules governed a suit in equity).

⁴⁰³ FED. R. CIV. P. 2 (“There is one form of action—the civil action.”).

⁴⁰⁴ See, e.g., WRIGHT ET AL., *supra* note 399, § 1004.

⁴⁰⁵ See Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 538 & n.31 (2016) (citing DEL. CODE ANN. tit. 10, § 341 (2013 & Supp. 2014); MISS. CONST. art. VI, § 159; TENN. CODE ANN. § 16-11-101 (2009 & Supp. 2014); William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 DEL. J. CORP. L. 819 (1993)).

⁴⁰⁶ See *id.* at 538 & n.32 (citing ILL. COMP. STAT. ANN. S. CT. R. 135 (West 2009 & Supp.

for jurisdictional purposes at the trial and appellate levels.⁴⁰⁷ These differences may matter on the margin, but the impact seems *de minimis*.

Another consideration is the rules of discovery and evidence that apply in state courts.⁴⁰⁸ This could be especially important to litigants who require a smoking gun to survive a motion to dismiss, or expert testimony to meet their burden of proof on a theory of causation.⁴⁰⁹ Of course, in federal court, federal rules apply.⁴¹⁰ Discovery is governed by the Federal Rules of Civil Procedure.⁴¹¹ Expert testimony is governed by the Federal Rules of Evidence,⁴¹² especially Federal Rule of Evidence 702⁴¹³ and the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴¹⁴ Litigants can take advantage of a body of precedent and academic work fleshing out the positive and normative aspects of these regimes.⁴¹⁵

So might the relative uncertainty from litigating under a state’s rules of discovery and evidence push plaintiffs into federal court? Again, we doubt it. Start with discovery. The federal rules are more uniform in aspiration than practice, a result of Federal Rule of Civil Procedure 83, which gives district courts authority to promulgate local rules.⁴¹⁶ Nearly all district courts have invoked that authority, and commentators have reflected on the variety that has resulted.⁴¹⁷ As for evidence, many claims present straightforward legal questions. Even claims that do rise and fall on, say, the admissibility of an expert’s testimony are likely to meet the same fate in federal and state court: thirty-two states have adopted rules mimicking Federal Rule of Evidence 702 and *Daubert*.⁴¹⁸ We do not deny that litigating in state court means doing your homework on that state’s rules of discovery and evidence. For litigators used to proceeding in federal court, that extra homework may matter on the margin. But again, we suspect that the impact here is *de minimis*.

2015) (“Pleading Equitable Matters”); 9 ILLINOIS CIVIL TRIAL PROCEDURE §§ 2:2–2:3 (2d ed. 2009 & Supp. 2014); N.J. CT. R. 4:3-1(a)).

⁴⁰⁷ See *id.* at 538 & n.33 (citing GA. CONST. art. VI, § 4).

⁴⁰⁸ See generally *id.*

⁴⁰⁹ See *id.* at 539–40.

⁴¹⁰ See FED. R. CIV. P. 1.

⁴¹¹ See FED. R. CIV. P. 26–37.

⁴¹² See FED. R. EVID. 101.

⁴¹³ FED. R. EVID. 702.

⁴¹⁴ 509 U.S. 579 (1993).

⁴¹⁵ See, e.g., *Hickman v. Taylor*, 329 U.S. 495 (1947) (Supreme Court precedent on discovery under the Federal Rules); 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2001 (3d ed. 2017) (academic work discussing the purpose of discovery).

⁴¹⁶ See FED. R. CIV. P. 83.

⁴¹⁷ See, e.g., A. Leo Levin, *Local Rules As Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1574–75 (1991).

⁴¹⁸ See Stephen J. McConnell & Sean P. Wajert, *Daubert/Frye Motions in Product Liability Litigation: Bringing or Defending Challenges to Expert Witness Evidence*, STRAFFORD (June 10, 2015), <http://media.straffordpub.com/products/daubert-frye-motions-in-product-liability-litigation-2015-06-10/presentation.pdf> [<https://perma.cc/Z4XU-KZTF>].

A final consideration is the right to a jury trial.⁴¹⁹ This is a constitutional entitlement of litigants in federal court who seek damages.⁴²⁰ And it is one of the few entitlements set out in the Bill of Rights that has not been incorporated against the states.⁴²¹ The upshot is that a state is under no obligation to afford juries in civil actions unless that state's constitution or other rules require, or the action is to enforce a federal right of which the jury trial is an indispensable part.⁴²² These caveats are big—most states have constitutional provisions that mirror the Seventh Amendment,⁴²³ and we imagine that many litigants who seek to enforce federal law in state court, and who seek damages, will be invoking a federal right that carries with it a jury trial. Accordingly, there would be no disadvantage to litigating in state court along this dimension.

C. Have Litigators Succumbed to Irrational Biases?

The previous sections posited rational explanations for why impact litigators have not exploited the Federal–State Standing Gap. Those explanations are inadequate. Neither limitations on remedies nor procedural hurdles give litigants good reason to struggle for standing in federal court rather than turning to the states.⁴²⁴ That leaves irrational explanations. We posit two. First, a weak form of path dependence may steer impact litigators toward federal, rather than state, court. Second, since many impact litigators were educated at top law schools, clerked for federal judges, and have spent most of their careers litigating in federal court, they may simply be too snobbish to consider state-court litigation a live possibility.

The kind of path dependence we have in mind is not one that ought rationally keep litigators from filing in state court and potentially using *ASARCO*'s path to federal review. It does not, for example, arise from a feedback effect via which the federal courts became over time the rational venue for impact litigation. Rather, we propose that impact litigators have been operating on autopilot, enacting a civil-rights-era preference for federal litigation that no longer makes sense.

⁴¹⁹ See Bray, *supra* note 405, at 539, 542–43.

⁴²⁰ See U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

⁴²¹ See Olesen v. Trust Co. of Chi., 245 F.2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896 (1957); see also Nat'l Rifle Ass'n of Am. v. City of Chicago, 567 F.3d 856, 858 (7th Cir. 2009), *rev'd and remanded on other grounds sub nom.* McDonald v. City of Chicago, 561 U.S. 742 (2010).

⁴²² See Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952).

⁴²³ See Eugene Volokh, Opinion, *Does the Seventh Amendment Civil Jury Trial Right Apply to the States (and to Puerto Rico)?*, WASH. POST: VOLOKH CONSPIRACY (Aug. 12, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/12/does-the-seventh-amendment-civil-jury-trial-right-apply-to-the-states-and-to-puerto-rico/?utm_term=.f025dc9a8978 [<https://perma.cc/Q2UQ-EDHV>].

⁴²⁴ See discussion *supra* Sections III.A–B.

For civil rights impact litigators in the mid-twentieth century, federal courts were almost certainly the right venue for litigation.⁴²⁵ State courts were then openly hostile to civil rights claims.⁴²⁶ They were so unwilling to enforce federal civil rights laws that some scholars have characterized them as “eschew[ing] the rule of law.”⁴²⁷ State courts became so involved in enforcing Jim Crow laws that the Supreme Court eventually ruled that state-court enforcement of private racial covenants could constitute state action and violate Equal Protection.⁴²⁸ Clearly, for mid-century impact litigators hoping to leverage federal law to fight racial inequality, state courts were the wrong place to be.⁴²⁹

Civil rights litigators learned their lesson. They turned to the federal courts to enforce federal law and won historic victories.⁴³⁰ But perhaps they learned the lesson too well. Maybe impact litigators working outside the area of civil rights and the era of Jim Crow *continue* to assume that state courts will be reluctant to enforce federal law. It is difficult to see why that should be right. State courts in the Jim Crow era were not necessarily averse to enforcing *all* federal law; their objection was primarily to laws fighting racial discrimination.⁴³¹ So for litigants interested in enforcing the Establishment Clause or the Emoluments Clause, there may never have been any reason to think state court an inferior venue.

Recent events have proved that some states—at least their executive officials—are now as eager as anyone to enforce federal law.⁴³² The lead litigants bringing challenges to the Trump administration’s policies have been states.⁴³³ Hawaii and Washington led the charge in challenging Trump’s travel ban as violating the Establishment Clause and Due Process Clause.⁴³⁴ And, apparently in hopes that it would avoid the standing challenges faced by CREW, Maryland has sued Trump for allegedly violating the Emoluments Clause.⁴³⁵ Ironically, even though Maryland’s standing

⁴²⁵ See, e.g., Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 536, 542 n.232 (2006).

⁴²⁶ See *id.* at 507.

⁴²⁷ See *id.* at 507 & nn.4–5 (collecting scholarship).

⁴²⁸ See *Shelley v. Kraemer*, 334 U.S. 1, 16, 18 (1948).

⁴²⁹ See Godsil, *supra* note 425, at 507.

⁴³⁰ See, e.g., *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁴³¹ See Godsil, *supra* note 425, at 533 (discussing how many southern state judges believed in a legal theory that enabled them to not enforce federal laws, but for non-racial reasons).

⁴³² See, e.g., Jaweed Kaleem, *Six States Are Challenging Trump’s Travel Ban in Court*, L.A. TIMES (Mar. 9, 2017, 11:53 AM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-washington-new-york-states-will-take-1489088278-htlmstory.html> [<https://perma.cc/55N5-XN6T>].

⁴³³ See *id.*

⁴³⁴ See *id.*

⁴³⁵ See Andrew Prokop, *A New Lawsuit Is Trying to Force the Disclosure of President Trump’s Tax Returns*, VOX (June 13, 2017, 8:00 AM), <https://www.vox.com/policy-and-politics/2017/6/13/15782218/trump-emoluments-lawsuit-maryland-dc> [<https://perma.cc/9PSD-SGU5>].

is a matter of some debate,⁴³⁶ it seems to have written off its own courts as potential enforcers of the Constitution; it filed suit in federal court.⁴³⁷

This brings us to our second theory of irrational avoidance of the state courts. Perhaps impact litigators are not laboring under the misguided civil-rights-era assumption that state courts will not enforce federal law. Maybe they instead regard state courts as comparatively incompetent.

State courts are much maligned by law professors, federal legislators, and the defense bar.⁴³⁸ Note that these elite lawyers are among the least likely to have significant experience litigating in state court. Some such individuals regard the state courts as “‘biased,’ ‘hostile,’ ‘discriminatory,’ ‘incompetent,’ ‘unprincipled,’ and ‘out-of-control.’”⁴³⁹ Many states elect their judges, and elected judges are sometimes viewed as less skillful and more corrupt than their appointed-for-life brethren.⁴⁴⁰ These views are dubious.⁴⁴¹ But whether they are right or wrong is, to an extent, irrelevant. As we have discussed at length, impact litigators facing standing hurdles do not have a choice between federal and state court.⁴⁴² Because their plaintiffs have no federal standing—and, given the nature of their challenge, no one may have it—their choice is state court or nothing.⁴⁴³ And until now, they have often chosen nothing.⁴⁴⁴ Surely no matter how much worse state court is than federal court, it is unreasonable to give up rather than litigate there.

We do not mean to suggest that impact litigators are aware of *ASARCO*'s no-standing path to the Supreme Court but consciously prefer no enforcement to state-court litigation. Rather we suppose that the kinds of people who become active impact litigators have failed to seriously consider state court as a venue for litigation. Such people have little experience in state court and tend to regard it with fear or derision.⁴⁴⁵ And if no one is thinking about state-court litigation, no one will notice that *ASARCO* provides a path from state court to the Supreme Court, plaintiff's standing be damned.

⁴³⁶ *See id.*

⁴³⁷ *See id.*

⁴³⁸ *See* Jennifer Walker Elrod, Speech, *Don't Mess with Texas Judges: In Praise of the State Judiciary*, 37 HARV. J.L. & PUB. POL'Y 629, 630 (2014) (“In elite law schools, federal courts get most of the attention and respect. State courts are often forgotten or (worse) viewed with skepticism”); *see also* Willy E. Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent” State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly “Impartial” and “Competent” Federal Courts—A Historical Perspective and an Empirical Analysis of Class Action Dispositions in Federal & State Courts, 1925–2011*, 3 WM. & MARY BUS. L. REV. 419, 425–26 (2012).

⁴³⁹ *Id.* at 425.

⁴⁴⁰ *See, e.g.*, Kent A. Gernander, *Judicial Elections II*, BENCH & B. MINN., Apr. 2001, at 5, 5.

⁴⁴¹ *See* Rice, *supra* note 438, at 508–68 (studying state-court class actions to challenge the idea that state courts have less skill and more prejudice).

⁴⁴² *See* discussion *supra* Part I.

⁴⁴³ *See* discussion *supra* Part I.

⁴⁴⁴ *See* discussion *supra* Part I.

⁴⁴⁵ *See supra* notes 438–40 and accompanying text.

IV. WHAT SHOULD WE THINK OF THE *ASARCO* RULE?*A. Is ASARCO Right as a Matter of Law?*

ASARCO's result is unexpected.⁴⁴⁶ It allows plaintiffs who would otherwise be constitutionally barred from litigating in federal court to have their claims adjudicated by the U.S. Supreme Court.⁴⁴⁷ As we describe, this subverts Article III, creating a path by which no-standing litigants can avoid its requirements and obtain federal review.⁴⁴⁸ Given this, one might wonder if *ASARCO* is good law.

The dissenters did not think so.⁴⁴⁹ Justice Rehnquist, joined by Justice Scalia, raised two major objections to the majority's ruling.⁴⁵⁰ First, Article III required the plaintiffs-respondents, rather than the defendants-petitioners, to show a cognizable injury.⁴⁵¹ Second, even if the defendants-petitioners' standing was what mattered, a state-court judgment against them is not an injury independently giving rise to an Article III "case" or "controversy."⁴⁵²

The idea that a defendant's stake in a case might be sufficient for Article III standing is unique to the *ASARCO* ruling.⁴⁵³ The majority ostensibly focused on the defendants-petitioners' standing because they were the ones first invoking the power of the federal courts.⁴⁵⁴ But as the dissent noted, while other cases hold that a defendant's continuing interest might be *necessary* for federal review, no case holds that it is *sufficient*.⁴⁵⁵

⁴⁴⁶ We are neither the first to notice nor the first to critique. *See, e.g.*, William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 264–65 (1990); Calvin Massey, *Standing in State Courts, State Law, and Federal Review*, 53 DUQ. L. REV. 401, 404–05 (2015); Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1298–99 (2005). But we are the first to explicate the opportunities *ASARCO* affords no-standing plaintiffs and reflect on why plaintiffs seem not to have taken full advantage. *See* discussion *supra* Section II.A, Part III.

⁴⁴⁷ *See* Massey, *supra* note 446, at 404–05.

⁴⁴⁸ *See* discussion *supra* Section II.A.

⁴⁴⁹ *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 634–37 (1989) (Rehnquist, C.J., concurring in part and dissenting in part).

⁴⁵⁰ *See id.*

⁴⁵¹ *See id.* at 634–35.

⁴⁵² *See id.* at 635–37.

⁴⁵³ *See* Pushaw, *supra* note 446, at 1298–99.

⁴⁵⁴ *See ASARCO*, 490 U.S. at 635 (Rehnquist, C.J., concurring in part and dissenting in part).

⁴⁵⁵ *See id.* Note that *Hollingsworth v. Perry*, 570 U.S. 693 (2013), can be read as comports with this view. There, a federal district court held that California's ban on gay marriage was unconstitutional. *Id.* at 698–701. California declined to appeal. The Supreme Court held that because no other putative defendant (or perhaps more accurately, no other appellant) had a real stake in the case, there was no Article III case or controversy; it dismissed for lack of jurisdiction. *Id.* at 700–01. The absence of a defendant (appellant) with a real interest in the case was fatal for federal review. *Id.* But nothing in *Hollingsworth* implies that, in the

Furthermore, in contexts other than a petition for certiorari from a state court, the federal courts focus on the plaintiff's, not the defendant's, standing.⁴⁵⁶ This is true regardless of which party first invokes the power of the federal courts.⁴⁵⁷ Defendants may remove a case from state court to federal court under 28 U.S.C. § 1441,⁴⁵⁸ thereby initiating federal review.⁴⁵⁹ Such defendants risk the same kind of injury incurred by the *ASARCO* defendants—a judgment against them. But contrary to *ASARCO*, it is the plaintiff's standing, not the defendants, that matters in removal.⁴⁶⁰ The Supreme Court has held that, when plaintiffs lack standing, the federal courts have no jurisdiction to hear a removed case.⁴⁶¹

The same is true when a party who would otherwise be a defendant in a suit for damages or an injunction brings an action for declaratory relief in federal court.⁴⁶² Under the *ASARCO* rule, the declaratory plaintiff is the party first invoking the power of the federal courts.⁴⁶³ We should therefore expect its standing to be sufficient. But when a party bringing an action for declaratory relief is functionally a defendant—when it is merely suing to preemptively trigger a lawsuit in which it would face damages or an injunction against it⁴⁶⁴—the declaratory plaintiff's potential injury counts for nothing.⁴⁶⁵

The Supreme Court has consistently held that, in such declaratory cases, it is the functional plaintiff, not the formal declaratory plaintiff, who matters for jurisdictional purposes.⁴⁶⁶ “[T]he Declaratory Judgment Act merely expands the remedies available in the district courts without expanding their jurisdiction.”⁴⁶⁷ Federal courts evaluating jurisdiction in declaratory actions must therefore imagine the hypothetical action for

absence of a plaintiff with a real stake in the case, the defendant's (appellant's) stake would have been sufficient. *See id.* at 697–715.

⁴⁵⁶ *See, e.g.,* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“[A] plaintiff must demonstrate standing for each claim he seeks to press.” (citation omitted)).

⁴⁵⁷ *See id.*

⁴⁵⁸ Federal officers may remove pursuant to 28 U.S.C. § 1442 (2012). *See* discussion *supra* notes 200–13 and accompanying text.

⁴⁵⁹ *See* 28 U.S.C. § 1441 (2012).

⁴⁶⁰ *See, e.g.,* *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) (“[A] party may challenge a violation of federal statute in federal court if it has suffered ‘injury that fairly can be traced to the challenged action of the defendant,’ and that is ‘likely to be redressed by the requested relief.’” (internal citations omitted)).

⁴⁶¹ *See DaimlerChrysler*, 547 U.S. at 342 n.3.

⁴⁶² *See, e.g.,* *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 18–19 (1983) (“[F]ederal courts do not have original jurisdiction, nor do they acquire jurisdiction on removal, where a federal question is presented by a complaint for a state declaratory judgment . . .”).

⁴⁶³ *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 619 (1989).

⁴⁶⁴ *See generally* Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275 (2010).

⁴⁶⁵ *See Franchise Tax Bd.*, 463 U.S. at 19.

⁴⁶⁶ *See id.*

⁴⁶⁷ *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 98 (1978) (Rehnquist, J., concurring in judgment).

damages or an injunction that could arise between the parties.⁴⁶⁸ That is, they imagine a case that could have been brought without the aid of the Declaratory Judgment Act.⁴⁶⁹ They then determine whether they would have jurisdiction over *that* case.⁴⁷⁰

For federal-question jurisdiction, “if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.”⁴⁷¹ Thus, when a declaratory plaintiff asks for a declaration of federal right that would otherwise arise only as a defense to a state-law suit against it, there is no jurisdiction.⁴⁷² It is insufficient that the declaratory plaintiff raises a federal question in its petition for the court to determine its rights.⁴⁷³ In other words, despite the fact that the declaratory plaintiff is, under *ASARCO*, the party first seeking federal review, its presentation of the case cannot establish jurisdiction.

The same logic applies to evaluating standing—rather than the presence of a federal question—in declaratory actions. Like the federal-question rule, Article III’s case-or-controversy requirement is jurisdictional.⁴⁷⁴ If the Declaratory Judgment Act did not expand the federal courts’ jurisdiction to hear federal questions, it also did not expand jurisdiction along the case-or-controversy axis.⁴⁷⁵ Before hearing a declaratory case, then, federal courts must determine whether there would be standing in the related hypothetical coercive action.⁴⁷⁶ And in such a hypothetical action, the plaintiff’s standing—not the defendant’s alone—would be a necessary condition on jurisdiction.⁴⁷⁷

The *ASARCO* rule thus is inapplicable in the two other situations where a functional defendant initiates federal review. A defendant attempting to remove to federal court cannot invoke its own standing to support jurisdiction.⁴⁷⁸ Nor can a party who would otherwise be a defendant in state court present his own injury to a federal court as a plaintiff in a declaratory action.⁴⁷⁹ The *ASARCO* majority’s rule is not only novel, it is in tension with the weight of federal standing doctrine.⁴⁸⁰

⁴⁶⁸ See 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3566 (3d ed. 2008).

⁴⁶⁹ See *Franchise Tax Bd.*, 463 U.S. at 19.

⁴⁷⁰ See *id.*

⁴⁷¹ *Id.* at 16 (citation omitted).

⁴⁷² See, e.g., *Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 241–42 (1952); *Ne. Ill. Reg’l Commuter R.R. Corp. v. Hoey Farina & Downes*, 212 F.3d 1010, 1014 (7th Cir. 2000) (“[I]f the plaintiff cannot get into federal court by anticipating what amounts to a federal defense to a state-law cause of action, he also should not be able to use the Declaratory Judgment Act to do so by asserting what is really a preemptive federal defense as the basis of his complaint.”).

⁴⁷³ See *Franchise Tax Bd.*, 463 U.S. at 13–14.

⁴⁷⁴ It is actually more fundamental than the federal-question inquiry. The latter comes from 28 U.S.C. § 1331, which is understood to be narrower than Article III, § 2. Standing in federal court is a constitutional requirement. See discussion *supra* Section I.A.

⁴⁷⁵ See *Franchise Tax Bd.*, 463 U.S. at 19.

⁴⁷⁶ See *id.*

⁴⁷⁷ See *id.*

⁴⁷⁸ See *id.* at 18–19.

⁴⁷⁹ See *id.*

⁴⁸⁰ Compare *id.*, with *ASARCO Inc. v. Kadish*, 490 U.S. 605, 619 (1989).

One can understand the general practice of focusing on plaintiffs', rather than defendants', standing by zooming out from standing's narrow criteria and examining Article III more broadly. The case-or-controversy requirement seeks, among other things,⁴⁸¹ adjudication of legal issues only when *both* parties have real skin in the game.⁴⁸² This prevents courts from deciding the law's meaning "in the rarified atmosphere of a debating society."⁴⁸³ Standing is just one of the formal lenses for thinking about that goal. Other Article III doctrines like mootness⁴⁸⁴ and ripeness⁴⁸⁵ also police the requirement that both "parties maintain an 'actual' and 'concrete' interest" in the litigation.⁴⁸⁶

A defendant facing damages or an injunction certainly has skin in the game; the potential judgment against him is his motivation. But that will more or less always be the case. And under Article III's case-or-controversy requirement, it takes two to tango; the point is ensuring that *both* parties will adequately argue the case.⁴⁸⁷ Merely noting that a judgment against the defendant will harm the defendant does not do the trick.⁴⁸⁸ We also need to know whether the *other* party—the plaintiff—has a serious interest.⁴⁸⁹

So a defendant facing a coercive judgment might be sensibly characterized, following the *ASARCO* majority, as having a redressable, traceable injury.⁴⁹⁰ But that's almost never the injury that matters. It can generally be assumed, and courts therefore usually turn immediately to the plaintiff's injury to ensure that *both* parties are in the case to win.⁴⁹¹ Courts focus on the plaintiff's standing because it is usually the factor in doubt.⁴⁹² If a defendant's commitment to the litigation happens to be in doubt, courts should also investigate it and, if it is found wanting, dismiss for lack of jurisdiction.⁴⁹³ Our examination of non-*ASARCO* standing doctrine suggests the following

⁴⁸¹ Standing doctrine also works to preserve the Executive's constitutional prerogative to enforce federal law. *See supra* note 24 and accompanying text.

⁴⁸² *See, e.g.,* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

⁴⁸³ *Id.*

⁴⁸⁴ *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67–75 (1997).

⁴⁸⁵ *See* *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977).

⁴⁸⁶ *See* *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring in the judgment) (quoting *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016)).

⁴⁸⁷ *See* *Valley Forge*, 454 U.S. at 472.

⁴⁸⁸ *See id.* (holding that as "the party who invokes the court's authority," the plaintiff must show he is injured).

⁴⁸⁹ *See id.*

⁴⁹⁰ *See* *ASARCO Inc. v. Kadish*, 490 U.S. 605, 619 (1989) (finding that ASARCO, the defendant-petitioner, suffered an injury that a favorable judgment would redress).

⁴⁹¹ *See, e.g.,* *Valley Forge*, 454 U.S. at 472.

⁴⁹² *See id.* (suggesting that a plaintiff's injury is an effective way to filter out abstract and generalized cases).

⁴⁹³ *See* discussion *supra* note 455.

rule: it is always *necessary* under Article III that an adverse decision will injure either the plaintiff or the defendant, but only the prospect of injury to both is *sufficient*.

This insight allows us to quickly understand the *ASARCO* dissent’s second point—that a judgment against a defendant is not a sufficient injury to support jurisdiction.⁴⁹⁴ The majority was right that the judgment against the defendant ensured that it was invested in the case.⁴⁹⁵ But it was clear that the plaintiffs were never threatened with physical harm, monetary loss, or any other traditionally cognizable but intangible injury.⁴⁹⁶ From the outset, they would have failed the standing test—one of several doctrines policing the case-or-controversy requirement.⁴⁹⁷ And, the dissent thought, since both parties’ investment is a condition on *any* federal court’s jurisdiction, the Supreme Court lacked power to hear the case.⁴⁹⁸

B. Is ASARCO Right as a Matter of Policy?

If, as suggested above, *ASARCO*’s legal foundation is shaky, why did the Supreme Court decide as it did? One might suspect it had policy in mind. The legal puzzle of *ASARCO* is complex, turning on who must be injured and how to present a case or controversy under Article III.⁴⁹⁹ The policy dilemma is simple. *ASARCO* asked whether some state-court decisions interpreting federal law are beyond the review of any federal court.⁵⁰⁰ The Supreme Court’s answer: no.⁵⁰¹ In so answering, the Court reserved to itself the power to conclusively interpret federal law.⁵⁰²

This policy dilemma did not go unnoticed in the *ASARCO* opinions. The dissent thought it was “unremarkable” that state courts might “remain free to decide important questions of federal statutory and constitutional law without the possibility of review in this Court.”⁵⁰³ Even if no-standing state-court cases were unreviewable, the dissent saw “no reason to fear that” the Court would be denied its “opportunity to review many important decisions on questions of federal law.”⁵⁰⁴

The dissent was wrong. There are two ways in which our legal landscape sans the *ASARCO* rule would be remarkable.⁵⁰⁵ First, contrary to the dissent’s position, there

⁴⁹⁴ See *ASARCO*, 490 U.S. at 634–35 (Rehnquist, C.J., concurring in part and dissenting in part).

⁴⁹⁵ See *id.* at 634.

⁴⁹⁶ See *id.*

⁴⁹⁷ See *id.* at 616–17 (plurality opinion).

⁴⁹⁸ See *id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part).

⁴⁹⁹ See *id.* at 612 (plurality opinion).

⁵⁰⁰ See *id.* at 617.

⁵⁰¹ See *id.* at 618–19 (majority opinion) (finding jurisdiction to review the Arizona Supreme Court’s interpretation of the federal New Mexico–Arizona Enabling Act of 1910).

⁵⁰² See *id.*

⁵⁰³ *Id.* at 636 (Rehnquist, C.J., concurring in part and dissenting in part).

⁵⁰⁴ *Id.* at 636–37.

⁵⁰⁵ Pushaw develops similar arguments on his way to calling for the Court to restructure

would indeed be important questions of federal law that the Supreme Court would have no opportunity to review.⁵⁰⁶ In such areas, state judiciaries who disagreed with the Supreme Court's interpretation of federal law could defy the Court's holdings.⁵⁰⁷ Second, even if state courts did their best to interpret federal law, they might often disagree.⁵⁰⁸ In areas of law where standing is rare, this could lead to the permanent fragmentation of federal law across state jurisdictions.

1. The *ASARCO* Rule Prevents State Courts from Openly Defying the Supreme Court

A world without *ASARCO* might be quite remarkable. Standing doctrine prevents many suits in *federal* court.⁵⁰⁹ But as we've illustrated, many of those suits could be brought in *state* court.⁵¹⁰ Suppose plaintiffs without standing begin to take advantage of the Federal–State Standing Gap, litigating their federal claims in state courts. With *ASARCO*, the Supreme Court has a chance to weigh in, reversing state courts that get federal law wrong.⁵¹¹ Without *ASARCO*, there is no federal review of *any* case where the plaintiffs lacked standing.⁵¹²

This result—that the state courts issue unreviewable judgments based on federal law—is perhaps strange. But is it worrisome? Maybe, if one expects state courts to decide questions of federal law incorrectly. They might sometimes decide incorrectly by accident. But an occasional state-court error in interpreting the law is no serious cause for concern. The Supreme Court will generally get the chance to issue guidance, and the misstep can be corrected.⁵¹³

But state courts might also decide federal claims incorrectly on purpose. It is no secret that states already bend federal law to serve their own, often partisan, purposes. In *Texas v. United States*,⁵¹⁴ conservative Texan officials leveraged the Administrative Procedure Act and the Take Care Clause to oppose President Obama's immigration policies.⁵¹⁵ In *Hollingsworth v. Perry*,⁵¹⁶ liberal officials from California declined to

its jurisdictional doctrines so that it may review all cases presenting federal constitutional questions. See Pushaw, *supra* note 446, at 1295–1300, 1341.

⁵⁰⁶ See *ASARCO*, 490 U.S. at 636–37 (Rehnquist, C.J., concurring in part and dissenting in part).

⁵⁰⁷ See *id.* at 636.

⁵⁰⁸ See discussion *infra* Section IV.B.1.

⁵⁰⁹ See, e.g., *ASARCO*, 490 U.S. at 612–13 (plurality opinion).

⁵¹⁰ See discussion *supra* Part I.

⁵¹¹ See *ASARCO*, 490 U.S. at 623–24.

⁵¹² See *id.* at 618, 623–24.

⁵¹³ See *id.* at 623–24.

⁵¹⁴ 787 F.3d 733 (5th Cir. 2015).

⁵¹⁵ See Adam Liptak & Michael D. Shear, *Supreme Court to Hear Challenge to Obama Immigration Actions*, N.Y. TIMES (Jan. 19, 2016), <https://nyti.ms/2jYm6O>. Ken Paxton, a Republican, was Attorney General of Texas at the time; he remains in that position as of this writing.

⁵¹⁶ 570 U.S. 693 (2013).

challenge a circuit court’s opinion that the state’s same-sex marriage ban violated the Fourteenth Amendment.⁵¹⁷ In doing so, they essentially adopted their preferred reading of federal law and denied the Supreme Court the opportunity to contradict them.⁵¹⁸

State executive officials are not the only ones known to play politics. The California Supreme Court has been locked in a battle with the U.S. Supreme Court for years about the validity of arbitration agreements.⁵¹⁹ Justices of the California Supreme Court, apparently sympathizing with consumers who sign such agreements, have read the Federal Arbitration Act so inconsistently with U.S. Supreme Court precedent that they have been said to be “dancing on their own.”⁵²⁰ Meanwhile, former Chief Justice Roy Moore of the Alabama Supreme Court resigned from his position last year⁵²¹ after being charged with ethics violations for ordering probate judges to ignore the U.S. Supreme Court’s decision in *Obergefell v. Hodges*.⁵²² Upon resigning, Moore defended himself as having stood up for “the people of Alabama . . . the Constitution . . . [and] God.”⁵²³ These are just recent, salient examples: plenty of others exist if one reaches back to the Civil Rights Era.⁵²⁴

States, acting through their officials and judges, have different interests than the federal government, and they are willing to interpret federal law to serve those interests.⁵²⁵ In some cases, they are willing to go so far as to openly defy the directives of the U.S. Supreme Court.⁵²⁶ Without the *ASARCO* rule, no federal court could correct a state court’s defiance in any case without Article III standing.

⁵¹⁷ See Maura Dolan & Carol J. Williams, *Jerry Brown Again Says Prop. 8 Should Be Struck Down*, L.A. TIMES (June 13, 2009), <http://articles.latimes.com/2009/jun/13/local/me-gay-marriage13> [<https://perma.cc/4ZMP-HU58>]. Jerry Brown, a Democrat, was Attorney General of California at the time; he is Governor of California as of this writing.

⁵¹⁸ See *Hollingsworth*, 570 U.S. at 702–03.

⁵¹⁹ See Anna McLean & Joy O. Siu, *Dancing on Their Own: The California Supreme Court’s Decision in McGill v. Citibank, N.A. that Class-Action Waivers Do Not Apply to Claims for Public Injunctive Relief Under California’s Consumer Protection Laws*, SHEPPARD MULLIN: CLASS ACTION STRATEGY DEF. BLOG (Apr. 7, 2017), <http://www.classactiondefensestrategy.com/2017/04/articles/consumer/dancing-california-supreme-courts-head-spinning-decision-mcgill-v-citibank-n-class-action-waivers-not-apply-claims-public-injunctive-relief-cal/> [<https://perma.cc/4VT6-VK5C>].

⁵²⁰ *Id.*

⁵²¹ Mike Cason, *Roy Moore Running for Senate, Resigns from Supreme Court to Challenge Luther Strange*, AL.COM (Apr. 26, 2017), http://www.al.com/news/montgomery/index.ssf/2017/04/roy_moore_announces_alabama_ch.html.

⁵²² 135 S. Ct. 2584 (2015) (holding that the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment together guarantee a right to same-sex marriage).

⁵²³ Cason, *supra* note 521 (quoting former Chief Judge Moore’s remarks at a post-suspension press conference).

⁵²⁴ See Godsil, *supra* note 425, at 507; cf. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

⁵²⁵ See *supra* notes 514–24 and accompanying text.

⁵²⁶ See Cason, *supra* note 521.

Savvy state judiciaries and litigants could, if they wished, take advantage of this fact. If, for example, the Ohio state judiciary disagreed with the Supreme Court about who counts as a debt collector under federal law,⁵²⁷ it could telegraph its view to interest groups. Those interest groups could then furnish a plaintiff—or class of plaintiffs—able to sue in state, but not federal, court. The state court could rule in the plaintiff’s favor, ignoring the Supreme Court’s understanding of federal law, and no one could do anything about it.⁵²⁸

Could state courts really disregard the Supreme Court’s directives in such an open fashion? Doesn’t the law require them to follow the Supreme Court’s holdings? Probably not. Constitutional scholars debate whether the coordinate branches of the federal government are required to abide by the Supreme Court’s holdings.⁵²⁹ Everyone agrees that the Supreme Court has the power to issue binding judgments in cases, including those involving federal officers.⁵³⁰ But judgments formally bind only the parties before the court.⁵³¹ It remains an unresolved question whether, for example, the executive branch may implement its own interpretation of the law when operating outside the scope of a formal judgment against it.⁵³²

If there is legitimate doubt that the coordinate branches of the federal government must follow Supreme Court holdings, there is less reason to think state judiciaries must do so. While state courts may be popularly regarded as lower courts, they are not “inferior courts” in the constitutional sense.⁵³³ Inferior courts are those created by Congress and vested with the “judicial Power of the United States.”⁵³⁴ State courts, by contrast, predate the Constitution and wield the judicial power of fifty sovereign states.⁵³⁵ The Supreme Court merely has appellate review over some state court decisions, and that is only because Congress has passed a statute making it so.⁵³⁶

Even if the state courts formally retain the right to defy Supreme Court holdings, maybe norms of adjudication prevent them from doing so. This, too, is unlikely. Even some federal courts—true “inferior courts”—openly challenge the Supreme Court’s interpretations of federal law, judicial norms notwithstanding.⁵³⁷ The Federal Circuit

⁵²⁷ See *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017).

⁵²⁸ See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612–13 (1989) (plurality opinion).

⁵²⁹ See generally, e.g., David W. Tyler, Note, *Clarifying Departmentalism: How the Framers’ Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy*, 50 WM. & MARY L. REV. 2215 (2009); Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713 (2017).

⁵³⁰ See Baude, *supra* note 285, at 1809–10; Walsh, *supra* note 529, at 1721.

⁵³¹ See Walsh, *supra* note 529, at 1715.

⁵³² See *id.* at 1721; see also Baude, *supra* note 285, at 1809–10.

⁵³³ See U.S. CONST. art. III, § 1.

⁵³⁴ *Id.*

⁵³⁵ See Arnold, *supra* note 357, at 1398.

⁵³⁶ See U.S. CONST. art. III, § 2; 28 U.S.C. § 1257 (2012).

⁵³⁷ See *infra* notes 538–40 and accompanying text.

is notorious for this practice.⁵³⁸ It regularly performs intellectual contortions to avoid conforming to the Supreme Court’s holdings.⁵³⁹ And Judge Stephen Reinhardt of the Ninth Circuit has said that the Supreme Court “can’t catch . . . all” of his court’s disobedient rulings.⁵⁴⁰ These federal judges are constrained by the possibility of Supreme Court review and reversal.⁵⁴¹ They are thus well served by couching their nonconforming decisions in conformist language. But without *ASARCO*, state courts would have many opportunities to stray without the threat of reversal.⁵⁴² In such cases, they would have no such conformist incentive and could disobey more openly than any federal judge.

This is the primary policy effect of the *ASARCO* rule. It functions to ensure that the federal judiciary, not those of the states, has the final say in all cases initiated under federal law.⁵⁴³ In doing so, it heads off the possibility that a state judiciary could strike off on its own, contorting federal law to serve its own preferences.

2. The *ASARCO* Rule Promotes the Uniformity of Federal Law

Assume now, as the Supreme Court regularly does, that the state courts are competent, impartial adjudicators of federal questions.⁵⁴⁴ Then there is no concern that states might systematically misinterpret federal law.⁵⁴⁵ What else is there to fear in a world where state courts are the final arbiters of some federal claims? Fragmentation. Recall that there may be no one with standing to raise certain questions about, for example, the Establishment Clause, the Equal Protection Clause, the Statement and Account Clause, or the Incompatibility Clause in federal court.⁵⁴⁶ Those questions could, however, be raised in some state courts, and, without *ASARCO*, each state’s highest court would be a terminal point of review.⁵⁴⁷ The United States has fifty state judiciaries, and a significant minority of those have lax standing requirements.⁵⁴⁸

⁵³⁸ *Federal Circuit, Never Change*, FIRST MONDAYS (Oct. 31, 2016), <http://www.firstmondays.fm/episodes/4> [<https://perma.cc/DK8E-EXT3>].

⁵³⁹ *See id.*; *see also* Laura G. Pedraza-Fariña, *Understanding the Federal Circuit: An Expert Community Approach*, 30 BERKELEY TECH. L.J. 89, 123–27 (2015).

⁵⁴⁰ Matt Rees, *The Judge the Supreme Court Loves to Overturn*, WKLY. STANDARD (May 5, 1997), <http://www.weeklystandard.com/the-judge-the-supreme-court-loves-to-overturn/article/2702> [<https://perma.cc/58QF-UK6R>] (quoting Judge Reinhardt).

⁵⁴¹ *See* 28 U.S.C. § 1254 (2012).

⁵⁴² *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–24 (1989).

⁵⁴³ *See id.*

⁵⁴⁴ *See, e.g., Sawyer v. Smith*, 497 U.S. 227, 241 (1990) (“State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution.”).

⁵⁴⁵ *See id.*

⁵⁴⁶ *See* discussion *supra* notes 26–30 and accompanying text.

⁵⁴⁷ *See ASARCO*, 490 U.S. at 617–18, 623–24; *see also id.* at 634–36 (Rehnquist, C.J., concurring in part and dissenting in part).

⁵⁴⁸ *See* discussion *supra* Section I.B.

Without *ASARCO*, such states might via competent, good-faith interpretation, come to different results.⁵⁴⁹ The Supreme Court of Ohio might, for example, disagree with the Supreme Court of Michigan regarding the contours of the Establishment Clause. Such disagreement would create the equivalent of a circuit split among state rather than federal courts. But without *ASARCO*'s path to Supreme Court review, the split might persist indefinitely.⁵⁵⁰

Uniformity in federal law matters. Uniformity reduces forum shopping and allows parties to confidently conform their activities to a known interpretation of the law.⁵⁵¹ Without uniformity in federal law, parties can find themselves subject to one legal rule, should a plaintiff sue in one jurisdiction, and another, should it sue elsewhere.⁵⁵² Depending on the conflicting rules, parties may be put in an impossible position wherein any course of action risks liability.⁵⁵³ Even barring such worst-case scenarios, fragmented law increases compliance costs by effectively transforming a single federal law into multiple rules varying across jurisdictions.⁵⁵⁴

Perhaps for these reasons, ensuring unity in the interpretation of federal law is one of the Supreme Court's primary jobs.⁵⁵⁵ The Rules of the Supreme Court of the United States lists factors that the Court considers when deciding whether to grant certiorari.⁵⁵⁶ Every factor mentions conflict—between federal circuit courts, federal circuit courts and state courts, or any court and the Supreme Court.⁵⁵⁷ Indeed, one of the reasons Congress made the Supreme Court's jurisdiction mostly discretionary was to allow it to focus on resolving splits in the lower courts.⁵⁵⁸ The *ASARCO* rule helps the Supreme Court to perform its unifying role.⁵⁵⁹ It does so in a narrow range of cases, but many of those cases bear on important constitutional questions.⁵⁶⁰

C. What Could Congress Do?

ASARCO has its problems, both legal and normative. But so would the world in which *ASARCO* came out the other way. In any case, *ASARCO* is the law, as determined by the Supreme Court.⁵⁶¹ We suggested above that the Court may have

⁵⁴⁹ See discussion *supra* Section I.B.

⁵⁵⁰ See *ASARCO*, 490 U.S. at 617–18, 623–24; see also *id.* at 634–36 (Rehnquist, C.J., concurring in part and dissenting in part).

⁵⁵¹ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–78 (1938).

⁵⁵² See *id.*

⁵⁵³ See *id.*

⁵⁵⁴ See *supra* note 549 and accompanying text.

⁵⁵⁵ See *Wright v. North Carolina*, 415 U.S. 936, 936–37 (1974) (Douglas, J., dissenting from denial of certiorari).

⁵⁵⁶ See U.S. SUP. CT. R. 10.

⁵⁵⁷ See *id.*

⁵⁵⁸ See *Wright*, 415 U.S. at 937 (Douglas, J., dissenting from denial of certiorari).

⁵⁵⁹ See *supra* notes 545–57 and accompanying text.

⁵⁶⁰ See *supra* notes 546–50 and accompanying text.

⁵⁶¹ See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 623–25 (1989).

overlooked the surprising consequence of *ASARCO*—that it opens a lane for an end run around Article III’s standing requirement.⁵⁶² If the Court determined that *ASARCO* was wrong, it could simply overturn its previous decision.⁵⁶³ It is uncontroversial that the Supreme Court can correct what it deems past mistakes.⁵⁶⁴

In this section, we ask who else could modify the holding of *ASARCO*. Specifically, we ask how much power Congress has in this area. First, we investigate whether Congress has the power to decide between the two worlds we describe above⁵⁶⁵—the world of *ASARCO* and the world in which *ASARCO* came out the other way. It matters whether Congress has this power because, even if one thinks *ASARCO* wrongly decided, there are reasons to doubt that the Court would overturn the decision.⁵⁶⁶

1. Could Congress Overturn *ASARCO*?

As discussed above,⁵⁶⁷ jurisdiction hawks may believe that *ASARCO* was wrongly decided. They have good reason to think so, given the body of Supreme Court case law on standing and the dissent in *ASARCO* itself.⁵⁶⁸ Such individuals might accept the trade-off involved in overturning *ASARCO*—preferring sound Article III jurisprudence at the cost of empowering state courts to shape federal law free from federal review. But it is unlikely that the Supreme Court will ever agree with such individuals and overturn *ASARCO*. Practically speaking, *ASARCO* is a power grab by the Court. For plaintiffs without federal standing, it shifts the final say on questions of federal law from the state courts to the Supreme Court.⁵⁶⁹ The Justices have a history of seizing power from lower courts and state courts, and once power is seized, it is rarely returned.⁵⁷⁰

If not to the Supreme Court, where might jurisdiction hawks look to overturn *ASARCO*? Perhaps Congress.⁵⁷¹ The question here is whether Congress has the power

⁵⁶² See discussion *supra* Part II.

⁵⁶³ See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386, 388, 400 (1937) (overruling *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), and abrogating *Lochner v. New York*, 198 U.S. 45 (1905)).

⁵⁶⁴ See *id.*

⁵⁶⁵ See discussion *supra* Section IV.B.

⁵⁶⁶ See discussion *infra* Section IV.C.1.

⁵⁶⁷ See *supra* notes 504–05 and accompanying text.

⁵⁶⁸ See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 634–37 (1989) (Rehnquist, C.J., concurring in part and dissenting in part).

⁵⁶⁹ See *id.* at 618, 623–24 (majority opinion).

⁵⁷⁰ See, e.g., *Teague v. Lane*, 489 U.S. 288, 300 (1989) (requiring lower courts to determine whether a rule applies retroactively on collateral review *before* addressing the merits, thereby depriving lower courts of authority to innovate in the area of constitutional criminal procedure); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (establishing a presumption that state courts decided a case on federal grounds when the case presents both federal and state grounds for decision, thereby preserving the Court’s jurisdiction).

⁵⁷¹ For purposes of this subsection, we use the term “overturn” narrowly. We are interested here in whether Congress could pass a law implementing the same rule that the *ASARCO*

to institute the rule that would exist if the Supreme Court overturned *ASARCO*. Could Congress legislate a rule under which the Supreme Court never has jurisdiction to review a ruling in a state-court case brought by a no-standing plaintiff?

It could. Article III sets out the maximal scope of the Supreme Court's jurisdiction.⁵⁷² It specifically enumerates the Court's original jurisdiction and appends a broad swath of appellate jurisdiction.⁵⁷³ But under Article III, § 2, the Supreme Court's appellate jurisdiction is subject to "such Exceptions . . . as the Congress shall make."⁵⁷⁴ Congress can constrain the appellate jurisdiction of the Supreme Court at will.⁵⁷⁵ The Supreme Court endorsed this power in *Ex parte McCordle*,⁵⁷⁶ holding that Congress could strip it of appellate jurisdiction in statutory habeas cases.⁵⁷⁷ Congress could similarly pass legislation stripping the Supreme Court's appellate jurisdiction in any case where the plaintiff lacked Article III standing.⁵⁷⁸ The effect of such a law would be identical to that of a Supreme Court decision overruling *ASARCO*.

2. Could Congress Fashion a Third Way?

It is not clear from a normative or a legal perspective whether one should prefer our actual legal world or one in which *ASARCO* was overturned. Our actual world allows plaintiffs without Article III standing to enforce federal laws in federal court.⁵⁷⁹ But if the Supreme Court had held that there was no standing in *ASARCO*, state courts would be free to fashion their own versions of federal statutory and constitutional law.⁵⁸⁰ They could even do so in defiance of the U.S. Supreme Court.⁵⁸¹ Presented with these two alternatives, one might seek a third.

The rock-and-a-hard-place nature of the two choices here follows from the Federal–State Standing Gap. If federal and state courts shared standing requirements, no one could bring a no-standing suit in a state court, win, and then get Supreme Court review (the problem with the *ASARCO* rule).⁵⁸² Nor could state courts decide important cases involving federal law that would be shielded from federal review (the problem without the *ASARCO* rule).⁵⁸³ To fashion a third way, then, Congress would need to eliminate the Federal–State Standing Gap.

Court would have implemented had it decided the case differently. Other rules that Congress could implement to displace *ASARCO* might also be thought of as "overturning" it; we deal with those next.

⁵⁷² See U.S. CONST. art. III.

⁵⁷³ See *id.* § 2.

⁵⁷⁴ *Id.*

⁵⁷⁵ See *id.*

⁵⁷⁶ 74 U.S. (7 Wall.) 506 (1869).

⁵⁷⁷ See *id.* at 513–14.

⁵⁷⁸ See U.S. CONST. art. III, § 2.

⁵⁷⁹ See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618, 623–24 (1989).

⁵⁸⁰ See *id.* at 636–37 (Rehnquist, C.J., concurring in part and dissenting in part).

⁵⁸¹ See discussion *supra* Part II.

⁵⁸² See *ASARCO*, 490 U.S. at 617–18.

⁵⁸³ See *id.* at 636–37 (Rehnquist, C.J., concurring in part and dissenting in part).

How could Congress perform such a feat? It could strip state courts of some of their jurisdiction to hear cases arising under federal law. It is uncontroversial that Congress has the power to establish exclusive jurisdiction in the federal courts over certain categories of cases.⁵⁸⁴ Under current law, state courts have no jurisdiction to hear bankruptcy, antitrust, patent, and copyright cases, among others.⁵⁸⁵

If Congress can establish exclusive federal jurisdiction over particular areas of law, it could also strip state courts' jurisdiction in cases without Article III standing. Establishing exclusive federal jurisdiction just *is* stripping the state courts of jurisdiction in a class of cases. The federal courts presumptively have jurisdiction to hear all cases “arising under [the] Constitution [and] the Laws of the United States.”⁵⁸⁶ And unless Congress says otherwise, the default rule is that states have concurrent jurisdiction over the same.⁵⁸⁷ So when Congress establishes exclusive jurisdiction in federal court over, say, patent cases, it is merely stripping the state courts of their presumptive jurisdiction.⁵⁸⁸ We propose that nothing is to stop Congress from enacting a law that, instead of stripping state court jurisdiction based on the content of cases, strips it based on the traditional elements of federal plaintiffs' standing.⁵⁸⁹ It could therefore enact legislation barring state courts from hearing cases arising under federal law unless the traditional elements of Article III standing were present.

If Congress were to strip state courts of jurisdiction in cases where no plaintiff had Article III standing, the Scylla and Charybdis of *ASARCO* and its negation would dissolve. Under such a regime, standing would remain an absolute requirement for litigation in all federal courts, including the Supreme Court. The method we've described for enforcing federal law in federal court without Article III standing would no longer work. If one were to attempt to bring one's no-standing case in state court, the state court would be obliged to dismiss for lack of jurisdiction. Since federal courts have always been obliged to do the same,⁵⁹⁰ the litigation would end there. Such a law would patch the Federal–State Standing Gap. This would be bad news for CREW, as it would once again have to contend with standing doctrine in its Emoluments Clause suit against Trump. It would also be bad news for litigants who wish to enforce otherwise unenforceable constitutional doctrines.

⁵⁸⁴ See, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443, 446–47 (1994); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 430 (1866).

⁵⁸⁵ See 28 U.S.C. §§ 1334, 1337, 1338 (2012) (bankruptcy, antitrust, and patent and copyright, respectively).

⁵⁸⁶ U.S. CONST. art. III, § 2.

⁵⁸⁷ See *Haywood v. Drown*, 556 U.S. 729, 735 (2009).

⁵⁸⁸ See *id.* (explaining that Congress can “expressly oust[] state courts of jurisdiction”).

⁵⁸⁹ Cf. Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–34 (1948) (arguing that the power of Congress to grant federal-question jurisdiction “should extend . . . to all cases in which Congress has authority to make the rule to govern disposition of the controversy” whether or not it exercises that authority).

⁵⁹⁰ See U.S. CONST. art. III, § 2.

The jurisdiction-stripping rule would also avoid the problems that a mere “overtum” of *ASARCO* would engender. If Congress required Article III standing in state court cases based on federal law, there could no longer be any unreviewable state-court cases interpreting federal law. The only cases in which a state court could interpret federal law would be those in which the plaintiffs had standing to sue. Even without *ASARCO*, such cases would be reviewable by the Supreme Court.⁵⁹¹ Under such a regime, states could still employ their own relaxed standing requirements when interpreting their own laws. But the possibility of rogue state judiciaries reshaping federal statutory or constitutional provisions would be eliminated.

CONCLUSION

Article III standing doctrine is often a thorn in litigators’ sides. Because of it, people with a sincere interest in enforcing federal law find that they cannot. And, as with *CREW*, impact litigators sometimes discover that locating a plaintiff with standing to sue is more easily said than done. Until now, a lack of standing—either in a single case or across the population of potential litigants—has been assumed to be an absolute bar to judicial redress.

The time has come to challenge that assumption. As we show, the state courts are viable alternative forums in which private parties may enforce federal law. They are not subject to Article III’s standing requirement.⁵⁹² They are able to issue largely the same remedies as the federal courts against—we argue—the same parties. It is even possible that state courts have *more* power in constitutional cases to issue damages judgments against federal officials.⁵⁹³ Finally, for impact litigants hoping to influence national law, the state courts offer a route to what they want most—federal Supreme Court review—even for plaintiffs without standing.⁵⁹⁴ Standing doctrine, as it turns out, should essentially never be treated as an obstacle to enforcing federal law. You, too, it turns out, can sue Donald Trump under the Emoluments Clause—or any other federal law—no standing required.

⁵⁹¹ See 28 U.S.C. § 1257(a) (2012).

⁵⁹² See discussion *supra* Section I.B.

⁵⁹³ See discussion *supra* Section III.A.

⁵⁹⁴ See generally *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989).