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## STANDING IN THE WAY: THE COURTS' ESCALATING INTERFERENCE IN FEDERAL POLICYMAKING

The connection between policy and law in the United States rests heavily on the concept and rhetoric of rights.<sup>1</sup> When the government makes a law to change someone's conduct, it often grants some other party a right.<sup>2</sup> Modern law enforcement involves some party — sometimes the government, sometimes a private person — initiating a legal proceeding against someone it says violated its rights.<sup>3</sup> This proceeding may result in a remedy. Its purpose is not only to vindicate the rightsholder but also to achieve the policy goals of the lawmakers who created the right.

When Congress creates rights, their enforcement often takes place through the federal courts. But in recent decades, federal courts have backed away from this arrangement. By imposing increasingly stringent standards on the sort of “injury” that qualifies a rightsholder to invoke a federal court's authority, the Supreme Court has restricted policymakers' ability to identify which rights can be vindicated there. Aside from its direct effect on the government's ability to make enforceable policy, this trend has surprising implications for the balance of power among the branches of the federal government and between them and the states.

Those implications include significant challenges for policymakers establishing statutory rights whose violation the Supreme Court does not consider sufficient to create standing for rightsholders in federal court. The following exploration of statutory rights that are no longer cognizable in federal court shows that the Court's recent standing cases are even more detrimental to the policymaking branches' power than they initially seem.

This Note proceeds in three Parts. Part I reviews the growth and uncertain future of cases involving claims that arise under federal statutes but cannot be heard in federal court because of limits on Article III standing. Part II explains that the Supreme Court's increasingly restrictive standing rules constrain Congress's power even more than previously observed. Not only do they limit Congress's ability to create statutory rights enforceable in federal courts, but they also constrain its

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<sup>1</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .”).

<sup>2</sup> American government resolves the tension between democracy and liberalism (that is, a commitment to equally shared individual rights) in part through a broad right to select rights creators in the first place. JEREMY WALDRON, LAW AND DISAGREEMENT 254 (1999) (referring to this right as “the right of rights”); Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 902 (2006).

<sup>3</sup> Jamal Greene, *The Supreme Court, 2017 Term — Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 110 (2018) (“[M]odern Americans associate rights reflexively with adjudication . . .”).

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power to make laws enforceable by other adjudicators, including administrative agencies and state courts. Part III notes that states may be the most promising frontier for enforcing threatened federal rights, though they face substantial doctrinal barriers.

### I. THE RISE OF FEDERAL CLAIMS EXCLUDED FROM FEDERAL COURT

While some might associate legal rights with constitutions, the U.S. Code is full of them too. Employees have a right to be paid a minimum wage, enforceable against their employers.<sup>4</sup> Renters have the right to lease apartments free from discrimination on the basis of certain characteristics, enforceable against landlords.<sup>5</sup> Investors have the right to accurate information about securities that they purchase, enforceable against the sellers of those securities.<sup>6</sup> Throughout its existence, Congress has created hundreds of new rights in response to changing economic conditions, evolving social norms, and whatever new problems the unpredictable course of history has presented. It has also provided that federal courts may hear almost any case arising under federal law, if either party wants it decided there. Within the past few decades, however, the Supreme Court has eroded Congress's ability to have federal statutory rights enforced in federal court. For example, the Supreme Court has ruled that the federal judiciary's power does not extend to cases where the rights violation did not cause a sufficiently "concrete" "injury in fact"<sup>7</sup> — a requirement that in recent years has become increasingly stringent and unpredictable.

How far this trend will go is unclear, but recent cases suggest a broad set of claims may be at risk. The possibly extraordinary breadth and confounding ambiguity of this set of cases create new challenges for policymakers trying to create enforceable policies — that is, to govern. This Part introduces these challenges; the subsequent Parts consider responses.

#### *A. The Shrinking Jurisdiction of Federal Courts to Vindicate Statutory Rights*

Like most laws, rights-creating laws are meant to be enforced. One way to make that happen is to allow plaintiffs to bring claims in court against whomever they allege violated their rights. To do so, Congress has taken advantage of the Constitution's extension of the "judicial Power of the United States" to "all Cases . . . arising under . . . the Laws

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<sup>4</sup> 29 U.S.C. § 206(a); *id.* § 216(b).

<sup>5</sup> 42 U.S.C. § 3604; *id.* § 3613.

<sup>6</sup> 15 U.S.C. § 77l.

<sup>7</sup> *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

of the United States.”<sup>8</sup> Along with state courts,<sup>9</sup> federal trial courts have “original jurisdiction of all civil actions arising under” federal law.<sup>10</sup> Plaintiffs can choose to bring actions in federal court in the first place,<sup>11</sup> and defendants can choose to remove them to federal court.<sup>12</sup> So, for the most part, if either party wants the case in federal court, a federal court will hear it.<sup>13</sup>

While statutory jurisdiction of federal courts over federal claims has expanded, however, the range of cases that federal courts can constitutionally hear has shrunk. The Supreme Court has interpreted Article III’s reference to “Cases” and “Controversies”<sup>14</sup> as a limitation on the power of federal courts irrespective of what statutory grants of jurisdiction allow.<sup>15</sup> Perhaps most importantly, the doctrine of standing has come to require that, for a federal court to hear a case, the plaintiff must have experienced an “injury in fact” that was both caused by the defendant’s challenged conduct and would be redressed by the court’s deciding in the plaintiff’s favor.<sup>16</sup> Though not found in constitutional text<sup>17</sup> or even in caselaw — at least in its modern form — before the mid-twentieth century,<sup>18</sup> this “injury-in-fact” requirement reflects concerns about limited judicial competence and avoiding incursions on the responsibilities of other branches.<sup>19</sup> However persuasive one finds these justifications, scholars and judges alike have criticized standing law for being vague and unpredictable — as (the second) Justice Harlan put it, a “word game played by secret rules.”<sup>20</sup>

Of the many hard questions standing law raises, one of the most important is simply: Who decides what injury counts? The answer seems to have changed over the past several decades. In 1975, the Court explicitly stated that Congress could transform a noninjury into a statutorily recognized harm that would meet the “injury-in-fact”

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<sup>8</sup> U.S. CONST. art. III, §§ 1–2.

<sup>9</sup> *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

<sup>10</sup> 28 U.S.C. § 1331.

<sup>11</sup> *See id.*

<sup>12</sup> *Id.* § 1441(a).

<sup>13</sup> This state of affairs is consistent with suggestions by the Framers, and many scholars and judges since, that the availability of federal courts to adjudicate federal claims both facilitates uniformity in federal law and helps ensure that the judges with the most experience with and respect for federal law adjudicate federal cases. *See* John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 250–56 (2007).

<sup>14</sup> U.S. CONST. art. III, § 2.

<sup>15</sup> *See* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3529 (3d ed. 2022).

<sup>16</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>17</sup> *See* Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 349–50 (2022) (describing the injury-in-fact test in its contemporary form as “made up out of whole cloth,” *id.* at 349, “lawless,” *id.* at 350, and “disconnected from standard sources of constitutional law,” *id.*).

<sup>18</sup> *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224–25 (1988).

<sup>19</sup> *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

<sup>20</sup> *Id.* at 129 (Harlan, J., dissenting).

requirement.<sup>21</sup> That pronouncement was no outlier, and it remained true in some form for a while longer.<sup>22</sup> As recently as 1998, the Court in *Federal Election Commission v. Akins*<sup>23</sup> ruled that voters had standing to challenge the Federal Election Commission's refusal to require a political group to disclose contributions of its members, allegedly in violation of federal campaign finance law.<sup>24</sup> Although the injury was the inability to obtain information about political donors (not any pecuniary loss, for instance) and shared by anyone who wanted that information, the harm was "sufficiently concrete and specific" to be an injury in fact.<sup>25</sup> That the injury was "widely shared" and "of an abstract and indefinite nature"<sup>26</sup> did not "deprive Congress of constitutional power to authorize its vindication in the federal courts."<sup>27</sup> As long as Congress could define injuries itself, it could create enforceable rights as it saw fit.

More recently, though, the Court has ruled Congress has no such power. In two cases involving the Fair Credit Reporting Act,<sup>28</sup> a federal law requiring consumer reporting companies to follow certain procedures to "assure maximum possible accuracy" of credit reports,<sup>29</sup> the Court indicated that plaintiffs whose credit files contained inaccuracies had not necessarily suffered a concrete "injury in fact."<sup>30</sup> In *Spokeo, Inc. v. Robins*,<sup>31</sup> the Court's standing analysis considered Congress's establishment of a federal right as one among multiple factors that might create an "injury in fact."<sup>32</sup> Although both "history and the judgment of Congress play important roles," "it is instructive to consider whether an alleged tangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."<sup>33</sup> Because Congress's decision to "elevat[e] intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement," its decision to protect the plaintiff from an

<sup>21</sup> *Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of a statute." (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

<sup>22</sup> See William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENV'T L. & POL'Y F. 247, 248-49 (2001).

<sup>23</sup> 524 U.S. 11 (1998).

<sup>24</sup> *Id.* at 13-14.

<sup>25</sup> *Id.* at 25; see also *id.* at 24-25.

<sup>26</sup> *Id.* at 23.

<sup>27</sup> *Id.* at 25.

<sup>28</sup> 15 U.S.C. §§ 1681-1681X.

<sup>29</sup> *Id.* § 1681e(b).

<sup>30</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549-50 (2016); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021).

<sup>31</sup> 136 S. Ct. 1540.

<sup>32</sup> *Id.* at 1549.

<sup>33</sup> *Id.* (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)).

inaccurately compiled credit report could not open federal courts to his allegation of a “bare procedural violation.”<sup>34</sup>

Five years later, in *TransUnion LLC v. Ramirez*,<sup>35</sup> the Court’s wresting away of the power to define “injuries in fact” from Congress became clearer. Citing *Spokeo*, the Court declared that the “injury-in-fact” inquiry “asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury.”<sup>36</sup> Though this test would “not require an exact duplicate in American history and tradition,”<sup>37</sup> courts could not “treat an injury as ‘concrete’ for Article III purposes based only on Congress’s say-so.”<sup>38</sup> According to the Court, allowing Congress to “authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law . . . would flout constitutional text, history, and precedent”<sup>39</sup> and intrude upon the executive branch’s constitutional authority to decide when and how to “pursue legal actions against defendants who violate the law.”<sup>40</sup>

Unlike limits on personal jurisdiction over defendants, standing requirements cannot be waived by any party. Claims that do not meet them cannot be brought by plaintiffs in federal court, nor can they be removed by defendants. So whichever cases cannot meet this “injury in fact” requirement will not be heard in federal court.

### *B. The Future of Federal Claims Excluded from Federal Courts*

The scope of cases excluded from federal court by the Court’s developing standing rules depends entirely on how demanding those rules are. Taken at face value, they are quite constricting. Since *TransUnion*, scholars have emphasized the astounding diminishment of Congress’s ability to create enforceable statutory rights that *Spokeo* and *TransUnion* imply. The principle that an unharmed plaintiff cannot sue in federal court, repeated more than a few times by the *TransUnion* opinion, had appeared before. But Congress’s inability to decide which plaintiffs are harmed and which are not was new. Professor Cass Sunstein notes the Court’s proclamation that an “injury in fact” must be analogous to an injury recognized at common law excludes

<sup>34</sup> *Id.*

<sup>35</sup> 141 S. Ct. 2190.

<sup>36</sup> *Id.* at 2204–05. This approach mirrors the Court’s recent practice of looking for support in English and American common law at the time of the Founding in other areas of constitutional interpretation as well. *See, e.g., Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249–51 (2022) (reviewing authorities on English common law from the thirteenth, seventeenth, and eighteenth centuries to interpret a constitutional amendment enacted in 1868).

<sup>37</sup> *TransUnion*, 141 S. Ct. at 2204.

<sup>38</sup> *Id.* at 2205 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 n.2 (11th Cir. 2020)).

<sup>39</sup> *Id.* at 2206.

<sup>40</sup> *Id.* at 2207.

many interests successfully asserted in older standing cases, such as statutory protections against race-based discrimination.<sup>41</sup> Dean Erwin Chemerinsky has surveyed statutory rights that seem threatened by *TransUnion*'s requirement of a "common-law analogue"<sup>42</sup> — that is, they recognize and attempt to redress injuries that do not necessarily involve the physical, monetary, or reputational harms recognized at common law.<sup>43</sup> Title II of the Civil Rights Act of 1964's<sup>44</sup> prohibition of race-, sex-, and religion-based discrimination in public accommodations, Title VII's prohibition on discrimination in employment, the Fair Labor Standards Act's<sup>45</sup> prohibition on child labor, the Telephone Consumer Protection Act's<sup>46</sup> protections against robocallers, and the Freedom of Information Act's<sup>47</sup> grant of access to government documents are just a few examples.<sup>48</sup>

The Court's requirement that plaintiffs allege an injury analogous to one cognizable at common law presents yet another problem. It is extraordinarily difficult for litigants — and for policymakers — to predict which claims qualify. As Professor Elizabeth Beske writes: "The Court's concreteness inquiry provides scant guidance to lower courts, invit[ing] them to substitute their own policy preferences for legislative will."<sup>49</sup> *TransUnion* only specified that courts must find a "close relationship" with common law injury,<sup>50</sup> "leaving lower courts at sea going forward, supplied with little more than intuition."<sup>51</sup> In *TransUnion* itself, the Court ruled that plaintiffs whose inaccurate credit reports were distributed to third parties could allege an injury analogous to common law defamation, but those whose reports had not been distributed could not.<sup>52</sup> Yet even in the narrow context of inaccurate credit reporting, "[t]he Court offered no principle by which to distinguish required elements of common law defamation that are dispensable (like falsity) and

<sup>41</sup> Sunstein, *supra* note 17, at 372 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376 (1982); *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 212 (1972)).

<sup>42</sup> *TransUnion*, 141 S. Ct. at 2204; Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 272 (2021).

<sup>43</sup> See *TransUnion*, 141 S. Ct. at 2204.

<sup>44</sup> 42 U.S.C. § 2000a.

<sup>45</sup> 29 U.S.C. §§ 201–219.

<sup>46</sup> 47 U.S.C. § 227.

<sup>47</sup> 5 U.S.C. § 552.

<sup>48</sup> Chemerinsky, *supra* note 42, at 270, 283–86. Of course, many of the circumstances governed by these laws concern monetary or reputational stakes. But it is not hard to imagine a claim that does not allege such an injury. Consider an employer that segregates workers by race. If Black workers are paid less than white ones, the former group has suffered a monetary harm. But what if they are paid the same? It would be difficult to argue that there was a "tradition" of recognizing the harms of a racially segregated workplace when Article III was enacted, or even for most of the rest of American history. See Sunstein, *supra* note 17, at 372–73.

<sup>49</sup> Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729, 735 (2022).

<sup>50</sup> *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

<sup>51</sup> Beske, *supra* note 49, at 767.

<sup>52</sup> *TransUnion*, 141 S. Ct. at 2214.

required elements of common law defamation that are indispensable (like publication).”<sup>53</sup> Analyzing *TransUnion*’s application to privacy rights, Professors Danielle Citron and Daniel Solove similarly conclude that “applying this test is difficult because the tradition of the common law is complicated, nuanced, and ever-shifting.”<sup>54</sup> Because the Court did not specify how close the “close relationship” between an alleged injury and the common law must be, because the common law itself traditionally has not required harm for recognizing all rights violations, and because courts have recognized different sorts of harms over time, “the target is constantly moving” and “the door [is] open for courts to reach wildly different conclusions.”<sup>55</sup>

## II. FURTHER PROBLEMS

Future Congresses seeking to create rights enforceable in federal court have a problem. There is some set of claims that federal courts cannot hear because those claims lack a basis in common law tradition, but it is not clear what that set includes. And even an explicit cause of action for rightsholders whom Congress considers injured will not help, as that is exactly what the Fair Credit Reporting Act provided the plaintiffs in *TransUnion*.<sup>56</sup> So what can policymakers do?

The Court in standing and other justiciability cases has emphasized at length that these doctrines operate to limit the power of federal courts, protecting the other branches from judicial intrusion. In *Spokeo*, the Court went so far as to say that “[t]he law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches.”<sup>57</sup> In response, critics have pointed out that holding courts to a standard of traditionally recognized injury, which is both untethered to congressional judgment and somewhat inscrutable, actually limits Congress’s ability to create enforceable statutory rights and puts courts in charge of deciding which harms are “concrete” enough for judicial redress. While agreeing with this claim, this Part shows that the Court’s standing jurisprudence goes even further in undermining congressional power.

One set of solutions proposed by scholars interested in saving the enforceability of statutory rights involves finding other, non–Article III tribunals to hear claims now barred from federal court.<sup>58</sup> These are

<sup>53</sup> Beske, *supra* note 49, at 767.

<sup>54</sup> Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 807 (2022).

<sup>55</sup> *Id.* at 806–07.

<sup>56</sup> *TransUnion*, 141 S. Ct. at 2201 (citing 15 U.S.C. § 1681n(a)).

<sup>57</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (alteration in original) (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013)).

<sup>58</sup> See Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1463–65 (2018). For some policy objections to this use of non–Article III adjudicators, see Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 211–17 (2011).

good ideas that have much to recommend them, and this Note is in large part inspired by them. As this Part will show, however, the narrowing of federal justiciability does not merely limit Congress's ability to allow plaintiffs to walk into federal court. In combination with other doctrines, cases like *Spokeo* and *TransUnion* may effectively limit Congress's use of non–Article III tribunals as well. These limits significantly complicate the view that “Article III’s case-or-controversy requirement does not tell us anything about what the substantive law should say or who should have primary responsibility for enforcing it.”<sup>59</sup> Instead, limits on federal courts — supposedly meant to protect the policymaking branches from judicial interference — have become limits on policymakers too.

### A. Agencies

One attractive option for claims that cannot be heard by federal courts is to make administrative agencies available to hear them.<sup>60</sup> Professor Zachary Clopton has suggested that Congress could view the dismissal of a case on the basis of the plaintiff’s lack of standing as an “invitation to create a non–Article III federal process.”<sup>61</sup> Like state courts’, agencies’ ability to hear cases is not (directly) restricted by Article III. In other words, if Congress gave an agency authority to hear and adjudicate claims by consumers against consumer reporting companies like those rejected in *TransUnion*, Article III would have no bearing on whether consumers could come before that agency.<sup>62</sup> As Clopton points out, Congress has done this before, such as by allowing non–Article III adjudicators to issue advisory opinions that Article III courts constitutionally could not.<sup>63</sup> In response to a decision like *Spokeo*, he writes, “Congress could amend the [Fair Credit Reporting Act] to provide explicitly for a stand-alone administrative remedy in the [Federal Trade Commission] or in a new tribunal.”<sup>64</sup> Not only does this approach seem to avoid the Court’s standing jurisprudence, but it also follows from the Court’s separation of powers rationale underlying it: “[T]he separation of powers commands the court to dismiss the case, yet it also allows those separated powers to do something about it.”<sup>65</sup>

But this path has serious limits — serious enough to ask whether Congress would or should rely on agencies to vindicate private rights that are unrecognized in court. First, even if an aggrieved person can

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<sup>59</sup> Clopton, *supra* note 58, at 1467.

<sup>60</sup> *See id.* at 1445.

<sup>61</sup> *Id.* (emphasis omitted).

<sup>62</sup> *See* Gardner v. FCC, 530 F.2d 1086, 1090–91 (D.C. Cir. 1976).

<sup>63</sup> Clopton, *supra* note 58, at 1447 (citing 28 U.S.C. § 171); *see also* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 705 (2004).

<sup>64</sup> Clopton, *supra* note 58, at 1459.

<sup>65</sup> *Id.* at 1460.



get an agency to rule in their favor, they probably need a court to enforce the agency's order, or at least the threat of judicial enforcement, to coerce the injurer to redress the injury. And for a private plaintiff to invoke the power of a federal court to enforce the order, they must have standing. Second, only losing defendants — not losing plaintiffs — may have a path to appeal agency decisions in court, creating risk for plaintiffs and a possibly prodefendant tilt in the law's development.

*I. Enforcing an Agency Order.* — Adjudication by an agency itself is not quite enough for an aggrieved party to receive redress. A plaintiff who sets out to be made whole — and, in turn, effectuate policymakers' decision that they *should* be compensated — needs to be able to enforce the agency's judgment. But “[a]n administrative order must be enforced by a court.”<sup>66</sup> The need for this extra step flows from the principle that the power to render enforceable judgments lies only with the judiciary.<sup>67</sup> Agencies can likely go to federal court to enforce their own orders, much as they would in the course of any public law enforcement action. But a private plaintiff can do so only if it establishes the elements of Article III standing.<sup>68</sup> “Administrative agencies need not adjudicate only Article III cases and controversies, but federal courts must.”<sup>69</sup> Back to square one.

Courts would probably reject a claim that the agency order itself creates an injury. Plaintiffs might argue they are not quite in the same position as they were before they arrived at the adjudicating agency. They have now been wronged a second time, through their adversary's refusal to comply with an agency order granting them relief. Courts seem to have foreclosed this kind of theory as an end run around Article III standing requirements. One plaintiff protesting the contract decision of an agency could not, the Eighth Circuit ruled, claim that the agency's decision to deny him relief itself created Article III standing.<sup>70</sup> Instead, the standing inquiry depended on the underlying contract dispute. The court explained:

[W]e may review on appeal only those agency adjudications in which the parties to the agency proceeding would have had standing to bring an action in federal district court with respect to the matter in dispute if one lay there. . . . To allow the losers in such disputes to appeal to the federal courts . . . would be to grant such parties Article III standing merely because Congress granted them standing to appear in the agency adjudication.

<sup>66</sup> WRIGHT & MILLER, *supra* note 15, § 8250(a). Even agency orders that, by statute, are immediately binding (or “self-executing”), *see, e.g.*, 42 U.S.C. § 405(h), may require judicial enforcement to coerce compliance. *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 891 (2001).

<sup>67</sup> *See* NLRB v. Interbake Foods, LLC, 637 F.3d 492, 497 (4th Cir. 2011) (“[T]he NLRA carefully recognizes the appropriate divide between the administrative authority to conduct hearings and issue orders and the exclusively judicial power of Article III judges to enforce such orders.”).

<sup>68</sup> *See, e.g.*, Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 174 (D.C. Cir. 2012).

<sup>69</sup> *Hydro Invs., Inc. v. Fed. Energy Regul. Comm'n*, 351 F.3d 1192, 1197 (D.C. Cir. 2003).

<sup>70</sup> *Wilcox Elec., Inc. v. FAA*, 119 F.3d 724, 727 (8th Cir. 1997).

Such a result would, in essence, improperly allow Congress to modify the constitutional requirements of standing.<sup>71</sup>

In a similar context, the D.C. Circuit confirmed that this rule would apply “even if Congress gave [the plaintiff] a right to seek judicial review of [the agency’s] decision in this Court.”<sup>72</sup> “Article III does not permit Congress to expand the federal judicial function through such stratagems.”<sup>73</sup>

An agency could probably sue to enforce its own order, as existing agencies are often authorized to do.<sup>74</sup> Agencies themselves cannot impose civil or criminal penalties on parties who do not comply with their orders, but federal agencies can go to court to enforce their orders.<sup>75</sup> And the government traditionally has not been limited by standing rules in the same way that private litigants are.<sup>76</sup>

This scenario at best amounts to a partial fix for plaintiffs. First, they would have to rely on agencies, with limited resources and political will, to litigate on their behalf. Some administrations, and some executive officials, would be less interested in seeing these orders enforced than others.<sup>77</sup> Congress could try to require that the Executive enforce them. But courts have interpreted Article II to give the President significant discretion over how and when to enforce the law, and they might be reluctant to direct the Executive’s enforcement of specific orders.<sup>78</sup> Second, it is conceivable that federal courts would rule that they do not have jurisdiction to enforce an order in such a case. The Supreme Court has repeatedly insisted that standing rules arise from limits on the judicial power found in Article III.<sup>79</sup> And there is no clear basis in Article III for limiting the judicial power in a case brought by a private

<sup>71</sup> *Id.* at 727–28 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–78 (1992)).

<sup>72</sup> *Hydro Invs.*, 351 F.3d at 1197.

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g.*, 15 U.S.C. § 3414(b)(1); 29 U.S.C. § 160(e).

<sup>75</sup> WRIGHT & MILLER, *supra* note 15, § 8253.

<sup>76</sup> Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1324–25 (2014); *see also* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2245 (1999).

<sup>77</sup> These limitations of agency enforcement have in some areas prompted Congress to authorize enforcement by private individuals (“citizen suits”) — just the sort of scheme that standing rules often foreclose. *See* Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENV’T L. & TECH. J. 55, 56 (1989).

<sup>78</sup> *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *In re Aiken County*, 725 F.3d 255, 263–66, 266 n.11 (D.C. Cir. 2013); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 681–85 (2014).

<sup>79</sup> Grove, *supra* note 76, at 1319–20. The *TransUnion* opinion does express concern about the intrusion on the Executive’s power to enforce the law that the Court believed would result from allowing Congress to authorize suits without injury-in-fact. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). But it was clear that its holding could rest independently on Article III’s limitation on the courts. *Id.* (“A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law *not only* would violate Article III *but also* would infringe on the Executive Branch’s Article II authority.” (emphases added) (emphasis omitted)).

party while extending it to a case that is identical in every way except that the government takes up the plaintiff's cause.<sup>80</sup> Given the recent standing cases' intense focus on whether the harm at issue is "concrete," it is not clear how the Court would view an end run around these rules that culminated in the government's trying to enforce an order against one private party for the benefit of another, without any underlying "injury in fact."<sup>81</sup>

An agency order can carry great force. It can call for highly deferential review if a court does review it.<sup>82</sup> It can have a preclusive effect on collateral judicial proceedings that involve the same claim or issues.<sup>83</sup> But just as Congress "may not simply enact an injury into existence"<sup>84</sup> for Article III purposes, an agency might have trouble doing so too.

2. *Appealing an Agency Order.* — An agency order might create an injury where there was none before — just not for the party who claimed to be harmed in the first place. In contrast to plaintiffs litigating in agencies, the defendant who loses in an agency adjudication is in a somewhat stronger position to get into court. As a result, policymakers who send these cases to agency tribunals may struggle to create a level playing field and inadvertently give defendants considerable control over the course of litigation and even over the development of relevant caselaw.

Following an agency adjudication in which the plaintiff wins, the defendant might want to seek review in federal court for a few reasons. Most importantly, they might not want to live with the possibility that the government itself will try to enforce the order and the costs of complying with it preemptively.<sup>85</sup> They might worry about the preclusive or precedential effect that the agency order will have on future adjudication in agencies and courts. They might fear some other consequence

<sup>80</sup> See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 794–95 (2009); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 667 (2006).

<sup>81</sup> Dismissal on such grounds would have some precedent. See *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 286 (1888) ("[I]f it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, . . . in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."); see also WRIGHT & MILLER, *supra* note 15, § 3651 ("The United States may not lend its name to a lawsuit merely for the benefit of a private individual but rather must show the requisite injury in fact sufficient to give it standing.").

<sup>82</sup> See, e.g., *Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 217.

<sup>83</sup> See *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015).

<sup>84</sup> *TransUnion*, 141 S. Ct. at 2205.

<sup>85</sup> See Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 184–231 (2019) (listing reasons that regulated entities would comply with agency guidance, which is also not directly legally binding).

of being deemed a violator, such as the loss of government funding.<sup>86</sup> And they might want to rid themselves of the public scrutiny and disapproval that comes from being on the wrong end of any official action.

A defendant has a stronger argument for its own standing to challenge an unenforced order than the plaintiff seeking to enforce the order has. In analogous circumstances involving agency action, courts have applied standing rules quite generously to regulated parties challenging the agency. For instance, in *Burlington Northern & Santa Fe Railway Co. v. Surface Transportation Board*,<sup>87</sup> the D.C. Circuit held that a company could challenge an order giving it full discretion to set railroad shipping rates (by removing a previous rate-setting order) merely because the prior rate order shielded the company from liability arising from the prescribed rate in a separate proceeding.<sup>88</sup> And in *Southwest Power Pool, Inc. v. Federal Energy Regulatory Commission*,<sup>89</sup> the D.C. Circuit allowed a company to challenge an agency's declaratory judgment interpreting a contract, even though harm to its bottom line would have arisen only if the other party to the contract exercised its rights in a certain way.<sup>90</sup> Because the party that lost in the agency tribunal would "remain in limbo" while its competitor took advantage of the challenged order, it had standing.<sup>91</sup> And the Supreme Court has long allowed regulated parties to challenge agency regulations before they are ever enforced at all.<sup>92</sup> Recently, courts have allowed regulated parties to challenge administrative guidance even when the challenged action "does not compel [the petitioner] to do anything" but merely "pressures" it to change its practices "or risk referral to the Attorney General" by the agency.<sup>93</sup> Finally, in a roughly analogous context, the Supreme Court ruled that a losing defendant (but not plaintiff) in state court suffered an Article III injury because the state court judgment placed them under

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<sup>86</sup> See Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1627 (2018).

<sup>87</sup> 403 F.3d 771 (D.C. Cir. 2005).

<sup>88</sup> *Id.* at 776.

<sup>89</sup> 736 F.3d 994 (D.C. Cir. 2013).

<sup>90</sup> *Id.* at 996–97.

<sup>91</sup> *Id.* at 997.

<sup>92</sup> See, e.g., *Abbott Lab's v. Gardner*, 387 U.S. 136, 154 (1967) (granting standing to challenge a regulation "directed at [the plaintiffs] in particular[,] . . . requir[ing] them to make significant changes in their everyday business practices" while under the threat of the "imposition of strong sanctions"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

<sup>93</sup> *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 448 (5th Cir. 2019); *id.* at 444 (noting that "legal consequences may flow from an agency action even if 'no administrative or criminal proceedings can be brought for failure to conform'" (quoting *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016))). The Supreme Court recently clarified that plaintiffs do not have standing to challenge an unenforceable statute, *California v. Texas*, 141 S. Ct. 2104, 2114 (2021), but only because the plaintiff faced no "actual or threatened enforcement, whether today or in the future," *id.*; see *id.* at 2114–15. The government probably could enforce the agency order contemplated in this Note, on the other hand.

“a defined and specific legal obligation, one which cause[d] them direct injury.”<sup>94</sup>

Along with the more general norm that courts give regulated entities broad leeway to challenge administrative action,<sup>95</sup> this background suggests that a losing defendant could appeal an order in federal court even when a winning plaintiff could not sue to enforce it, based either on the possibility that the government will enforce it or on its collateral effects in other proceedings.<sup>96</sup>

3. *Consequences of a One-Sided Appeal.* — The prospect of defendants, and only defendants, getting to appeal agency orders might raise red flags for a Congress whose goal was to vindicate the rights of the plaintiffs in the first place. Not only will defendants get multiple bites at the apple — arguing their case before an agency and a court — but they will also get to choose which cases are ever heard by federal courts at all,<sup>97</sup> allowing them to pick and choose when and where to have federal courts weigh in on important legal questions.<sup>98</sup> Because these questions may not often, if ever, be heard by federal courts outside appeals of agency adjudication (given the standing problem), defendants’ control over what questions are considered in federal court — and when and where that happens — would be strikingly comprehensive.<sup>99</sup>

Congress could try to address this problem by simply denying defendants’ ability to bring challenges to agency orders,<sup>100</sup> or by requiring total deference to whatever agencies decide. But here, Congress may

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<sup>94</sup> ASARCO Inc. v. Kadish, 490 U.S. 605, 618 (1989). State courts are different from agencies in that they can “render binding judicial decisions.” *Id.* at 617. That said, the state court judgment in that case was declaratory, *id.* at 611, binding on lower courts but not coercive until they ordered injunctive relief — a bit like an agency order before the government gets around to enforcing it.

<sup>95</sup> See Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 454 (2015).

<sup>96</sup> This odd result matches what Professor Heather Elliott identifies as the Supreme Court’s more general “asymmetric view of standing — making it easy for regulated entities to get standing, and hard for everyone else.” Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 491 (2008).

<sup>97</sup> Plaintiffs in such cases could once take solace that courts applying the *Chevron* doctrine would defer to agency’s legal interpretations, see *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), but most of today’s Supreme Court has openly criticized that approach, to the point that litigants hesitate to bring it up at all. See, e.g., Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 933–34 (2021).

<sup>98</sup> Granted, Congress probably could require significant deference to agency’s determinations of fact without running afoul of Article III. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80–81 (1982).

<sup>99</sup> Doing this effectively might depend on defendants’ ability to coordinate with one another and maintain discipline in appealing strategically, perhaps through trade associations and the like. But given that defendants in these cases are likely to be large, sophisticated, repeat players, this kind of planning is probably viable in some circumstances. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 100–02 (1974) (explaining the mechanisms by which repeat players can exercise inordinate influence over caselaw development).

<sup>100</sup> Such a statute would effectively be an exception to the Administrative Procedure Act’s provision of a cause of action to any party aggrieved by an agency action, 5 U.S.C. § 702.

run into another Article III limit — the requirement that, because Article III vests the judicial power of the United States in federal courts, the “essential attributes” of adjudication must remain there.<sup>101</sup> In protecting the judiciary’s purview, the Supreme Court has employed a distinction between “public rights” cases — mostly, those involving the government — and “private right[s]” cases, usually involving a dispute between private parties.<sup>102</sup> In the 1932 *Crowell v. Benson*<sup>103</sup> decision, the Court explained that while “public rights” cases can be resolved by agencies with no judicial supervision,<sup>104</sup> “private right[s]” cases require the “essential attributes of the judicial power” to remain with Article III judges.<sup>105</sup> While the exact scope of this requirement has wavered over time,<sup>106</sup> courts continue to worry whether agency adjudication “impermissibly threatens the institutional integrity of the Judicial Branch.”<sup>107</sup> Thus, defendants could argue that a law limiting their ability to challenge agency orders violates the requirement that Article III courts must at least be available to review questions of law decided in non–Article III tribunals.<sup>108</sup>

Some scholars considering non–Article III adjudication in these circumstances point out that the “essential attributes” requirement would seemingly not apply to claims that do not fall within the Article III power at all.<sup>109</sup> But a case’s classification as within or outside of Article III may not be so stable. It is unclear when the “essential attributes”

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<sup>101</sup> *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

<sup>102</sup> *See id.* at 50.

<sup>103</sup> 285 U.S. 22.

<sup>104</sup> *Id.* at 50 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

<sup>105</sup> *Id.* at 51.

<sup>106</sup> *See Pfander, supra* note 63, at 660–71 (reviewing and critiquing the Court’s various approaches). *Chevron* itself is arguably an example of the narrowing of the *Crowell* rule, to the extent it represents the judiciary ceding its authority to make final decisions about questions of law. *See Merrill & Hickman, supra* note 66, at 867 n.187.

<sup>107</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986); *see also* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982).

<sup>108</sup> Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 976–91 (1988) (considering the necessity and scope of review by constitutional courts of questions of law and questions of fact, respectively). One recent lower court decision takes this principle even further by suggesting that any agency adjudication of private rights cases violates the Seventh Amendment’s guarantee of a jury trial. *Jarkesy v. SEC*, 34 F.4th 446, 451 (5th Cir. 2022). It does not seem that the reasoning in that decision would apply directly to the claims at issue here, because the court limited that holding to “whether an action’s claims arise at common law,” *id.* at 453 — the inverse of the claims excluded from federal court by *Spokeo* and *TransUnion*. But along with the decline of *Chevron* deference, the nondelegation doctrine’s possible revival, and other judicial advances on the administrative state, these are not hopeful signs for more robust agency adjudication. *See, e.g., Gillian E. Metzger, The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17–31 (2017) (surveying the “judicial challenges to national administrative governance,” *id.* at 17).

<sup>109</sup> Clopton, *supra* note 58, at 1451; Elliott, *supra* note 58, at 222–23. Elliott argues that Congress still could not give a non–Article III tribunal jurisdiction over all cases in which plaintiffs lack Article III standing. *Id.* at 224.

requirement kicks in, but, once it does, a defendant in a “private rights” dispute would need some recourse in a federal court. That may mean that any further action by the agency after issuing an order would require federal court supervision. Another way to view this issue is through the doctrine of ripeness. Clopton notes that claims that are nonjusticiable because they are unripe pose different challenges for non–Article III tribunals than claims lacking Article III standing present, because “it might humble the judicial branch to take away a set of cases that in time may ripen into Article III disputes”<sup>110</sup> — as opposed to cases that never will. But if an adverse agency order does create an Article III injury, all cases brought before an agency might in some sense be initially unripe. If and when the agency decides against the defendant, the defendant has an “injury-in-fact,” and the dispute has ripened into an Article III case. On this view, Congress would be removing from judicial supervision cases that may be justiciable in the future, which is not much better than removing those that are justiciable now.<sup>111</sup>

None of this is to say that agency adjudication is not, as a policy matter, a good solution to the problem of otherwise unenforceable statutory rights. But the Court’s constraints on justiciability in federal courts may have broader implications than they seem to on their face. Through the inability of plaintiffs to enforce orders in their favor and the possibly one-sided ability of defendants to have courts review them, the Court’s standing rulings may have hamstrung Congress’s ability to effectively use agency adjudicators too.

### B. State Courts

The other place for non–Article III adjudication is state court.<sup>112</sup> But here, too, the Court’s justiciability decisions may have limited congressional power in unexpected ways. State courts can hear claims arising under federal law, even if federal courts could not hear the same claims due to standing or other justiciability limits.<sup>113</sup> States can and do fashion their own standing rules, leading to a “kaleidoscope” of standards around the country.<sup>114</sup> Many states follow the lead of Article III jurisprudence to some degree, though the vast majority have tests that are in various ways less stringent or more discretionary.<sup>115</sup> As Professor

<sup>110</sup> Clopton, *supra* note 58, at 1452.

<sup>111</sup> See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587, 589 (1985) (describing the “pragmatic” approach to limits on non–Article III adjudication, which scrutinizes congressional attempts to take power from courts notwithstanding formal categories of cases or contested questions); *Stern v. Marshall*, 564 U.S. 462, 510–12 (2011) (Breyer, J., dissenting) (describing the “pragmatic approach” to Article III limits on non–Article III adjudication, *id.* at 510).

<sup>112</sup> *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting).

<sup>113</sup> See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

<sup>114</sup> Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1215 (2021).

<sup>115</sup> See Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RES. L. 349, 353 (2016).

Thomas Bennett puts it, this patchwork “makes the availability of a forum for the redress of many federal claims contingent on geography.”<sup>116</sup> Where state standing rules do allow for federal claims that lack Article III standing, both plaintiffs and defendants face a mixed bag.<sup>117</sup> On one hand, cases are stuck in the forum typically thought to favor plaintiffs, and defendants lose their normal control over whether a case is removed to federal court.<sup>118</sup> On the other hand, plaintiffs face an even clearer-cut version of the one-sided appeal problem. If defendants lose in the state court system, they can appeal to the Supreme Court; if plaintiffs lose, they go home.<sup>119</sup> And unlike in the agency context, where a federal court might defer to an agency’s legal interpretation, no doctrine suggests that a federal court must defer to a state court’s interpretation of federal law.

Because *Spokeo* and *TransUnion* are so new, it is unclear whether states will adopt the same requirements.<sup>120</sup> If they do, state standing rules will be as much of a barrier to plaintiffs as federal standing rules would be in federal court. If they are concerned about the vindication of statutory rights threatened by the Court’s standing jurisprudence, states could revise or affirm their standing rules so that their courts are available to hear those claims.<sup>121</sup> Instead of relying on (some) states to protect federal rights on their own, Congress might be interested in *requiring* state courts to hear certain federal claims, notwithstanding standing rules that would otherwise keep them out.

This proposal might seem far-fetched, and, to be clear, no prominent response to *Spokeo* and *TransUnion* has offered it. But it is still worth considering, for a couple of reasons. First, as a practical matter, the more aggressively the Court applies its rule that injuries must have historical analogues, the more Congress will be constrained in creating enforceable statutory rights, and the more tempting this solution will look. Congress might further observe that the prospect of federal rights being vindicated in some states but not others undermines the concern for uniformity driving the grant of federal question jurisdiction to the

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<sup>116</sup> Bennett, *supra* note 114, at 1215.

<sup>117</sup> This is why Justice Thomas commented that *TransUnion* “might actually be a pyrrhic victory” for the defendant in that case. *TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting).

<sup>118</sup> Bennett, *supra* note 114, at 1241–42. Not only do defendants often have the choice of whether to remove to federal court, but also removability allows them to bring the case into the federal system and then petition the court to transfer it to their chosen forum. See 28 U.S.C. § 1404. This maneuver is especially effective when plaintiffs come from different places, as is often the case in a class action. See 2 WILLIAM B. RUBENSTEIN, NEWBURG & RUBENSTEIN ON CLASS ACTIONS § 6:42 (6th ed. 2022) (“In class actions, the plaintiff’s choice of forum is generally given less weight.”).

<sup>119</sup> Bennett, *supra* note 114, at 1248–49 (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952); *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989)).

<sup>120</sup> See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 174 (2018) (describing and criticizing “lockstepping,” which is the “tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts’ interpretation of the Federal Constitution”).

<sup>121</sup> See *infra* p. 1241.



federal courts in the first place. Second, as an academic matter of understanding constitutional structure, this section will show that Congress's power over state courts appears to be determined in part by the scope of authority that Article III gives federal courts. This surprising state of affairs is made all the more interesting by its disconnection from constitutional text and history.

*I. Opening the Door to Commandeering.* — Despite being dismissed by some commentators,<sup>122</sup> Congress's ability to control state courts is more doctrinally available than some might realize. After all, the Supremacy Clause refers explicitly to federal law binding state judges.<sup>123</sup> Not only must a state court hear a federal claim if it would hear a similar one arising under state law,<sup>124</sup> but also Congress has substantial power to manipulate the workings of state courts to protect the enforcement of federal rights. In a line of midcentury cases involving the Federal Employers' Liability Act<sup>125</sup> (FELA), a federal statute that protects railroad employees injured at work, the Court interpreted FELA to replace state court rules with federal rules if they were "part and parcel" of the right Congress had created.<sup>126</sup> Otherwise, applying state rules would "take away a goodly portion of the relief which Congress afforded" railroad workers.<sup>127</sup> More recently, when ruling that Congress cannot "commandeer" state executive and legislative officials, the Court expressly distinguished congressional power over state courts — "this sort of federal 'direction' of state judges is mandated by

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<sup>122</sup> See, e.g., Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1352 (2005) ("[I]t seems unreasonable that the Constitution would allow Congress to utilize state courts to enforce statutory directives where federal courts cannot.").

<sup>123</sup> U.S. CONST. art. VI, cl. 2; see also Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 140 (1998) ("Congress . . . has substantial power to determine that particular procedures must be employed to vindicate federal rights, which must be followed by state courts in entertaining federal actions.").

<sup>124</sup> Testa v. Katt, 330 U.S. 386, 394 (1947); Mondou v. N.Y., New Haven & Hartford R.R., 223 U.S. 1, 57–58 (1912) (quoting Claflin v. Houseman, 93 U.S. 130, 136–37 (1876)); Howlett v. Rose, 496 U.S. 356, 380 (1990); Haywood v. Drown, 556 U.S. 729, 741 (2009) (quoting Howlett, 496 U.S. at 381–83).

<sup>125</sup> 45 U.S.C. §§ 51–60.

<sup>126</sup> Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952) (quoting Bailey v. Cent. Vt. Ry., Inc., 319 U.S. 350, 354 (1943)) (holding that FELA required a jury trial in state court, overriding a state rule providing that judges resolve some factual questions).

<sup>127</sup> *Id.* (quoting Bailey, 319 U.S. at 354); see also Brown v. W. Ry. of Ala., 338 U.S. 294, 298–99 (1949) (quoting Davis v. Wechsler, 263 U.S. 22, 24 (1923)) (ruling state pleading rule preempted by FELA). A handful of other cases under FELA and other statutes preserved state rules arguably in conflict with federal policy as nondiscriminatory "valid excuse[s]." Douglas v. N.Y., New Haven & Hartford R.R., 279 U.S. 377, 388 (1929); Herb v. Pitcairn, 324 U.S. 117, 120–21 (1945) (quoting Douglas, 279 U.S. at 388). But those cases appear to rest on a perceived lack of congressional intent to displace state court rules, not the constitutionality of Congress doing so. See Douglas, 279 U.S. at 387–88 ("It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty.").

the text of the Supremacy Clause.”<sup>128</sup> Like any federal legislation, such policies must be “necessary and proper” for execution of one of Congress’s enumerated powers.<sup>129</sup> While fulfilling this requirement should never be taken for granted, the Court has applied it permissively to federal impositions on state courts. Two 2003 decisions held that a law tolling limitations periods for certain federal and state claims and a law deeming certain materials inadmissible into evidence were necessary and proper to effectuate Congress’s powers to organize the federal judiciary and to regulate interstate commerce, respectively.<sup>130</sup>

2. *Closing the Door*. — Forcing state courts to hear cases that federal courts cannot hear may yet be a bridge too far. In *Alden v. Maine*,<sup>131</sup> the Supreme Court ruled that Congress cannot subject states to suits in their own courts, even though the Eleventh Amendment refers only to federal courts.<sup>132</sup> Deciding otherwise, the Court explained, would mean that “the National Government would wield greater power in the state courts than its own judicial instrumentalities.”<sup>133</sup> “Article [III] in no way suggests,” the Court continued, “that state courts may be required to assume jurisdiction that could not be vested in the federal courts and forms no part of the judicial power of the United States.”<sup>134</sup> Much of the *Alden* opinion discusses the history and principles behind sovereign immunity, such that a broader rule of federal power over state courts may be dicta. But that broader rule — stated a couple of times in terms unrestricted to the context of sovereign immunity — is clear: “We are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits which are not within the judicial power of the United States and could not be heard in federal courts.”<sup>135</sup> If this is really the law, Congress could not require

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<sup>128</sup> *New York v. United States*, 505 U.S. 144, 178–79 (1992); see also *Printz v. United States*, 521 U.S. 898, 928–29 (1997).

<sup>129</sup> U.S. CONST. art. I, § 8, cl. 18; see *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) (“Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States.”).

<sup>130</sup> *Jinks v. Richland County*, 538 U.S. 456, 461–65 (2003); *Pierce County v. Guillen*, 537 U.S. 129, 134, 147 (2003). In another interesting example of Congress’s significant power over state courts, the Federal Arbitration Act, 9 U.S.C. §§ 1–16, “creates a body of federal substantive law” that preempts state court procedures, even though it does not itself create federal question jurisdiction. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (quoting *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 25 n.32); see David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 541–42 (2004).

<sup>131</sup> 527 U.S. 706 (1999).

<sup>132</sup> *Id.* at 712.

<sup>133</sup> *Id.* at 752.

<sup>134</sup> *Id.* at 753.

<sup>135</sup> *Id.* at 754. The Court acknowledged that this principle was in some tension with the “Madisonian Compromise,” whereby the Constitution does not require lower federal courts and thus implicitly assumes that state courts will hear federal claims. *Id.* at 753; see also Michael G.

state courts to hear cases that Article III standing rules barred from federal court.

The Court was not clear about where this limitation comes from. It cited an older decision that referred to the “federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute.”<sup>136</sup> But those facts would exist where state justiciability limits were more lenient than Article III’s without congressional interference in state courts at all. The *Alden* Court explained that neither the Supremacy Clause nor Article III affirmatively gives Congress the power to make state courts hear cases that federal courts cannot, without suggesting they prevent Congress from doing so in exercising its enumerated powers.<sup>137</sup> The best reading may be that commandeering state courts by making them hear cases that fall outside of Article III’s purview (but not in other ways<sup>138</sup>) falls outside of Congress’s powers under Article I.<sup>139</sup> That is, creating a right enforceable in state court that could not be vindicated in federal court is not a necessary and proper exercise of Congress’s enumerated powers.

If this reading is correct, the scope of Congress’s Article I power depends exactly on the scope of federal courts’ powers under Article III. If Article III includes a particular case, Congress could (perhaps) require a state court to hear it. If Article III does not, Congress could not require a state court to hear it (even though the state court could under its own accord). So when the Supreme Court restricts the scope of Article III, it is restricting the scope of Article I as well — and not just by making federal rights unenforceable in federal court. Not only is this result hard to find in the text of either Article I or III, but it is also in some tension with the original vision of judicial federalism, which is that state courts — not federal courts — would be primarily responsible for hearing cases arising under federal law. The “Madisonian Compromise” meant that the constitution did not require any lower federal courts,<sup>140</sup>

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Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 42 (explaining the Madisonian Compromise). But just because “state courts may be opened to suits falling within the judicial power,” *Alden*, 527 U.S. at 753, does not mean Congress can force them to be. See also *infra* pp. 1240–41.

<sup>136</sup> *Alden*, 527 U.S. at 752 (citing *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 206 (1991)).

<sup>137</sup> See *id.* at 753.

<sup>138</sup> As noted above, just a few years after *Alden*, the Court held that various other federal impositions on state courts were constitutional. See cases cited *supra* note 130.

<sup>139</sup> See *Alden*, 527 U.S. at 754 (“[W]e hold that States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.”).

<sup>140</sup> Collins, *supra* note 135, at 42; see also THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961) (“[I]t is extremely probable that . . . in the organization of the judicial power, the officers of the States will be clothed in the corresponding authority of the Union.”). Even though Congress immediately created federal courts after the Constitution’s enactment, their purpose was largely to protect out-of-state defendants from biased state judges, not to hear federal

which might imply that, if Congress can create statutory rights at all, they must be enforceable in state courts.<sup>141</sup> Despite the power of this argument, the language of *Alden* turns the default of state court jurisdiction over federal claims on its head. Congress faces a limit on its power over state courts defined not by any enumerated power of Congress (say, the Commerce Clause), but by the power of federal courts as limited by Article III.

Just as the new standing cases indirectly limit agency adjudication, they limit Congress's power over another non–Article III adjudicator as well. Again, the depreciation of the political branches' power by a doctrine purportedly meant to protect it goes much further than it at first seems.

### III. REMAINING OPTIONS

Congress may be running out of good options to protect some statutory rights. If so, the most important takeaway of Parts I and II is that the ball is in state lawmakers' court(s). The judiciary's interference with the political branches' power to make policy by creating statutory rights is surprisingly thorough. But there is no doubt that state courts can hear federal claims (unless Congress says otherwise), unbound by Article III.<sup>142</sup> Some plaintiffs may be well situated and content to bring their cases in state court, where defendants will have no ability to remove them to the federal system.<sup>143</sup> But state policymakers who want to make sure certain federal rights are enforceable should make sure that their state courts are open to hear such claims.<sup>144</sup> Because state procedural rules typically apply in state court, even in the adjudication of federal claims,<sup>145</sup> state lawmakers can make other policies, such as liberal pleading or class action rules, to open the courthouse doors as widely as possible to these federal claims that cannot be brought in federal court.<sup>146</sup>

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claims in general. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 64 (1928) (explaining that, before 1875, lower federal courts existed primarily “as protection to citizens litigating outside of their own states” — that is, to exercise diversity jurisdiction). Federal courts did not assume general federal question jurisdiction until 1875. See Act of March 3, 1875, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331).

<sup>141</sup> Collins, *supra* note 135, at 42; see also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953) (noting that in cases where federal courts lack jurisdiction to hear claims, “[i]f federal rights are involved, perhaps the state courts are under a constitutional obligation to vindicate them”).

<sup>142</sup> *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting).

<sup>143</sup> See *supra* p. 1237.

<sup>144</sup> See Clopton, *supra* note 58, at 1464.

<sup>145</sup> See FED. R. CIV. P. 1 (stating that the Federal Rules of Civil Procedure govern proceedings in federal courts).

<sup>146</sup> See Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 424 (2018). This sort of state policymaking reflects contrary visions of American federalism: one in which states are autonomous challengers to the federal government and another in which states

But plaintiffs have major problems even with the friendliest of state policymakers on their side. Through recent constitutional jurisprudence in another area, involving the Due Process Clause, the Supreme Court has limited state courts' adjudication of claims against out-of-state defendants, requiring (roughly) that plaintiffs sue either where the events underlying their claims happened or where the defendant is at home.<sup>147</sup> This is a big problem when plaintiffs who were injured in different states want to sue together. It is an even bigger problem for those with claims that cannot be brought in federal court, for two reasons. First, they could be brought only in states that have more permissive standing rules than federal courts do, which might not be the same states where major corporate defendants incorporate or locate their headquarters.<sup>148</sup> Second, some observers have noted that the kinds of cases that the new standing rules are most likely to keep out of federal courts tend to involve small-dollar claims brought by many, dispersed plaintiffs against large corporate defendants.<sup>149</sup> Enterprising state lawmakers might try to find their way around these rules, such as by enacting statutes that require corporations to *consent* to state court jurisdiction as a condition of doing business<sup>150</sup> — but a case currently pending in the Supreme Court threatens to block that path too.<sup>151</sup>

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carry out federal policy. See Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1260–64 (2009). On one hand, state lawmakers would be looking for ways around — some might say subverting — the Supreme Court's interpretation of constitutional restraints on courts. On the other hand, the whole point of doing so would be to effectuate the will of federal policymakers.

<sup>147</sup> See *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014); *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1781 (2017). *Bristol-Myers Squibb* was not a class action, and it is unclear whether an action representing out-of-state unnamed class members could be brought against out-of-state defendants if the named plaintiffs were injured in the forum state. See *id.* at 1789 n.4 (Sotomayor, J., dissenting). Most lower courts to consider the question have held that it could. 2 RUBENSTEIN, *supra* note 118, § 6:30.

<sup>148</sup> See *Daimler*, 571 U.S. at 137 (noting that these are two places in which a corporation can be subject to general jurisdiction).

<sup>149</sup> See Beske, *supra* note 49, at 753–54 (highlighting “consumer protection and data privacy” cases where lower courts have struggled to apply *Spokeo*); Chemerinsky, *supra* note 42, at 285–86 (offering cases fitting this description as examples of those lacking traditional judicial recognition). For example, violations of the federal law at issue in *Spokeo* and *TransUnion*, the Fair Credit Reporting Act, “lend themselves to resolution through class action litigation” because “they tend to involve a large number of harmed individuals with small claims, often dispersed throughout the country.” 7 RUBENSTEIN, *supra* note 118, § 21:4.

<sup>150</sup> Pennsylvania is the only state with a corporate registration statute that does this explicitly, 42 PA. CONS. STAT. § 5301(a)(2)(i)–(ii), but courts have sometimes interpreted other states' registration statutes to implicitly require consent to state court jurisdiction. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1363–69 (2015).

<sup>151</sup> *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 569 (Pa. 2021) (striking down Pennsylvania's consent-by-registration statute), *cert. granted*, 142 S. Ct. 2646 (2022).

## CONCLUSION

No one can say for sure how justiciability limits and related doctrines will develop in the future. The Supreme Court could retreat from its recent intrusions on the congressional power to confer standing, perhaps by rephrasing or otherwise limiting the reach of its most aggressive pronouncements of standing limits. The other branches could exercise their own powers over the Supreme Court to manipulate its constitutional jurisprudence or to amend the Constitution.<sup>152</sup> But the current trend is clear. Recent standing cases seriously threaten the enforcement of important federal statutory rights in federal courts. And, as this Note has shown, they probably go even further in constraining policymakers, also limiting their ability to use non–Article III adjudicators such as agencies and state courts instead. Whatever happens, the stage is set for a struggle over the enforcement of certain federal rights with the actors cast in strange roles: states in favor, the federal courts against, and federal policymakers — the same ones who created the rights in the first place — sitting in the audience.

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<sup>152</sup> See Jill M. Fraley, *Against Court Packing, Or a Plea to Formally Amend the Constitution*, 42 CARDOZO L. REV. 2777, 2778–81 (2021).