ASYMMETRICAL JURISDICTION

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Most people—and most lawyers—would assume that the U.S. Supreme Court has jurisdiction to review any determination of federal law by an inferior court, whether state or federal. And there was a time when it was so. But the Court's recent justiciability decisions have created a perplexing jurisdictional gap—a set of cases in which state court determinations of federal law are immune from the Supreme Court's appellate jurisdiction. The Court has thus surrendered a portion of its supremacy and thereby undermined the policies that underlie its appellate jurisdiction.

In an effort to address this problem, the Court has created a strange exception to its justiciability doctrines that turns the rationale for appellate jurisdiction on its head. The Court has held that it may exercise appellate jurisdiction over otherwise nonjusticiable cases only where the state court has upheld the claimed federal right. As a matter of history and of doctrine, however, this is precisely the set of cases where Supreme Court review is least needed. A number of scholars have proposed attacking the problem by requiring state courts hearing federal questions of law to apply federal justiciability doctrines. But this view is difficult to justify doctrinally, and, paradoxically, it risks undermining federal interests by preventing state court enforcement of federal rights and policies in a broad swath of cases.

This Article proposes a more coherent solution to the jurisdictional gap—restoring the understanding of the Supreme Court's appellate jurisdiction that was held by the founding generation: namely, that it extends to review of all state court determinations of federal law that are adverse to the claimed federal right. This approach finds ample support in the text and history of Article III's grant of Supreme Court appellate jurisdiction and has two principal advantages over current doctrine and previous proposals for reform. First, it better serves the policies underlying Supreme Court appellate jurisdiction by restoring the Court's supremacy as to all determinations of federal law by inferior courts. Second, it is more consistent with the Supreme

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Court's practice in other doctrinal areas of treating its appellate jurisdiction over state court determinations of federal law as exempt from certain constitutional restrictions on the federal judicial power. It thus eliminates a puzzling inconsistency in the Court's treatment of its own appellate jurisdiction in different contexts.

INTRODUCTION

One of the principal tensions in federal jurisdiction is between the U.S. Supreme Court's role as guardian of federal supremacy and the independent authority of state courts to adjudicate federal substantive rights without having to heed federal jurisdictional constraints. Most people would assume that this fundamental tension is resolved in favor of federal jurisdiction and that the Supreme Court has authority to review any judgment by a state or federal court adverse to a claimed federal right. And there was a time when it was so. In recent decades, however, the Supreme Court's justiciability decisions have created a jurisdictional gap—a category of cases in which state courts may exercise jurisdiction over questions of federal law, but the Supreme Court may not review their decisions on appeal. This jurisdictional gap, and the underlying tension it exposes between federal supremacy and state sovereignty, undermines a basic structural premise of our Constitution and threatens the consistent enforcement of federal policy.

Consider, for example, the heated assault by elected state officials on the 2010 federal health care reform bill, the Patient Protection and Affordable Care Act (PPACA, or the Act). Attorneys General in twenty-seven states have sued to bar implementation of parts of the Act, generally on federal constitutional grounds.[1] Meanwhile, seven states have enacted statutes purporting to provide that the Act's health insurance mandates shall not be effective in the state, and state legislators in at least thirty-four other states have introduced bills purporting to nullify or challenge the health insurance mandate or other provisions of the Act.[2] This challenge to federal authority is without recent precedent, and it exposes the unintended consequences of changes to federal justiciability doctrine.

One might expect that the U.S. Supreme Court would be the final arbiter of the constitutionality of the PPACA and of the conflicts between the federal and state statutes. But the perplexing jurisdictional gap described above means that state supreme courts may have the final say on both these questions within the confines of their respective state court systems. State courts generally exercise concurrent jurisdiction over questions of federal law. And because state courts can hear cases that would be nonjusticiable in federal court, the effective implementation of the PPACA within a particular state could depend on a determination of federal law by elected state court judges.[3]

1. *See infra* Part II.B.
2. *See infra* Part II.B.
3. *See infra* Part II.B.

A state court judgment upholding a state law nullifying the PPACA would be immune from Supreme Court review if rendered in a case that did not meet federal justiciability standards.[4]

This is so because the Supreme Court's recent justiciability case law ties its hands in such cases. The Court has held that federal justiciability requirements are constitutionally mandated constraints on federal jurisdiction, applicable not only to the original jurisdiction of lower federal courts, but also to the Supreme Court's appellate jurisdiction.[5] In contrast, most state courts treat the doctrines of standing, mootness, and ripeness as discretionary, holding that they possess broad discretion to hear cases that are moot or unripe, or in which the plaintiff lacks standing.[6] State justiciability law is a question of state court jurisdiction, which is a matter generally committed to the authority of state government, rather than one imposed by the federal Constitution.[7] From these principles, the Court has deduced that it lacks jurisdiction over state court determinations of federal law rendered in cases that would not satisfy federal justiciability standards.[8]

The Court, in other words, has created a troublesome gap—a class of cases in which the Supreme Court is not necessarily the supreme arbiter of federal law. Health care costs and benefits are largely prospective, and challenges to the federal health care Act, as well as the various state statutes challenging the Act, raise serious standing and ripeness concerns.[9] It is therefore easy to imagine a challenge to the federal health care Act filed in state court by a plaintiff whose claim is not justiciable under federal standards, either

4. *See infra* Part III.A.

5. *See infra* Part I.B.2. Commentators have observed that the results in many cases are not consistent with the Court's rhetoric of standing, mootness, and ripeness as mandatory jurisdictional bars. *See infra* notes 27, 59–60, and accompanying text.

6. *See infra* Part I.B.3.

7. *See infra* Part I.B.3; *see also* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (holding that Article III's "Cases or Controversies" clause—ostensibly the source of federal justiciability doctrines—does not constrain state court jurisdiction). There are, of course, limited exceptions to the proposition that state court jurisdiction is not a question of federal law. But, as discussed *infra* in Part III.B, these exceptions do not apply in the circumstances discussed herein.

8. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 316–17 (1974) (dismissing as moot an appeal from a state court's determination of federal law); Doremus v. Bd. of Educ., 342 U.S. 429, 432–35 (1952) (same); Tileston v. Ullman, 318 U.S. 44, 46 (1943) (same); *see also* ASARCO, 490 U.S. at 617–24 (holding that the federal standing doctrine limits the U.S. Supreme Court's appellate jurisdiction even on appeal of a federal question from state court).

9. *See, e.g.*, Rosalind S. Helderman, *Obama Administration Asks Judge to Dismiss Virginia Suit Against Health-Care Law*, WASH. POST, May 25, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/05/24/AR2010052404073.html; Simon Lazarus & Alan Morrison, *Lawsuit Abuse, GOP Style*, SLATE, May 5, 2010, http://www.slate.com/id/2252867; *see also* Astrid Fiano, *Feds Move for Dismissal of Florida Suit Challenging Health Reform Law*, DOTMED NEWS, June 22, 2010, http://www.dotmed.com/news/story/13085.

because the plaintiff lacks standing or because the plaintiff's claim is unripe or moot. In such a case, the fate of the federal health care bill within a particular state could rest entirely in the hands of state court judges[10]—judges who are typically elected and thus may be susceptible to local bias or political pressure.[11]

This Article argues that the Supreme Court's self-imposed nonsupremacy with respect to federal questions adjudicated by state courts in cases that would not satisfy federal justiciability standards is a mistake, both as a matter of doctrine and as a matter of policy. Neither the Court nor the legal scholars who have addressed various aspects of this problem have yet proposed a satisfactory solution. The Court recognizes an exception to its own doctrine but only when the state court has *upheld* a plaintiff's federal right. This approach, in my view, solves the wrong half of the problem because it leaves irremediable the judgments of state judges that give preference to state law over federal law. Some scholars would ignore principles of federalism and impose federal jurisdictional rules on sovereign state courts. This approach has the virtue of evenhandedness, but it deeply interferes with state prerogatives to structure state judicial systems as state authorities see fit. In this Article, I propose a simpler solution: The justiciability doctrines that constrain the original jurisdiction of federal courts should not apply in the same way or to the same extent to the Supreme Court's appellate jurisdiction. In particular, the Supreme Court's appellate jurisdiction over state court determinations of federal law should be coextensive with state court jurisdiction to hear federal questions.

The Article proceeds in four parts. Part I traces the distinct evolutionary paths of state and federal justiciability doctrines in the twentieth century and describes the resulting jurisdictional asymmetry. Part II describes the problem that has resulted: the creation of a whole category of state court determinations of federal law that are insulated from Supreme Court review, and thus

10. The effect of such an unreviewable state court determination of federal law would likely be limited to the parties and other litigants in the same state court system, inasmuch as federal courts would not, of course, be bound by a state court's determination of federal law, either as precedent or by preclusion. *See ASARCO*, 490 U.S. at 621–22.

11. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 346–47 (1816) (holding that the constitutional scheme presupposes that "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice"). As Justice Marshall famously put it in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821), "When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist . . . ." *See also id.* at 386–87 (stating that state courts cannot be relied on adequately to enforce federal rights because "[i]n many States the judges are dependent for office and for salary on the will of the legislature").

immune from the Supreme Court's ordinary functions of protecting federal rights while generating uniformity. Part III canvasses the approaches taken by the Supreme Court and by scholars to this problem and argues that none of these proposed solutions is satisfactory. Part IV advances a more balanced and workable approach: recognizing that an appeal to the Supreme Court from a state court judgment on a question of federal law fully satisfies Article III's case or controversy requirement, whether the prevailing party in state court was the plaintiff or the defendant. This proposed approach would protect the Supreme Court's role in enforcing federal rights and ensuring constitutional uniformity, without abrogating the principle that state court jurisdiction is a question of state law.

I. THE EVOLUTION OF JURISDICTIONAL ASYMMETRY

The Supreme Court can review only those cases over which it has jurisdiction. But the people who wrote and adopted the Constitution and the first Judiciary Act intended the Supreme Court's appellate jurisdiction to encompass every state court judgment that rejects a claim of federal right.[12] This understanding has been turned on its head in recent decades by the divergent evolution of federal and state justiciability law. Over the past eighty years the Court has transformed federal justiciability doctrine by recognizing constitutional limitations on its ability to hear cases, while state courts generally have continued to treat their justiciability doctrines as discretionary. Thus, it no longer is true that all state court determinations adverse to a claimed federal right are subject to Supreme Court review.

In this Part, I show that this jurisdictional asymmetry leaves the Supreme Court in an awkward position—unable to review state court determinations of federal law when the case is nonjusticiable by federal standards, and yet unable to vacate the state court decision because the state court properly determined that it had jurisdiction. The divergent evolution of justiciability doctrine has upset the delicate balance between state and federal judicial power envisioned and established by the founders. It has also frustrated the policies underlying Supreme Court appellate review of state court determinations of federal law.

12. *See infra* Part I.A.

A. The Founders' Balance

The Constitution creates only one federal court—"one supreme Court"[13]—and leaves open the question whether there should be inferior federal courts.[14] The delegates to the Constitutional Convention understood that state courts would exercise jurisdiction over federal claims—and, indeed, that they would be the only inferior courts that could do so if Congress declined to create inferior federal courts.[15] The founders understood that state courts would hear federal claims,[16] and Alexander Hamilton wrote in Federalist 82 that the power to do so was inherent in the judicial power of state courts unless Congress expressly prohibited it:

> [I]n every case in which they were not expressly excluded by the future acts of the national legislature, [State courts] will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. 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 parts of the globe. . . . When in addition to this we consider the State governments and the national government, as they truly are, in the light of kindred

13. U.S. CONST. art. III, § 1.

14. The question of whether to create lower federal courts caused a nearly irreconcilable division among the delegates to the Convention. Some delegates viewed lower federal courts as an essential part of the new federal system, while others regarded them as redundant of the state courts at best and a threat to state sovereignty at worst. The result was what has come to be known as the "Madisonian compromise"—an agreement not to decide the matter, but instead leave to Congress the decision whether to create inferior federal courts at all and, if so, how extensive their jurisdiction should be. *Id*. Congress did not provide for general federal question jurisdiction in the federal courts until nearly one hundred years after the ratification of the Constitution. The Judiciary Act of 1789 provided for jurisdiction over various categories of actions, including actions in which the United States was a party, actions between citizens of different states, and actions in which an alien was a party. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. It did not, however, provide for general federal question jurisdiction. *See id.* at 73–93.

15. *See Martin*, 14 U.S. at 339–40 (noting that Congress might have declined to establish inferior federal courts, leaving state courts as the only inferior courts for enforcement of federal law); *see also ASARCO*, 490 U.S. at 617 (noting that state courts could have been the only inferior courts since "inferior federal courts are not required to exist under Article III"); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 201–19 (2007) (arguing that the founders intended state tribunals to operate under the supervision and control of the Supreme Court with respect to adjudications of federal law).

16. *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124–25 (Max Farrand ed., 1966) (remarks of John Rutledge) ("State tribunals ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights."); *see also* Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 982–86 (2010).

> 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.[17]

The founders nonetheless had two concerns about leaving the enforcement of federal law to state courts. First, state courts, being subject to local bias or political pressure, might provide inadequate enforcement of federal rights.[18] Second, different state courts might give different interpretations to the same law, creating "truly deplorable public mischiefs."[19] I will refer to these concerns as the underenforcement problem and the uniformity problem.

To address these twin concerns, the founders provided for "one supreme Court"[20]—a "court of supreme and final jurisdiction"[21]—with appellate jurisdiction over determinations of federal law made by other courts.[22] From the first, this grant of appellate jurisdiction was interpreted to apply to determinations

17. THE FEDERALIST NO. 82, at 516 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). This understanding was borne out by the practice of state courts in the early modern period of reviewing state and federal laws for compliance with the federal constitution. *See, e.g.*, Nunn v. State, 1 Ga. 243, 251 (1846) (holding part of a state statute unconstitutional on federal constitutional grounds); Griffin v. Wilcox, 21 Ind. 370, 372–73 (1863) (holding a federal statute unconstitutional); Larthet v. Forgay, 2 La. Ann. 524, 525 (1847) (holding that a warrantless search violated the Fourth Amendment prohibition on unreasonable searches and seizures); Wetherbee v. Johnson, 14 Mass. 412, 421 (1817) (holding a federal statute unconstitutional); *see also* Mazzone, *supra* note 16, at 985–90.

18. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 386–87 (1821) (stating that state courts cannot be relied on adequately to enforce federal rights because "[i]n many States the judges are dependent for office and for salary on the will of the legislature[, and w]hen we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist"); *see also Martin*, 14 U.S. at 346–47 (noting that the constitutional scheme presupposes that "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice").

19. *Martin*, 14 U.S. at 347–48 (noting that the Supreme Court's appellate jurisdiction over state courts is based on "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution[, and i]f there were no revising authority to control the[ ] jarring and discordant judgments [of state courts], and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states[, and t]he public mischiefs that would attend such a state of things would be truly deplorable").

20. U.S. CONST. art. III, § 1.

21. THE FEDERALIST NO. 81, *supra* note 17, at 505 (Alexander Hamilton) ("That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested.").

22. U.S. CONST. art. III, § 2 (granting the Supreme Court appellate jurisdiction over, among other things, "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," subject to Congress's power to make "exceptions"); *Martin*, 14 U.S. at 346–51 (holding that the structure of the constitutional scheme indicates that the Supreme Court must have power to review state court determinations of federal law); *see also* Pfander, *supra* note 15, at 212–14.

of federal law made by *any* court within the United States, whether state or federal,[23] and the Court repeatedly has held that it possesses appellate jurisdiction over state court determinations of federal law.[24] The Court's appellate jurisdiction over state court determinations of federal law has enabled it to enforce the supremacy of federal law[25] and to provide for the uniform interpretation thereof.[26]

B. Upsetting the Balance

The founders' balance—state court power to adjudicate federal questions, subject to the Supreme Court's appellate jurisdiction—held for well over a century. Since the mid-twentieth century, however, federal justiciability doctrines have evolved from prudential and discretionary doctrines into constitutionally mandated jurisdictional limitations. Federal courts now are said to lack power to hear claims that are moot or unripe, or with respect to which

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23. *See Martin*, 14 U.S. at 338–40; *see also* THE FEDERALIST NO. 22, *supra* note 17, at 197 (Alexander Hamilton) (arguing that the Supreme Court must have power to review state courts because national uniformity would be impossible "[i]f there is in each State a court of final jurisdiction").

24. *See Martin*, 14 U.S. at 338–49 (holding that the Supreme Court's appellate jurisdiction must extend to state court determinations of federal law, for reasons including the necessity of uniformity and the need to ensure adequate enforcement of federal claims of right).

25. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 10.1, at 638 (4th ed. 2003) (stating that "only the Supreme Court can ensure the supremacy of federal law," and noting that "[w]ithout Supreme Court review of state court decisions, states would be free to disregard federal statutes and even the Constitution"); *see also* Pfander, *supra* note 15, at 212–14.

26. *See* CHEMERINSKY, *supra* note 25, § 10.1, at 638–39 (noting that the Court's authority to review determinations of federal law by state and federal courts "serves to ensure the uniformity of federal law" in furtherance of the policy "that federal law should mean the same thing in all parts of the country").

Professors Frost and Mazzone have argued that the founders accorded far less weight to ensuring uniformity than does the modern Court. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1614–26 (2008); Mazzone, *supra* note 16, at 980 (arguing that the Supreme Court's supremacy is "a myth"). Professors Frost and Mazzone both note that the Judiciary Act of 1789 excepted from Supreme Court appellate jurisdiction cases in which the state court had validated the claim of federal right, *see* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87, and conclude that the founders' concern with uniformity was at best a qualified one. It might be more precise to say that the founders were concerned with a specific kind of uniformity: a "common floor of federal constitutional rights throughout the country." Mazzone, *supra* note 16, at 989; *see also* Kansas v. Marsh, 548 U.S. 163, 202 (2006) (Stevens, J., dissenting) ("[D]uring the entire period between 1789 and 1988, the laws enacted by Congress placed greater weight on the vindication of federal rights than on the interest in the uniformity of federal law."). The first Congress was willing to tolerate non-uniform interpretations of federal law by state courts, that is, *only to the extent that those courts vindicated claims of federal right*. Thus, one might argue that the founders evinced more concern over the underenforcement problem than the uniformity problem. Over time, however, the desire for a uniform interpretation of federal law has taken on greater salience. In 1914, Congress extended the Supreme Court's appellate jurisdiction to all state court determinations of federal law. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790.

the plaintiff lacks standing.[27] Yet state courts have, for the most part, continued to treat these same justiciability doctrines as only discretionary.[28]

1. The Prudential Precursors of Modern Justiciability Doctrines

Courts, both state and federal, have long recognized that it generally is undesirable to expend judicial resources hearing cases that cannot alter the affairs of the parties or have otherwise been deprived of vitality by circumstances occurring out of court.[29] Cases in which the litigation concerns an object that has been destroyed,[30] for instance, or in which the plaintiff seeks relief that no longer can be granted,[31] routinely have been dismissed as "moot" since the early days of the American republic.[32] And long before the doctrine of standing had acquired a name, courts dismissed cases in which the plaintiff appeared to lack a personal stake in the outcome of the litigation.[33]

27. Many commentators have, of course, observed that, despite the "mandatory" rhetoric surrounding federal justiciability doctrines, in actual practice courts seem to exercise significant discretion over whether and how to apply the doctrines. *See generally* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229–34 (1988); Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 584–98 (2009); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163 (1992).

28. I use the term "justiciability" to refer to the doctrines that limit federal court power based on the Cases or Controversies Clause—namely, standing, mootness, and ripeness. *Cf.* Flast v. Cohen, 392 U.S. 83, 95 (1942) ("Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine."). Other doctrines that bear on what cases federal courts can and will hear—such as the political question doctrine, the act of state doctrine, and various abstention doctrines—are beyond the scope of this Article.

29. *See, e.g.*, United States *ex rel.* Norwegian Nitrogen Prods. Co. v. U.S. Tariff Comm'n, 274 U.S. 106 (1927) (concluding that a dispute over an information request becomes moot when a hearing to consider the request is held); Atherton Mills v. Johnston, 259 U.S. 13 (1922) (concluding that an action contesting the validity of a child labor statute becomes moot when the child at issue reaches an age no longer affected by the statute); Berry v. Davis, 242 U.S. 468 (1917) (concluding that an action to enjoin enforcement of a statute becomes moot when the statute is repealed).

30. *See, e.g.*, Brownlow v. Schwartz, 261 U.S. 216 (1923) (concluding that a controversy over a building becomes moot when the building is sold to an uninvolved third party); California v. San Pablo & Tulare R.R. Co., 149 U.S. 308 (1893) (concluding that an action to recover taxes owed by a railroad company becomes moot when the taxes are paid); Nat'l Ass'n of Sec. Dealers v. SEC, 143 F.2d 62, 63 n.1 (3d Cir. 1944) (concluding that a dispute over the applicability of a regulatory statute to a sale of bonds becomes moot when the bonds are redeemed by the obligor).

31. *See, e.g.*, Cheong Ah Moy v. United States, 113 U.S. 216 (1885) (dismissing as moot a habeas petition after the petitioner had been deported).

32. *See, e.g.*, Allen v. Georgia, 166 U.S. 138, 140 (1897); Smith v. United States, 94 U.S. 97, 97 (1876) ("[W]e are not inclined to hear and decide what may prove to be only a moot case.").

33. *See, e.g.*, Waite v. Dowley, 94 U.S. 527, 534 (1876) (describing a case as "moot" where the plaintiff asserted a claim belonging to a third party); *cf.* Lord v. Veazie, 49 U.S. (8 How.) 251, 253 (1850) (holding that "a fictitious suit, or a feigned issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, is a contempt of court, and will be dismissed on motion").

The doctrines of mootness and standing espoused in federal courts today, however, have undergone substantial transformation. Although courts of the nineteenth century routinely dismissed a whole host of cases on the ground that they were not genuine disputes,[34] those same courts generally gave no indication that they lacked *authority* to hear moot or otherwise abstract cases.[35] Rather, courts dismissed such cases using language suggesting an exercise of discretion.[36] The explanations given for declining to hear such cases tended to focus not on constitutional text, but on instrumental concerns, such as conservation of judicial resources,[37] preservation of judicial

34. These included feigned or collusive cases in which the parties colluded to bring the case "for the purpose of obtaining the opinion of th[e] court on important constitutional questions without the actual existence of the facts on which such questions can alone arise." Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 134–35 (1873); *see also* United States v. Johnson, 319 U.S. 302 (1943) (dismissing a case upon discovering that the defendant had selected the plaintiff's counsel and that counsel had never met his client); *Allen*, 166 U.S. at 140; *Veazie*, 49 U.S. at 253 (holding that "a fictitious suit, or a feigned issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, is a contempt of court, and will be dismissed on motion"); *Ex parte* Steele, 162 F. 694, 701 (N.D. Ala. 1908) (defining a moot case as "one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy"); Coxe v. Phillips, 95 Eng. Rep. 152 (K.B.) (1736) (holding that an attempt to conduct a fictitious action was a contempt of court). They also included cases that today would be termed "unripe"—that is, cases challenging an action that had not yet occurred and was not reasonably certain to occur. Nineteenth-century cases did not use the term "unripe," but instead lumped such cases together with other "moot" or abstract cases. For instance, in *Tregea v. Modesto Irrigation District*, 164 U.S. 179 (1896), the Court faced a challenge to a statute authorizing an irrigation district to issue bonds. The Court found that the district had not yet decided to issue bonds and held that a determination of the district's authority to issue bonds prior to any attempt by the district to do so would be purely advisory in nature. The Court thus dismissed the case as "moot," although in modern parlance we might call the case unripe. *Id.* at 185–86; *see also Smith*, 94 U.S. at 97 ("[W]e are not inclined to hear and decide what *may prove to be* only a moot case." (emphasis added)); *Waite*, 94 U.S. at 534 (describing as "moot" a case in which the plaintiff asserted a third party claim that was unripe and might "never be raised by any party entitled to raise it").

35. *See* Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) ("[I]t seems very doubtful that the earliest case I have found discussing mootness, *Mills v. Green*, 159 U.S. 651 . . . (1895), was premised on constitutional constraints; Justice Gray's opinion in that case nowhere mentions Art. III.").

36. *See, e.g.*, *Allen*, 166 U.S. at 140 ("[W]e have repeatedly held that *we would not* hear and determine moot cases . . . ." (emphasis added)); *Smith*, 94 U.S. at 97 ("[W]e are not *inclined* to hear and decide what may prove to be only a moot case." (emphasis added)).

37. *See, e.g.*, United States v. Johnson, 319 U.S. 302 (1943); *cf.* Mills v. Green, 159 U.S. 651, 653 (1895) ("The defendant moved to dismiss the appeal . . . [arguing] 'there is now no actual controversy involving real and substantial rights between the parties to the record . . . .' We are of opinion that the appeal must be dismissed upon this ground, without considering any other question appearing on the record . . . ."); *Waite*, 94 U.S. at 534.

authority,[38] ensuring that issues are litigated by properly motivated parties,[39] and preventing collusive cases.[40]

For instance, in *United States v. Johnson*,[41] the Court dismissed a case in which the plaintiff and defendant appeared to have colluded to obtain the Court's judgment in a suit that the Court determined was "not in any real sense adversary."[42] The Court dismissed the case in terms that emphasized such dismissals were discretionary and not mandatory, unless the public interest was threatened by hearing the case.

> Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it *may* set aside any adjudication thus procured and dismiss the cause . . . . It is the court's *duty* to [dismiss] where, as here, the public interest has been placed at hazard . . . .[43]

The *Johnson* Court's emphasis on the Court's discretion was echoed in other cases in the nineteenth and early twentieth centuries as well.[44]

In similar fashion, when federal courts in the nineteenth and early twentieth centuries decided to hear cases that appeared moot or otherwise abstract, they justified those decisions based on practical considerations.[45] Thus, courts articulated both a general rule that such cases should be dismissed and a series of exceptions to that rule to permit consideration of abstract cases when compelling reasons existed to hear them. These exceptions to the justiciability rules were expressly justified based on practical considerations of judicial economy,[46] avoidance of party

38. *See, e.g.*, *Johnson*, 319 U.S. at 305; *Smith*, 94 U.S. at 97 (dismissing a criminal defendant's appeal from conviction when the defendant had refused to subject himself to the Court's judgment by escaping from prison); *see also* Walling v. Reuter Inc., 321 U.S. 671 (1944) (concluding that the defendant's decision to cease business activities will not deprive a court of jurisdiction); *Coxe*, 95 Eng. Rep. 152 (holding that an attempt to conduct a fictitious action was a contempt of court).

39. S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300, 301 (1892) (concluding, on the appeal of an action between two corporations that came under the control of the same person after judgment was rendered in the lower court, that "litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one"); *Waite*, 94 U.S. at 534 ("This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it"); *Veazie*, 49 U.S. at 253 (holding that "a fictitious suit, or a feigned issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, is a contempt of court, and will be dismissed on motion").

40. *See, e.g.*, Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 134–35 (1873).

41. 319 U.S. 302.

42. *Id.* at 305.

43. *Id.*

44. *See infra* notes 45–49 and cases cited therein.

45. *See, e.g.*, S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 514–16 (1911); Mills v. Green, 159 U.S. 651, 654 (1895).

46. *See, e.g.*, Smith v. United States, 94 U.S. 97, 97 (1876).

gamesmanship,[47] and the desirability of resolving issues that were both substantively important and likely to recur.[48]

Finally, the earliest federal ripeness cases, too, generally spoke of dismissal as discretionary rather than mandatory and emphasized the policy reasons for dismissal, such as judicial economy and avoidance of party collusion.[49] Indeed, "prior to the 1970s, ripeness was generally considered a matter of prudential concern, which could be shaped and applied flexibly as individual cases warranted."[50]

In their earliest incarnations, then, standing, mootness, and ripeness were generally applied as though they were discretionary, prudential doctrines.[51] As discussed below, it was only in recent decades that the Supreme Court changed direction, holding that mootness[52] and standing[53] were constitutionally mandated jurisdictional bars.

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47. *See, e.g.*, *Mills*, 159 U.S. at 654 (noting that "if the intervening event is owing either to the plaintiff's own act, or to a power beyond the control of either party, the court will stay its hand"). Despite *Liner v. Jafco*'s, 375 U.S. 301 (1964), nominal constitutionalization of mootness, *see infra* Part I.B.2, modern courts often focus on the same prudential concerns. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000) (stating that the Court's interest "in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness"); Khouzam v. Ashcroft, 361 F.3d 161, 167–68 (2d Cir. 2004) (holding that an alien's petition for review was not moot after the petitioner and the government agreed to vacate the Board of Immigration Appeals decision that would have deported the alien to Egypt, stating that "[a]t oral argument, we expressed doubts as to the soundness of the Attorney General's definition of torture[, and f]or the government to agree to a *vacatur* two weeks *after* oral argument suggests that it is trying to avoid having this Court rule on that issue").

48. *See, e.g.*, *S. Pac. Terminal Co.*, 219 U.S. at 515–16; Grossberg v. DeEusebio, 380 F. Supp. 285, 292 (E.D. Va. 1974) (declining to dismiss a claim as moot despite the fact that the plaintiffs "will never again be susceptible to the conduct of which they complained" because hearing the claim "is the only effective means to insure full and deliberate adjudication of the Establishment clause issues they raise").

49. For instance, in *Tregea v. Modesto Irrigation District*, 164 U.S. 179 (1896), the Court dismissed the plaintiff's case on grounds that modern courts would classify under the ripeness doctrine, although it did not use that term. *Id.* at 185–86; *see also* Smith v. United States, 94 U.S. 97, 97 (1876) ("[W]e are not inclined to hear and decide what *may prove to be* only a moot case." (emphasis added)); Waite v. Dowley, 94 U.S. 527, 534 (1876) (describing as "moot" a case in which the plaintiff asserted a third party claim that was unripe and might "never be raised by any party entitled to raise it").

50. Lumen Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175, 228–29 (2010); *see also* Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162–64 (1967); Poe v. Ullman, 367 U.S. 497, 502–04 (1961) (describing the ripeness doctrine as one of a series of rules developed by the Court for its own prudential governance).

51. Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring); *see also Mills*, 159 U.S. at 653. *But see* Eisler v. United States, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting) ("We can decide only cases or controversies. A moot case is not a 'case' within the meaning of Art. III.").

52. *Liner*, 375 U.S. 301.

53. *See infra* Part I.B.2; *see also* Sunstein, *supra* note 27, at 168 (noting that a principal feature of modern standing doctrine "is an insistence that Article III requires injury in fact, causation, and redressability—requirements unknown to our law until the 1970s").

2. The Evolution of Federal Justiciability Doctrines Into Mandatory Limits on Jurisdiction

Although early justiciability cases were based largely on prudential considerations, the Supreme Court in the mid–twentieth century transformed standing, mootness, and ripeness into ostensibly jurisdictional doctrines mandated by the Constitution.[54] Of particular importance, in a series of cases in the mid–twentieth century, the Court began to constitutionalize the principal requirement of modern standing doctrine: injury in fact.[55] Then, in *Liner v. Jafco*,[56] the Court dropped the other shoe, holding that "[a] moot case is not a 'case' within the meaning of Art. III."[57] Finally, in a series of cases dating from the mid-1970s, the Court "has been clear that, although the ripeness demand may have begun as an exercise in judicial discretion, it is now firmly planted in the Constitution."[58] Some scholars have questioned the notion that current federal justiciability doctrines are mandated by Article III,[59] while

54. *See, e.g.*, Abbott Labs v. Gardner, 387 U.S. 136 (1967) (ripeness); *Liner*, 375 U.S. at 306 n.3 (mootness); Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (describing the doctrine of standing as a jurisdictional limit derived from the "Cases or Controversies" clause); *see generally* Hall, *supra* note 27, at 571–73; Sunstein, *supra* note 27, at 169 (noting that only eight references to "standing" as an Article III limitation appear in Supreme Court cases prior to 1965—and none before 1944).

55. *See* Flast v. Cohen, 392 U.S. 83, 97 (1968) (noting that "justiciability . . . doctrine has become a blend of constitutional requirements and policy considerations," and remarking on "uncertain and shifting contours" between policy-driven rules of judicial self-governance and constitutionally mandated jurisdictional limitations); *see generally* Sunstein, *supra* note 27, at 183–86.

56. 375 U.S. 301.

57. *Id.* at 306 n.3. *Liner*'s statement that Article III requires dismissal of moot claims was arguably dicta, given that the Court in *Liner* found the claims at issue in that case not to be moot and declined to dismiss them. Subsequent cases, however, followed without question *Liner*'s rationale in holding that dismissal of moot claims was constitutionally mandated. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Lewis v. Cont'l Bank Corp., 494 U.S. 472 (1990); Honig v. Doe, 484 U.S. 305 (1988); Preiser v. Newkirk, 422 U.S. 395 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974); SEC v. Med. Comm'n for Human Rights, 404 U.S. 403 (1972); North Carolina v. Rice, 404 U.S. 244 (1971). The constitutional basis of the mootness bar thus swiftly acquired the patina of settled doctrine.

58. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 162–63 (1987); *see also* Mulligan, *supra* note 50, at 229 (noting the Burger Court's transformation of ripeness into "a jurisdictional issue mandated by Article III").

59. *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 827 (1969); Fletcher, *supra* note 27, at 229–34 ("Properly understood, standing doctrine should not require that a plaintiff have suffered 'injury in fact.'"); Louis Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1307–14 (1961); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1420–21 (1988) (arguing that pre–twentieth century courts did not view "standing" as a requirement of the Cases or Controversies Clause). For further arguments that the Cases or Controversies Clause will not bear the weight placed on it by modern justiciability doctrines, see Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 623–25 (1992), on the example of mootness.

others have argued that many of the Court's justiciability decisions stand at odds with the ostensibly "jurisdictional" nature of standing and mootness.[60] But despite misgivings expressed by individual members of the Court,[61] the full Court has continued to assert that the standing, mootness, and ripeness doctrines are mandatory limitations on federal jurisdiction.[62]

3. The Separate Evolution of State Court Justiciability Doctrines

State courts generally have declined to follow the Supreme Court's march from a prudential conception of justiciability to the view that these are mandatory, jurisdictional doctrines. Historically, state courts have applied their own standing, mootness, and ripeness doctrines and have anchored them in a familiar combination of prudential considerations involving judicial efficiency and ensuring the sharp presentation of issues in a concrete factual setting.[63] Most state courts have retained the discretion to hear cases deemed significant regardless of justiciability, often by adopting a "public interest exception," under which cases that are nonjusticiable may be heard if the public interest warrants that result.[64]

60. *See, e.g.*, Hall, *supra* note 27, at 588–98; Sunstein, *supra* note 27, at 173–82.

61. *See, e.g.*, *Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring) ("The logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.").

62. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."); *Elk Grove Unified Sch. Dist.*, 542 U.S. at 11–12; *see also* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.1, at 215 (2d ed. 1984) (questioning the Article III model, but concluding that "[t]he Article III approach is nonetheless firmly entrenched, and must be reckoned the major foundation of current doctrine").

63. *See, e.g.*, Bowers Office Prods., Inc. v. Univ. of Alaska, 755 P.2d 1095, 1096 (Alaska 1988) ("'[C]ase of controversy' is a term of art used to describe a constitutional limitation on federal court jurisdiction. But . . . '[o]ur mootness doctrine . . . is a matter of judicial policy, not constitutional law.'" (second omission in original) (citation omitted)); McCroskey v. Gustafson, 638 P.2d 51, 54–56 (Colo. 1981); Indianapolis v. Ind. State Bd. of Tax Comm'rs, 308 N.E.2d 868, 869–71 (Ind. 1974); Salorio v. Glaser, 414 A.2d 943, 947 (N.J. 1980) ("New Jersey State courts are not bound by the 'case or controversy' requirement governing federal courts . . . . This Court remains free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration."). *See generally* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263 (1990).

64. *See, e.g.*, Cnty. of Fresno v. Shelton, 78 Cal. Rptr. 2d 272, 277 (Ct. App. 1998) (stating that California state courts have discretion to hear moot cases that pose issues of broad public interest that are likely to recur); McBain v. Hamilton Cnty., 744 N.E.2d 984, 987 (Ind. Ct. App. 2001) (stating that Indiana state courts will review moot cases when they present questions of "great public interest" that contain issues likely to recur); Gerstein v. Allen, 630 N.W.2d 672, 677 (Neb. Ct. App. 2001) (stating that Nebraska courts will review moot cases that involve a matter of great

Indeed, many states go further, explicitly reserving the right to render "advisory opinions."[65]

When hearing questions of substantive federal law, state courts routinely hold that they are free to apply their own justiciability rules.[66] The Supreme Court, too, has repeatedly acknowledged the principle that, as a matter of sovereignty, state courts are free to apply their own conceptions of justiciability and are not bound by Article III's limitations on federal court jurisdiction.[67]

II. THE PROBLEM OF SUPREME COURT NONSUPREMACY

The divergence between state and federal justiciability doctrines, together with the Supreme Court's determination that the strict federal conception of justiciability applies fully to its own appellate jurisdiction, has sharply curtailed the Court's power to review state court determinations of federal law that do not satisfy federal justiciability standards. This Part traces the doctrinal missteps by which the Court ceded its status as final arbiter of

public interest or when other rights or liabilities may be affected by the case's determination); Cobb v. State Canvassing Bd., 140 P.3d 498, 504 (N.M. 2006) (noting that New Mexico state courts will review moot cases that present issues of substantial public interest or that are capable of repetition yet evade review); City of Yakima v. Mollett, 63 P.3d 177, 179 (Wash. Ct. App. 2003) (noting that Washington state courts will review moot cases that present "matters of continuing and substantial public interest").

65. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 98 (4th ed. 1996) (noting that a number of state courts, including those of Colorado, Florida, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island, and South Dakota, are authorized to render advisory opinions).

66. *See, e.g.*, State v. McElveen, 802 A.2d 74, 81–83 (Conn. 2002); Hibler v. Conseco, Inc., 744 N.E.2d 1012, 1023 (Ind. Ct. App. 2001); *see also* FALLON ET AL., *supra* note 65, at 154 ("Article III's definition of judicial power applies only to the federal courts. The state courts are thus free to adjudicate federal questions even when there is no 'case or controversy' within the meaning of Article III."); Fletcher, *supra* note 63, at 264 n.1 ("State courts are quite aware that they are free to disregard the federal 'case or controversy' requirement, even when adjudicating questions of federal law.").

67. *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . . ."); N.Y. State Club Ass'n v. New York, 487 U.S. 1, 8 n.2 (1988) ("[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The States are thus left free . . . to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution."); City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983) ("[S]tate courts need not impose the same standing or remedial requirements that govern federal-court proceedings."); Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) ("To whom and for what causes the courts of Kansas are open are matters for Kansas to determine. But Kansas can not define the contours of the authority of the federal courts, and more particularly of this Court." (citation omitted)).

federal law when state and federal jurisdictional rules differ and illustrates the problems that have ensued.

A. Surrendering Supremacy

The distinct evolutionary paths taken by state and federal justiciability doctrines have produced doctrines with a familial resemblance and clear common ancestry, but distinct modern forms. For the most part, these different doctrines operate in different spheres, and thus do not come into conflict. State courts hearing state law claims, for example, routinely apply state jurisdictional rules with no ill effects. In similar fashion, lower federal courts apply federal jurisdictional rules[68] in both federal question and diversity cases without creating any risk of promulgating federal law rules that are unreviewable by the Supreme Court.

The problem arises when a state court exercises jurisdiction over a federal claim. In that instance, current doctrine insulates state court determinations of federal law from Supreme Court appellate review if they are rendered in cases that do not satisfy federal justiciability rules. And because, more often than not, state justiciability rules are more lenient than federal justiciability rules, it is not uncommon for state courts to hear and resolve federal questions in actions that would have been nonjusticiable, and could not have been litigated, in federal court.[69] In such cases, federal justiciability doctrine forbids the U.S. Supreme Court from entertaining an appeal from the state court's final judgment. And because state courts may apply their own justiciability rules, the Court is barred even in federal question cases from vacating the state court judgment as it would a lower federal court judgment rendered in a nonjusticiable case.[70]

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68. *See, e.g.*, Bano v. Union Carbide Corp., 361 F.3d 696, 713–14 (2d Cir. 2004); Fed. Kemper Ins. Co. v. Rauscher, 807 F.2d 345 (3d Cir. 1986). An exception could theoretically arise in the unlikely circumstance where a conflicting state justiciability rule was deemed "substantive" under the *Erie* doctrine. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

69. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 316–17, 319–20 (1974) (remanding for further proceedings in state court after holding that mootness of the plaintiff's claim did not prevent state court review of federal claims); Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) ("We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such."); Tileston v. Ullman, 318 U.S. 44 (1943) (dismissing an appeal for lack of standing, but not vacating a state court judgment).

70. It is well established that state courts can apply their own justiciability rules, even when hearing federal question cases. *See, e.g.*, *ASARCO*, 490 U.S. at 617; *N.Y. State Club Ass'n*, 487 U.S. at 8 n.2; *Lyons*, 461 U.S. at 113.

Insulating state court determinations of federal law from the Supreme Court's appellate jurisdiction undermines the Court's role as supreme arbiter of federal law[71] and poses two related problems: At best, it delays the authoritative resolution of important legal issues; at worst, it risks empowering state governments to flout federal law. On either view, it leaves the supremacy of federal law to the good will of state officials, which frustrates the policies underlying the constitutional and statutory provisions authorizing Supreme Court appellate review of state court determinations of federal law.[72] Although of recent vintage, this problem has occurred repeatedly as the Supreme Court developed its jurisdictional model of standing, mootness, and ripeness.[73] The resulting gap in the Court's jurisdiction undermines federal supremacy and threatens to delay—perhaps to derail—implementation of the recent federal health care reform Act in particular states.

B. Illustration No. 1: State Court Litigation Challenging the Federal Health Care Bill

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act of 2010 (PPACA, or the Act). The reaction at the state level has been a veritable frenzy of resistance. Even before the PPACA became law, Virginia had enacted legislation purporting to challenge certain aspects of the Act, and South Carolina had introduced similar legislation.[74] As of this writing, five additional states have enacted such laws,[75] and similar legislation has been introduced in thirty-four additional states.[76] Alongside this state legislative activity, the Attorneys General of twenty-seven states have filed federal lawsuits arguing that the Act exceeds Congress's constitutional powers,[77] and litigation concerning the validity of the

71. *See supra* Part I.A.

72. *See supra* Part I.A; *see also* Fletcher, *supra* note 63, at 269–70.

73. The first instance that I have been able to find in which the Court held that it lacked Article III jurisdiction to hear an appeal from a state court judgment rejecting a claim of federal right was in the Court's 163rd year. *See Doremus*, 342 U.S. 429.

74. *See* VA. CODE ANN. § 38.2-3430.1:1 (Supp. 2010); H. 4181, 2010 Leg., 118th Sess. (S.C. 2010), *available at* http://www.scstatehouse.gov/sess118_2009-2010/bills/4181.htm; Richard Cauchi, *State Legislation and Actions Challenging Certain Health Reforms, 2010–11*, NAT'L CONF. STATE LEGS., http://www.ncsl.org/?tabid=18906 (last updated Mar. 29, 2011).

75. The states are Georgia, Idaho, Louisiana, Missouri, and Utah. Cauchi, *supra* note 74.

76. *Id.*

77. The states participating in the lawsuits that seek declaratory and injunctive relief against various provisions of the Patient Protection and Affordable Care Act of 2010 (PPACA) currently include: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. Virginia *ex*

various state laws that have been enacted to limit or challenge the Act—which could be filed in either state or federal court[78]—seems likely to follow.[79]

This developing confrontation between state and federal government officials raises a constellation of constitutional issues—including issues concerning the validity of the PPACA under the Commerce Clause and the taxing power,[80] and issues concerning the validity under Article VI's Supremacy Clause of the state laws purporting to override or nullify certain provisions of the Act.[81] These challenges to the Act raise significant issues of federal justiciability law concerning both the standing of the named plaintiffs and the ripeness of the claims asserted.[82]

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rel. Cuccinelli v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010); Amended Complaint at 3–4, Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-91-RV/EMT). The district court in *Virginia v. Sebelius* held that the plaintiff has standing and that the PPACA exceeds Congress's enumerated powers. *See Sebelius*, 702 F. Supp. 2d 598. As of this writing, thirty-one lawsuits challenging PPACA have been filed by various states, state officials, and private parties. *See* Kevin Sack, *Battle Over Health Care Law Shifts to Federal Appellate Courts*, N.Y. TIMES, May 9, 2011, at A14, http://www.nytimes.com/2011/05/09/us/09appeals.html. Of these thirty-one cases, nine are awaiting action in federal courts of appeal, nine are pending in federal district courts, while thirteen have been dismissed. *Id.*; *see also* U.S. DEP'T OF JUSTICE, DEFENDING THE AFFORDABLE CARE ACT, http://www.justice.gov/healthcare (last updated June 2011).

78. The pending lawsuits, which name federal officials as defendants, were initially filed in federal court (and could have been removed to federal court had they been filed in state court, pursuant to section 1442 removal). *See* 28 U.S.C. § 1442 (2006). But any litigation challenging the state nullifying legislation could be filed in state court—and, lacking a federal defendant, would not be removable under section 1442. If such litigation were filed by a plaintiff who lacked standing under federal law or whose claim was moot or unripe, then the state court could adjudicate the questions involved, with no prospect of Supreme Court review.

79. The Supremacy Clause is not, of course, an area of exclusive federal jurisdiction. *See* U.S. CONST. art. VI (requiring state courts to enforce supremacy of federal law). State courts can, and frequently do, entertain litigation challenging state laws under the Supremacy Clause. *See, e.g.*, Hawkeye Bank & Trust N.A. v. Milburn, 437 N.W.2d 919, 922–23 (Iowa 1989) (upholding a state law against a Supremacy Clause challenge); Russell v. CSX Transp., Inc., 689 So. 2d 1354, 1356–58 (La. 1997) (overturning a state law based on a Supremacy Clause challenge); *cf.* 28 U.S.C. § 1257(a) (conferring jurisdiction on the Supreme Court to hear appeals from state court judgments upholding state laws against challenge under federal law).

80. Amended Complaint, *Florida ex rel. McCollum*, *supra* note 77. On January 31, 2011, U.S. District Judge Roger Vinson granted summary judgment in favor of the plaintiffs after finding that the individual plaintiffs and the state had standing and that the PPACA exceeded Congress's constitutional powers. As of this writing, an appeal is pending.

81. *See* Timothy S. Jost, *Can the States Nullify Health Care Reform?*, 362 NEW ENG. J. MED. 869 (2010), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp1001345.

82. There appear to be significant questions as to whether the plaintiffs in these cases have standing to seek the relief sought, inasmuch as none of the plaintiff Attorneys General in the federal lawsuits alleges that he or she is among the uninsured. Thus, it is unclear that they will be subject to the challenged health insurance mandates. Given that the mandates do not take effect until 2014, doubts have been raised concerning the ripeness of the plaintiffs' claims as well. *See, e.g.*, Fiano, *supra* note 9; Helderman, *supra* note 9; Lazarus & Morrison, *supra* note 9. The first court to address the standing question—in the Virginia lawsuit—held that the plaintiff did possess standing. *See supra* note 77.

As noted above, these issues will likely be addressed in litigation in both state and federal courts. Although the first cases addressing these issues were filed in federal court, there remain significant doubts as to whether the pending cases are within the constitutional[83] or statutory[84] jurisdiction of the federal courts. Regardless of how those issues are resolved, state court litigation concerning the validity of the various state laws purporting to nullify certain provisions of the PPACA may be inevitable. The problem discussed in this Article pertains principally to the Supreme Court's authority to review the results of such state court litigation.[85] Such litigation will raise the very real prospect of an unreviewable state court determination of federal law because of the substantial possibility that, under federal justiciability rules, the plaintiff in such a case would lack standing or possess only a moot or unripe claim.[86] Under current doctrine, the Supreme Court would be bound to dismiss any appeal in such a case if the state court has upheld the state law against the Supremacy Clause challenge. Thus, a judgment in favor of the challenged state law—no matter how plainly incorrect—would be immune from correction. This result, of course, flies in the face of both the underenforcement concern and the uniformity concern that the founders sought to address by providing for a "supreme Court"[87] to review state determinations of federal law.

C. Illustration No. 2: The Moot Affirmative Action Case

If the developing health care reform controversy illustrates the risk of outright defiance of federal policy, the case of *DeFunis v. Odegaard*[88] exemplifies a second set of problems that have arisen from the jurisdictional gap—namely, the risk of delay and uncertainty with respect to implementation of federal law.

Four years before its better-known decision in *Regents of the University of California v. Bakke*,[89] the Supreme Court granted certiorari in a case challenging the University of Washington Law School's affirmative-action-based admissions

83. *See supra* note 82.

84. *See* Kevin Walsh, *The Ghost That Slew the Mandate* (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1748550 (arguing that under a clear line of Supreme Court precedent, the statutory subject-matter jurisdiction of the federal courts excludes declaratory judgment actions in which a state seeks a declaration that a state statute is not preempted by federal law—precisely the relief sought in *Virginia v. Sebelius*).

85. The federal court litigation does not give rise to the concerns addressed in this Article because lower federal courts must apply federal justiciability rules, and the Supreme Court may review or vacate federal court determinations of federal law.

86. *See supra* note 82.

87. U.S. CONST. art. III.

88. 416 U.S. 312 (1974).

89. 438 U.S. 265 (1978).

policy.[90] Marco DeFunis, a white applicant, sued after he was denied admission, alleging that the policy violated the Equal Protection Clause of the Fourteenth Amendment.[91] The state trial court entered judgment in DeFunis's favor, and he was permitted to enroll.[92] In DeFunis's second year in law school, the Washington Supreme Court reversed the trial court's judgment and held that the policy was constitutional.[93] When the U.S. Supreme Court took the case, it ordered the state supreme court's judgment stayed, permitting DeFunis to remain enrolled pending the Court's consideration of his lawsuit.[94]

At the time of oral argument, DeFunis already had enrolled for his final quarter, and counsel for the state defendants conceded that if the state prevailed, it would not seek to expel DeFunis from school but would allow him to complete his studies.[95] The Court, in an unusual per curiam opinion over four dissents, held that the action was moot and vacated the judgment of the Washington Supreme Court.[96] But, because the Washington Supreme Court was not bound by Article III, the Court did not order dismissal, but simply remanded the action to the state court "for such proceedings as by that court may be deemed appropriate."[97] On remand, the Washington Supreme Court, in a plurality opinion, reinstated its original judgment against DeFunis, holding that "[f]or this court not to give a determinative ruling . . . would breach our obligation to the public and our duty to the public officials involved in our system of higher education."[98]

By ceding to the Washington Supreme Court the decision—albeit binding only in the state of Washington—of an important federal constitutional question, the Supreme Court's resolution of *DeFunis* undermined both of the policy goals that are supposed to be served by Supreme Court appellate jurisdiction over state court determinations of federal law. If other state courts had subsequently heard cases raising the same federal questions, they might have decided them differently, and the interest in uniformity would have been disserved. And by yielding its authority to oversee state court determinations of federal rights, the Court undermined the interest in ensuring that state courts do not discriminate against federal rights. Although in *Bakke* the Court

90. *Defunis*, 416 U.S. 312.
91. *Id.* at 314.
92. *Id.*
93. *Id.* at 315.
94. *Id.* at 315–16.
95. *Id.* at 316.
96. *Id.* at 319–20.
97. *Id.* at 320.
98. DeFunis v. Odegaard, 529 P.2d 438, 444 (Wash. 1974).

eventually decided the substantive issues that had been presented in *DeFunis*, it did so only after four years of delay and uncertainty.[99]

In summary, one of the unintended consequences of the Supreme Court's transformation of the doctrines of standing, mootness, and ripeness from largely discretionary doctrines to mandatory doctrines is the creation of a class of cases in which state courts may be the final arbiters, within their geographic boundaries, of federal rights—a class of cases, that is, in which the Supreme Court is not "supreme."[100]

III. NEITHER THE COURT NOR LEGAL SCHOLARS HAVE ADEQUATELY ADDRESSED THE JURISDICTIONAL GAP

The Supreme Court and legal scholars have recognized that it is problematic to immunize from Supreme Court review a whole category of state court determinations of federal law.[101] But they have misdiagnosed the problem and so offered the wrong solution. The Court's solution solves at best half the problem, by holding that it has jurisdiction only where the state court has *validated* the claimed federal right. That set of cases, however, is precisely the set of cases in which Supreme Court review is least needed because such cases present no risk of subordinating federal law to state interests. Scholars have proposed alternative solutions to the problem, but at the cost of underenforcing federal rights and undermining the traditional balance of power between state and federal courts.

A. The Supreme Court's Ad-Hoc Solution Fails to Address Those Cases in Which Supreme Court Review Is Most Appropriate

The Court's solution to the problem of unreviewable state court determinations of federal law has been to declare that a losing state court *defendant* may appeal the judgment, but a losing state court *plaintiff* may not appeal. The Court's rationale is that a losing defendant acquires by virtue of the state court judgment against him a concrete interest in the action sufficient to create an Article III case or controversy. This approach does not reach cases in which the

99. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

100. *See also, e.g.*, Doremus v. Bd. of Educ., 342 U.S. 429, 434–35 (1952); Tileston v. Ullman, 318 U.S. 44 (1943).

101. *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 620–23 (1989); Fletcher, *supra* note 63, at 280–82; Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-*Erie *Analysis*, 99 NW. U. L. REV. 1315, 1346–47 (2005).

state court rejected plaintiff's federal claim.[102] But providing appellate review primarily or exclusively when the state court has protected the claim of federal right turns the rationale for Supreme Court appellate review on its head: Given the founders' principal concern with state court underenforcement of federal rights, current doctrine denies appellate review in the very category of cases in which it is most needed.

1. Appellate Review of Cases in Which the Plaintiff Lacks Standing

If a state court plaintiff asserts a federal claim for which she lacks standing, the Court has created a limited exception permitting appellate review only when the state court has protected the asserted federal right. In *ASARCO, Inc. v. Kadish*,[103] for instance, individual state taxpayers, together with an association of schoolteachers, challenged an Arizona statute governing mineral leases as void under federal law.[104] The Arizona Supreme Court found the statute invalid, and the Supreme Court affirmed.[105] Before reaching the merits, Justice Kennedy's opinion for the Court addressed the question of standing and conceded that, under federal standing rules, the plaintiffs would lack standing.[106] Thus, had the action been commenced in a federal district court, that court would have had to dismiss.

Writing for a majority, Justice Kennedy then held that, although the case did not present a "case or controversy" at the outset (because the plaintiffs lacked standing) the case had been transformed into a "case or controversy" by virtue of the state court judgment in the plaintiffs' favor. The state court adjudication "constitutes the kind of injury cognizable in this Court on review from the state courts. [Defendants] are faced with 'actual or threatened injury'

102. To be clear, under *ASARCO*, the status of an appeal as a "case or controversy" turns on the identity of the prevailing party, not directly on whether the state court accepted or rejected the claimed federal right. Only a losing defendant may appeal, whether the defendant's loss resulted from the state court's acceptance of the plaintiff's federal claim or its rejection of a federal defense raised by the defendant. No case that I am aware of, however, has yet applied *ASARCO* in the latter circumstance, although it remains possible. In practice, then, *ASARCO* has tended to permit Supreme Court review only of state court judgments validating the plaintiff's claimed federal right. And there appears to be little reason to assume that this asymmetry will not persist.

103. 490 U.S. 605.

104. *Id.* at 610.

105. *Id.* at 610, 633.

106. *Id.* at 612–17. Justice Kennedy's opinion stated that, even assuming that the plaintiffs proved that the statute had cost the state millions of dollars that would otherwise have been directed to schools, it was "pure speculation" whether a judgment in the plaintiffs' favor would result in either lower taxes for the taxpayer plaintiffs or increased school spending and compensation for the teacher's association plaintiffs. On this point, Justice Kennedy's opinion garnered four votes; the other four participating Justices saw no reason to reach this issue. *Id.*

that is sufficiently 'distinct and palpable' to support *their standing* to invoke the authority of a federal court."[107] Thus, although the plaintiffs still lacked standing under federal justiciability law to complain about defendants' conduct, the Court assessed its own appellate jurisdiction in light of the injury imposed on defendants by the state court adjudication.[108] The Court emphasized that the functions served by justiciability doctrines—ensuring the presentation of issues in a concrete factual setting between adverse and properly motivated parties—were met here.

The Court also opined that failing to review the decision would render some state court adjudications of federal law essentially nonreviewable—a result the Court found unacceptable.[109] The Court rejected the alternative of vacating the state court judgment because that would, in effect, impose federal standing requirements on state courts.[110]

Chief Justice Rehnquist, joined by Justice Scalia, wrote separately to note the peculiarity of making the Supreme Court's jurisdiction depend on the identity of the prevailing party below.[111] The Chief Justice noted that this result created an asymmetrical right of appeal—something previously unheard of in American law. "Although the *Doremus* case [requiring dismissal in these circumstances] is good law for plaintiffs who lack standing but lost in the state court on the merits of their federal claim, it is not good law for such plaintiffs who prevailed on the merits of their federal question in the state courts."[112]

In light of the rationale for Supreme Court appellate review of state court determinations of federal law, this result is exactly backward. The Court's appellate jurisdiction is intended to guard against underprotection of federal rights by state courts;[113] indeed, for the first 125 years of its history, the Court's appellate jurisdiction over state court determinations of federal law was expressly limited to review of judgments *rejecting* the claim of federal right on the theory that the Court's role was to enforce the Supremacy Clause by preventing underenforcement of federal rights.[114]

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107. *Id.* at 618 (emphasis added) (citation omitted) (quoting Warth v. Seldin, 422 U.S. 490, 500–01 (1975)).

108. *Id.* at 618–20.

109. *Id.* at 620–22.

110. *Id.* at 620–21.

111. *Id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part).

112. *Id.*

113. *See* Fletcher, *supra* note 63, at 281 ("Because of suspicions that state courts may tend to favor their own state's statutes over the commands of federal law, there has always been greater distrust of state court decisions sustaining state statutes against federal challenges than of decisions striking down state statutes."); *see also supra* Part I.A.

114. *See* CHEMERINSKY, *supra* note 25, § 10.2, at 640; *see also supra* note 26 (discussing section 25 of the Judiciary Act of 1789).

2. Appellate Review of Cases in Which the Plaintiff's Claim Is Moot

The Court took a similar tack in *City of Erie v. Pap's A.M.*,[115] holding that it may exercise appellate jurisdiction in an otherwise moot lawsuit only if the lower court's judgment was in favor of the plaintiff. In *Pap's*, the plaintiff operator of a nude dancing establishment sued the city of Erie, Pennsylvania seeking an injunction against enforcement of an ordinance that banned public nudity.[116] The state trial court granted the injunction on federal constitutional grounds, and the state supreme court affirmed that decision.[117] While the City's petition for certiorari was pending, the seventy-two-year-old man who owned the plaintiff corporation chose to retire.[118] He thereafter submitted a sworn declaration stating that he had exited the adult entertainment business, closed the Kandyland club that was the subject of the litigation, and sold the real estate on which it was located.[119] He therefore moved to dismiss the case as moot.[120]

The Court denied the motion, found the case not moot, and reversed on the merits.[121] The Court described the mootness issue as a "close" one, but found that the case was not moot because (1) Pap's could resume its nude dancing operations at some point in the future, and (2) the city (the defendant below) was suffering harm in the form of the state court's order invalidating its public nudity ordinance.[122]

Neither of these rationales fits readily into the "voluntary cessation" exception to the mootness rule, upon which the *Pap's* Court relied. That doctrine has been applied where (1) the *defendant* ceases to engage in the challenged conduct, in a way that arguably moots the claim, but (2) the court finds it reasonable to expect the defendant's challenged conduct to recur.[123] The Court's opinion in *Pap's* inverts this doctrine, focusing on discontinuance of prior conduct by the plaintiff—the very party that instigated the suit—rather than the defendant. The Court thus applied voluntary cessation in a situation utterly divorced from its usual context and rationale.

Further, the Court's first rationale—that Pap's could resume its activities despite the retired owner's sworn statement that he did not intend to do so—is

115. 529 U.S. 277 (2000).
116. *Id.* at 284.
117. *Id.* at 284–86.
118. *Id.* at 287.
119. *Id.* at 284–87.
120. *Id.* at 287.
121. *Id.* at 283, 287.
122. *Id.* at 288–89.
123. WRIGHT ET AL., *supra* note 62, § 3533.5.

a non sequitur under conventional mootness analysis. The Court cited no opinion in which a case had been deemed nonmoot despite the plaintiff's desire to abandon his claim for relief. Concurring in part,[124] Justice Scalia referred to this part of the Court's rationale as "the neat trick of identifying a 'case or controversy' that has only one interested party."[125] Justice O'Connor's opinion for the majority appeared to rest on a desire to protect the Court's authority against party manipulation that is intended to destroy jurisdiction[126]—a legitimate prudential concern, to be sure, but one that is not evidently derived from any interpretation of the Cases or Controversies Clause, which makes no distinction between cases rendered moot by party manipulation and those rendered moot by other causes.

The Court's second rationale—that the case was saved from mootness by the ongoing harm suffered by the City in the form of an arguably incorrect order by the state court[127]—is no more persuasive. First, the argument ignores the evident mootness of the plaintiff's claim—which is the essential factor under conventional mootness analysis.[128] Second, *every* injunction entails the harm to defendant of having to comply with an order based on an arguably incorrect view of the law. If an Article III case or controversy exists merely because the defendant is subject to an arguably incorrect state court order on a question of federal law, then no injunctive relief claim could ever become moot while the defendant was subject to an injunction. In that event, there would seem to be little reason for federal jurisdiction to turn on the identity of the party aggrieved by the decision below.

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124. Justice Scalia concurred as to the Court's judgment of reversal, but not its mootness analysis. *Pap's A.M.*, 529 U.S. at 307 (Scalia, J., concurring in the judgment). His concurrence is curious, to say the least, given that he believed the case was moot and thus outside the Court's Article III jurisdiction. *Id.*

125. *Id.* In terms of the traditional rationale for justiciability doctrines, there was, of course, ample reason to doubt that the plaintiff would vigorously advocate the issues in light of his sworn statement that he had no ongoing interest in the subject matter.

126. *Id.* at 287–88 (majority opinion) (stating that Pap's "could again decide to operate a nude dancing establishment in Erie," and hinting at concerns about Pap's veracity).

127. The Court held that the simple possibility that it might reverse the state court injunction and thereby affect the defendant's rights was "sufficient to prevent the case from being moot." *Id.* at 288.

128. *Id.* at 302 (Scalia, J., concurring in the judgment); *cf.* S. Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300, 301 (1892) (concluding, on appeal of an action between two corporations that came under the control of the same person after judgment was rendered by the lower court, that "litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one"); Waite v. Dowley, 94 U.S. 527, 534 (1876) ("This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it.").

B. The State-Restrictive Approach Favored by Legal Scholars Is Flawed

The fact that some state court determinations of federal law are immune from Supreme Court appellate review has not escaped scholarly notice.[129] Although scholars have criticized the Court's ad-hoc approach in *ASARCO* and *Pap's*,[130] no scholar has yet proposed a comprehensive and theoretically sound solution. The conventional wisdom attacks the problem by imposing a case or controversy restriction on state court jurisdiction over federal questions.[131] This state-restrictive approach would align state court jurisdiction to hear federal questions with the Supreme Court's appellate jurisdiction over state court determinations of federal law—thereby eliminating the jurisdictional gap described above and addressing the uniformity problem.

However, this view suffers from two severe flaws: It is difficult to justify doctrinally, and it exacerbates the underenforcement problem by replacing the possibility of underenforcement of federal rights in these cases with certain nonenforcement. I explore these defects in greater detail below. I then discuss the advantages of my own very different proposal in Part IV.

1. The Article III Rationale

Some commentators, including Judge Fletcher, maintain that state courts should be required to apply the same case or controversy standard as federal courts when they hear cases involving federal claims.[132] Judge Fletcher justifies this approach in three ways. First, he argues that it serves the values that Article III justiciability doctrines are often said to serve—namely, protecting the separation of powers and ensuring that courts decide issues only in the "hard, confining, and yet enlarging context of a real controversy."[133] Second, he suggests that applying the Cases or Controversies Clause to state courts would help "clarify and improve" the "notoriously confused" federal justiciability

129. *See, e.g.*, James W. Doggett, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported Into State Constitutional Law?*, 108 COLUM. L. REV. 839 (2008); Fletcher, *supra* note 63; Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145 (1984); Katz, *supra* note 101.

130. *See* Doggett, *supra* note 129, at 851–54; Fletcher, *supra* note 63, at 280–83; Hall, *supra* note 27, at 596–98; Katz, *supra* note 101, at 1346–47.

131. *See* Fletcher, *supra* note 63, at 282–84; *see also* Katz, *supra* note 101, at 1340–49.

132. Judge Fletcher's 1990 article first articulated many of the key arguments in favor of this state-restrictive approach. *See* Fletcher, *supra* note 63, at 282–84; *see also* Doggett, *supra* note 129, at 851–54; Katz, *supra* note 101, at 1340–49.

133. Fletcher, *supra* note 63, at 282–83 (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 115 (1962)).

doctrines, by engaging more courts in the elaboration of the doctrines.[134] Finally, he claims that extending the case or controversy requirement to state proceedings involving federal questions comports with "the Supreme Court's most important institutional function," namely, "to serve as the final appellate tribunal on questions of federal law."[135] He notes that this role is especially important in cases originating in the state courts, "whose loyalty to national values and expertise in federal substantive law is sometimes in doubt."[136]

As to the first point, scholars have questioned the degree to which federal justiciability doctrines serve the policies they purport to serve.[137] Moreover, the case or controversy requirement has costs as well as benefits. In particular, the delayed or piecemeal litigation of federal constitutional questions that results from the case or controversy requirement creates profound uncertainties for the many state actors who must comply with the law as they conduct the business of state government. Although states are undoubtedly aware of the oft-cited policies underlying federal justiciability law, with few exceptions they have declined to adopt them as state law.[138] Given the framers' creation of a federal system, there is no clear reason why state policymakers cannot opt for the values of greater certainty when the Constitution itself imposes the case or controversy rule only on federal courts.

As to Judge Fletcher's second point, while it is conceivable that imposing the "notoriously confused" federal justiciability doctrines on fifty separate state court systems ultimately may lead to improvements in the doctrine, that prospect is far from obvious. In any case, it would undoubtedly be preferable to improve federal justiciability doctrine before imposing it on state court systems, in order to avoid the costs associated with forcing fifty independent state court systems to apply a "notoriously confused,"[139] "manipulable,"[140] and "incoherent"[141] doctrine. This is the goal of Part IV.

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134. *Id.* at 284.

135. *Id.* at 283.

136. *Id.* at 283–84.

137. For a thoughtful discussion of these questions, see Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 465–501 (2008) (arguing that standing doctrine serves some of its ostensible rationales only moderately well and others not at all); *see also* Hall, *supra* note 27, at 575–88; Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663 (2007).

138. *See supra* Part I.B.3; *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844–76 (2001) (describing ways in which justiciability norms in state courts differ from those in federal courts).

139. Fletcher, *supra* note 63, at 284.

140. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988).

141. Fletcher, *supra* note 27, at 231; *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 480 (1996) (describing the standing doctrine as "theoretically incoherent").

Judge Fletcher's third argument rests on the necessity of ensuring that the Court reviews state court determinations of federal law. Yet, as I explain in Part IV, this goal can be achieved by permitting Supreme Court appellate review over any state court determination of federal law. In short, it can be accomplished by recognizing that the case or controversy requirement is fulfilled when the losing party below—plaintiff or defendant—seeks review of a state supreme court's valid judgment that is binding on the parties and based on a determination of federal law.[142] As I will explain, this approach has significant advantages over current doctrine and over the state-restrictive approach articulated by Judge Fletcher.

Finally, while these policy arguments are important, a more fundamental flaw in the state-restrictive approach is that it gives insufficient weight to constitutional structure. For Judge Fletcher's approach to be convincing, it would need to offer a doctrinal argument for subjecting state courts to Article III's Cases or Controversies Clause—something that it notably lacks. The prevailing narrative holds that federal justiciability law is mandatory for federal courts because Article III is the source of federal judicial power and limits that power to "cases" and "controversies."[143] State judicial power, in contrast, is created by state constitutions, not by Article III.[144] The framers could have imposed a cases or controversies requirement on state courts, either across the board or in the federal question context. But they did not. Thus, it is not clear how the extension of the Cases or Controversies Clause to state courts could be accomplished doctrinally. At the very least, doing so would entail a dramatic shift in the balance of power between state and federal courts.[145]

142. The Court's jurisdiction is subject, as always, to congressional control under the Exceptions Clause and to the Court's own discretion with respect to certiorari.

143. U.S. CONST. art. III, § 2.

144. Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990); *see also* Claflin v. Houseman, 93 U.S. 130, 136–37 (1876) ("[A] State court derives its existence and functions from the State laws . . . . Thus, a legal or equitable right acquired . . . under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class."); THE FEDERALIST NO. 82, *supra* note 17 (Alexander Hamilton). Judge Fletcher acknowledges that, for as long as federal law has contained justiciability constraints derived from Article III, the Supreme Court has held that Article III's constraints do not apply to state courts. Fletcher, *supra* note 63, at 276.

145. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 620–21 (1989) ("It would be an unacceptable paradox to exercise jurisdiction to confirm that we lack it and then to interfere with a State's sovereign power by vacating a judgment rendered within its own proper authority. This case is not one committed to the exclusive jurisdiction of the federal courts. We have no authority to grant a writ only to announce that, solely because we may not review a case, the state court lacked power to decide it in the first instance.").

2. The Supremacy Clause Rationale

Judge Fletcher and other advocates of imposing a case or controversy requirement on state courts in federal question cases also have defended their approach by reference to the Supremacy Clause of Article VI and Congress's power to oust state courts of jurisdiction over federal claims. The Supremacy Clause constrains state court action in a variety of ways. First, a congressional enactment may limit or eliminate state court jurisdiction over questions of federal law either explicitly or implicitly. Second, the so-called "reverse-*Erie*" doctrine requires state courts, when hearing federal question cases, to apply federal procedural rules when conflicting state procedural rules would undermine enforcement of federal rights. As I demonstrate in this Subpart, however, the conditions for application of these doctrines are not present here. First, as to congressional ouster, there is simply no indication that Congress has ever desired to tamper with state court justiciability rules, including in federal question cases. Second, the "reverse-*Erie*" principle has no application in this context. That principle bars states from applying stringent state procedural rules to frustrate enforcement of federal rights; it has never been applied to prevent state courts from applying procedural rules that are *more lenient* than their federal counterparts.

a. Congressional Ouster of State Court Jurisdiction

That Congress possesses the power to limit state court jurisdiction over questions of federal law is indisputable.[146] Indeed, Congress has done so many times.[147] Congress, however, has never enacted a law that purported to impose federal justiciability standards on state courts hearing federal claims. The default rule in the two-tiered American court system is that state courts

146. *See* Bowles v. Willingham, 321 U.S. 503, 511–12 (1944) (discussing Congress's power to withhold questions of federal law from state courts); *see also* Keene Corp. v. United States, 508 U.S. 200, 207 (1993) (explaining that Congress has the authority to "define" and circumscribe jurisdiction for all lower courts); *cf.* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress . . . .").

147. *See, e.g.*, Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001) (noting that federal courts normally have exclusive jurisdiction over admiralty and maritime disputes pursuant to 28 U.S.C. § 1333); Am. Dredging Co. v. Miller, 510 U.S. 443 (1994) (noting that admiralty law is usually subject to exclusive federal jurisdiction); United States v. Antelope, 430 U.S. 641 (1977) (noting exclusive federal jurisdiction over crimes committed under the federal-enclave murder statute, 18 U.S.C. § 1111); Gonzales v. Parks, 830 F.2d 1033, 1035 (9th Cir. 1987) ("Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction."). According to 28 U.S.C. § 1338(a), exclusive federal jurisdiction also applies to patent and copyright disputes.

exercise concurrent jurisdiction over federal claims, absent either an explicit or implicit congressional prohibition.[148]

Express congressional preemption of state court jurisdiction has been found only when Congress has vested exclusive jurisdiction in federal courts or otherwise ousted state court jurisdiction in explicit terms. No one, however, argues that that has happened here. Courts have found implicit ouster of state court jurisdiction only when there is a "disabling incompatibility" between the federal substantive statute in question and the exercise of state court jurisdiction. The disabling incompatibility test has been a source of some confusion among the courts,[149] but has never been applied outside the antitrust context.[150] In the case from which the "disabling incompatibility" doctrine is drawn, the Court found claims under the Sherman and Clayton Acts to be subject to exclusive federal jurisdiction, on the rationale that "the antitrust laws are uniquely federal in that they pertain to issues of national commerce."[151]

Although the case law gives little guidance on how to determine whether Congress has implicitly provided for exclusive federal jurisdiction,[152] the Court in the past has focused on the nature of the particular substantive cause of action in question. When courts have found "disabling incompatibilities," they have done so with respect to one statute or federal claim of right at a time;[153] the doctrine has never been applied across the board to all federal substantive rights as a means of forcing states to adopt a federal procedural rule in wholesale fashion. For this reason, it would be a radical expansion of existing

148. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981) ("[S]tate courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication." (citing Claflin v. Houseman, 93 U.S. 130, 136 (1876))); *see also Tafflin*, 493 U.S. at 458–59 (noting the "deeply rooted presumption in favor of concurrent state court jurisdiction," and observing that "we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States").

149. *See* Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 322 (1976) (noting that courts, including "the Supreme Court, it would seem, ha[ve] been unable to implement the *Claflin* rule in a rational fashion").

150. *See Tafflin*, 493 U.S. at 470–71 (Scalia, J., concurring) ("Although . . . we have *said* that the exclusion of concurrent state jurisdiction could be achieved by implication, the only cases in which to my knowledge we have acted upon such a principle are those relating to the Sherman Act and the Clayton Act . . . .").

151. Redish & Muench, *supra* note 149, at 316–17. *See also Tafflin*, 493 U.S. at 462 (noting that the Clayton Act "confer[s] exclusive jurisdiction on the federal courts"); Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261 (1922) (holding that alleged violations of the Sherman Anti-Trust Act and Clayton Act were properly dismissed from state court for lack of jurisdiction); Klein v. Am. Luggage Works, Inc., 206 F. Supp. 924 (D. Del. 1962).

152. *See* Redish & Muench, *supra* note 149, at 316.

153. *See, e.g.*, *Tafflin*, 493 U.S. at 470–71 (Scalia, J., concurring); Donnelly v. Yellow Freight Sys., Inc., 874 F.2d 402, 406 (7th Cir. 1989) (analyzing individually whether such an incompatibility was present for a specific Title VII claim in a state court).

doctrine to compel states to apply federal justiciability law across the board in all federal question cases.

Moreover, adoption of a rule requiring state courts to apply federal justiciability rules to all claims based on federal law would place state courts in a Supremacy Clause "Catch-22." State courts are required to hear a federal claim of right when they possess jurisdiction under state law to hear analogous state law claims.[154] In those circumstances, state courts not only may, but *must*, consider cases that present questions of federal law even if those cases could not be brought in federal court.[155] And therein lies an unavoidable tension: A rule that requires state courts to apply federal justiciability rules to federal law claims, while allowing them to apply more lenient state rules to state law claims, mandates discrimination against federal claims of the very sort that the Court has forbidden under the Supremacy Clause.

b. Applying "Reverse-*Erie*" to Prevent State Enforcement of Federal Rights, or the "Inverse Reverse-*Erie*" Doctrine

Another way in which the Supremacy Clause constrains the actions of state courts is the reverse-*Erie* doctrine. The doctrine is so named because, while the *Erie* doctrine constrains federal courts' choice of law in diversity cases, the reverse-*Erie* doctrine constrains state courts' choice of law in federal question cases.[156] In particular, the reverse-*Erie* rule requires state courts to follow federal procedural rules in federal question cases if those rules are "essential to effectuate" the purposes underlying the federal substantive law at issue.[157] For example, under reverse-*Erie*, the Court has required state courts to provide a jury trial[158] and to apply federal standards regarding the sufficiency of evidence to sustain a verdict.[159] As one influential commentator has described the doctrine, federal procedures that "are 'part and parcel' of the [federal] remedy afforded must be followed in state court."[160]

Some scholars have argued that the reverse-*Erie* doctrine can be applied to require states to apply federal justiciability law in federal question cases.[161]

154. *See* Testa v. Katt, 330 U.S. 386 (1947) (holding that a state court must hear a federal claim if it possesses jurisdiction to hear an analogous state law claim).

155. *See id.*

156. *See, e.g.*, Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361 (1952); *see also* RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE § 10.8, at 504 (2006).

157. *Dice*, 342 U.S. at 361; *see also* FREER, *supra* note 156, at 504.

158. *Dice*, 342 U.S. at 362–63.

159. Brady v. S. Ry., 320 U.S. 476, 479 (1943); *see also* FREER, *supra* note 156, at 504.

160. FREER, *supra* note 156, at 504 (quoting *Dice*, 342 U.S. at 361).

161. *See* Katz, *supra* note 101, at 1340–49.

This argument is a stretch, however, for two reasons. First, despite scholarly criticism,[162] the Court has treated justiciability as a question distinct from the merits and has never treated it as "part and parcel" of the substantive claim.[163] Second, reverse-*Erie* generally has been applied as a one-way ratchet. It prevents state courts from undermining federal rights, but not from choosing to hear federal claims.[164] When state court procedural rules prevent enforcement of federal policies, reverse-*Erie* displaces those rules, and requires the use of more lenient federal rules.[165] Reverse-*Erie* has never been applied, however, in the inverse situation—when the state rule in question is more lenient than the federal procedural rule and thus would facilitate enforcement of the federal right in state court.[166] Applying reverse-*Erie* to prevent states from enforcing federal rights runs counter to the rationale underlying the reverse-*Erie* doctrine and finds no basis in the Supremacy Clause.

In sum, there is little or no doctrinal support for forcing state courts to apply more stringent federal justiciability rules rather than more lenient state justiciability rules. Congress has neither implicitly nor explicitly preempted state justiciability law, and neither Article III nor the Supremacy Clause standing alone supports that result.

3. The State-Restrictive Approach Exacerbates the Underenforcement Problem

Forcing state courts to apply federal justiciability law is also unsound as a matter of policy. Although the state-restrictive approach adequately addresses the uniformity problem, it exacerbates the underenforcement problem by preventing state courts from enforcing federal rights that they otherwise would have enforced. The independent authority of state courts to enforce federal rights has been recognized since shortly after the founding of the republic.[167]

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162. *See, e.g.*, Fletcher, *supra* note 27; Sunstein, *supra* note 27.

163. *See, e.g.*, City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 243 (1983); *see also* Fletcher, *supra* note 63, at 295 n.142 (acknowledging this).

164. *See, e.g.*, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222–23 (1986) (noting that the reverse-*Erie* doctrine dictates that state courts must make available substantive remedies provided by the governing federal standards); Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942) ("[T]he state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected."); Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 627 n.5 (3d Cir. 1994) (noting that reverse-*Erie* would not permit a state court to undermine federal rights because a "federal maritime rule of decision applicable to the controversy would still displace a state rule that was in conflict" had the case been brought in state court).

165. *See, e.g.*, *Dice*, 342 U.S. at 361–63.

166. Indeed, the Court has explicitly noted that state courts are free to enforce federal rights that federal courts cannot. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981).

167. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 346–48 (1816).

Indeed, the Court as early as 1816 recognized that in some circumstances, state courts are the only courts with jurisdiction to enforce particular federal rights:

> Permitting state courts to entertain federal causes of action facilitates the enforcement of federal rights. If Congress does not confer jurisdiction on federal courts to hear a particular federal claim, the state courts stand ready to vindicate the federal right, subject always to review, of course, in this Court.[168]

In other words, our constitutional structure presupposes that the optimal level of enforcement of a particular federal right sometimes will be greater than the jurisdiction of federal courts to enforce that right. The state-restrictive approach conflates a jurisdictional question (whether federal courts have jurisdiction to enforce a particular right in a particular circumstance) with a substantive question (whether as a matter of federal substantive law, a particular federal right ought to be enforced in that circumstance). When we keep those questions distinct, it is easier to see that the Supremacy Clause, far from barring state courts from hearing federal claims of right that would not be justiciable in federal court, in some cases may affirmatively require them to hear such claims.[169]

In sum, discretionary state justiciability doctrines serve the important purpose of permitting states to adjudicate rights when, in their judgment, the public interest requires it.[170] This may serve federal interests by permitting enforcement of federal substantive rights that could not be enforced in federal courts, but that, as a matter of federal substantive policy, ought to be enforced. Therefore, the solution proposed by some scholars to the jurisdictional gap—that state courts must apply federal justiciability doctrine—would result in the underenforcement of federal law by hindering state court enforcement of federal rights. To the extent that such state enforcement may threaten federal supremacy, the founders made state courts inferior to the Supreme Court on matters of federal law.[171]

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168. *Gulf Offshore*, 453 U.S. at 478 n.4 (citing *Martin*, 14 U.S. at 346–48).

169. One might defend Judge Fletcher's proposal on the ground that subjecting state courts to federal justiciability rules in federal question cases cannot, by definition, lead to "under enforcement." This argument, however, depends on the assumption that the proper level of enforcement of federal rights is defined in part based on federal justiciability rules. The Court has repeatedly held that justiciability is not a question of the merits and insisted that those doctrines are based on considerations of the proper judicial role, not on substantive policy considerations. *See, e.g.*, City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 243 (1983); *see also* Fletcher, *supra* note 63, at 295 n.142 (acknowledging this).

170. *See supra* Part I.B.3.

171. *See, e.g.*, Pfander, *supra* note 15, at 212–19.

IV. A PROPOSED SOLUTION: THE "SUPREME" SUPREME COURT

The Supreme Court's effort, in cases like *ASARCO* and *Pap's*, to maneuver around the case or controversy requirement is unnecessary. The problem of state court determinations of federal law that are insulated from Supreme Court appellate review can be addressed in a more coherent way by recognizing that the Supreme Court's appellate jurisdiction extends to the review of *all* state court judgments regarding a claimed federal right.[172] This entails a narrower view of standing, mootness, and ripeness doctrines in the context of Supreme Court appellate jurisdiction than with respect to the original jurisdiction of the lower federal courts. In particular, the Court should recognize that when a state court renders a judgment on a question of federal law, binding on the parties, a losing party's petition for certiorari presents a case or controversy, regardless of whether the state court judgment upholds or rejects the claimed federal right and regardless of whether the appellant is the plaintiff or the defendant.[173]

This approach finds ample support in the text and intent of Article III's grant of Supreme Court appellate jurisdiction and has two principal advantages over current doctrine and previous proposals for reform. First, it better serves the policies underlying Supreme Court appellate jurisdiction by addressing *both* the uniformity problem *and* the underenforcement problem. This result is achieved by restoring the Court's supremacy as to all determinations of federal

172. *See Martin*, 14 U.S. at 351 (stating that the Supreme Court's appellate jurisdiction was understood at the time of the founding to extend to all state court determinations adverse to a claim of federal right); *id.* ("Strong as this conclusion stands upon the general language of the constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings . . . . It is an historical fact, that at the time when the judiciary act was submitted to the deliberations of the first congress . . . the same exposition was explicitly declared and admitted by the friends and by the opponents of that system."); *see also* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85 (granting the Supreme Court jurisdiction over "a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, *and the decision is against their validity*; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or law of the United States, *and the decision is in favour of such their validity*" (emphasis added)).

173. As noted above, the Court already recognizes that it has appellate jurisdiction when the state court has validated the claimed federal right. *See supra* Part III.A. My proposed refinement is to recognize it as well where the state court has rejected the federal right—the very circumstance in which Supreme Court appellate review is most important. Chief Justice Rehnquist made a similar proposal with respect to mootness in a different context. *See* Honig v. Doe, 484 U.S. 305, 331–32 (1988) (Rehnquist, C.J., concurring) (proposing exception to mootness for cases mooted on appeal to the Supreme Court, and noting that the link between Article III and mootness doctrine is at best "attenuated").

law by inferior courts. Second, this approach is more consistent with the Supreme Court's practice in other doctrinal areas of treating its own appellate jurisdiction over state court determinations of federal law as exempt from certain constitutional restrictions on the "federal judicial power." Part IV.A argues that any state court judgment on a question of federal law presents a case or controversy for Article III purposes. Part IV.B supports this conclusion by reference to the Court's function of protecting the supremacy of federal law. Finally, Part IV.C shows that the proposal would eliminate a puzzling inconsistency in the Court's treatment of its own appellate jurisdiction in different contexts.

A. The Appeal of an Adverse Judgment Presents a Case or Controversy

The Court's adoption of asymmetrical appellate jurisdiction rests on two illogical and unworkable distinctions. First, *ASARCO* and *Pap's* distinguish between plaintiff-appellants and plaintiff-appellees, affording standing only to the latter. That is, *ASARCO* recognizes the standing of a winning state court plaintiff to defend the judgment below, while denying standing to a losing state court plaintiff to attack the adverse judgment. But a plaintiff's personal stake in the outcome does not depend on whether he or she happened to win or lose in state court. Second, *ASARCO* and *Pap's* distinguish between plaintiff-appellants and defendant-appellants, again recognizing standing only in the latter. But the Court's basis for recognizing standing to appeal on the part of losing state court defendants in *ASARCO* and *Pap's*—namely, that such defendants are aggrieved by the adverse state court judgment—is equally applicable to losing state court plaintiffs. Neither distinction, in short, makes sense as a matter of doctrine, of logic, or of policy.

1. A Plaintiff's Standing to Prosecute or to Defend an Appeal Does Not Depend on Whether the Plaintiff Won or Lost Below

The theory of Supreme Court appellate jurisdiction announced in *ASARCO* rests on a distinction between plaintiffs who won in state court and those who lost there.[174] This distinction is not only illogical, but inconsistent with the (admittedly limited) case law on standing of defendants and standing to appeal.

174. ASARCO Inc. v. Kadish, 490 U.S. 605, 634 (1989) (Rehnquist, C.J., concurring in part and dissenting in part).

There is little case law on standing to defend, perhaps because a defendant against whom a claim is asserted will almost invariably be deemed to possess standing.[175] The Court has, however, recognized that standing requirements apply no less to defendants than to plaintiffs,[176] and apply as well on appeal as in the trial court.[177] From this it follows that "if standing to appeal has constitutional and prudential aspects, 'standing' (i.e. the right) to *defend* an appeal in the federal courts has equivalent status."[178] In other words, any interest sufficient to justify an appellant's standing to prosecute an appeal should also be sufficient to justify an appellee's standing to defend an appeal, and vice versa. And yet, *ASARCO* and cases following its logic abandon this equivalence more or less without comment—affording victorious plaintiffs standing to defend the judgment below on appeal while stating that a losing plaintiff would lack standing to appeal, despite an equal or greater interest on the part of the losing plaintiff.

By way of illustration, imagine a state-court litigation matter in which two individual plaintiffs, "W" and "L," seek relief against the same defendant on identical federal claims. Imagine further that both plaintiffs lack standing under federal justiciability rules, but that both claims are deemed justiciable under state law and are resolved by the state courts. Plaintiff W prevails in the state supreme court, while Plaintiff L loses. The losing party as to each claim seeks to appeal to the United States Supreme Court.

In terms of their concrete interest, both W and L claim to be aggrieved by the defendant's conduct, and each possesses an identical interest in obtaining an enforceable final judgment against the defendant. The only difference between their interests is that the losing plaintiff, L, is further aggrieved by the trial court's alleged error on the merits. Thus, L's claim of injury, and concrete interest in the appeal, is at least as compelling as W's, if not more so. Yet *ASARCO* would recognize W's standing to *defend* the judgment below

175. Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 831 (2004) ("Defending may be thought of as a 'right' less often that [sic] it is perceived as an onerous necessity; but, of course, it is a right.").

176. Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) ("Standing to sue *or defend* is an aspect of the case-or-controversy requirement." (emphasis added)).

177. *Id.* at 64 ("Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'"); *see also* Quinn v. Millsap, 491 U.S. 95, 102–04 (1989) (recognizing the defendants' standing to appeal in a state court declaratory judgment action); Barrows v. Jackson, 346 U.S. 249, 257 (1953) (addressing the standing of the appellee to defend the judgment below).

178. Steinman, *supra* note 175, at 852 (emphasis added).

against defendant's appeal, but would hold that L lacks standing to *attack* the judgment below by prosecuting an appeal.[179]

This is illogical. Moreover, it is at odds with the Court's rationale in recognizing a *winning* state court plaintiff's standing to defend a lower court judgment. The Court has recognized as sufficiently concrete to satisfy standing requirements such a plaintiff's risk of losing the benefits that would follow enforcement of that judgment.[180] For Article III purposes, no meaningful distinction exists between such an interest and the interest of the *losing* state court plaintiff in securing reversal and eventual judgment.[181]

In sum, whatever restrictions Article III places on Supreme Court appellate jurisdiction over state court determinations of federal law, as a matter of logic and doctrine, ought to apply equally to parties seeking to defend the judgment below and those seeking to attack it.

2. A Losing Party's Standing to Appeal Does Not Depend on Whether the Party Is a Plaintiff or a Defendant

Apart from the perplexing asymmetry between the Court's treatment of plaintiff-appellees (who have standing under *ASARCO* and *Pap's*) and plaintiff-appellants (who do not), the Court's approach also rests on a specious distinction between losing state court plaintiffs and losing state court defendants.

The *ASARCO* rule, permitting losing defendants but not losing plaintiffs to appeal, has been defended on the ground that a losing state court defendant

179. *ASARCO*, 490 U.S. at 634 (Rehnquist, C.J., concurring in part and dissenting in part) (noting that under the Court's ruling, "although the *Doremus* case [requires dismissal in these circumstances] for plaintiffs who lack standing but lost in the state court on the merits of their federal claim, it [does not require dismissal where] plaintiffs . . . prevailed on the merits of their federal question in the state courts").

180. *Id.* at 624 (majority opinion) (noting the "paradox" of recognizing asymmetrical standing and then affirming the state court judgment, with the result that plaintiffs/respondents "have succeeded in obtaining a federal determination [on the merits] here that would have been unavailable if the action had been filed initially in federal court"); *see also* Steinman, *supra* note 175, at 853 (deducing from case law that "any constitutionally mandated requirements of 'standing' to defend an appeal presumably would include the notion that the appellee has been benefitted by the lower court decision in such a way that the appeal puts her to a risk of loss or detriment that she would suffer if the appeals court were to afford the redress that the appellant seeks").

181. Steinman, *supra* note 175, at 852 ("[B]oth the Court's language and its logic suggest that the Court infers, from Article III's case-or-controversy requirement, limitations upon those eligible to defend trial court judgments on appeal, and that it has imposed or would impose additional requirements or limitations in the interest of prudent judicial administration." (citations omitted)); *cf. Quinn*, 491 U.S. at 104 (confirming a defendant's standing to appeal in a state action where state officials obtained a declaratory judgment that the state statute did not violate the Equal Protection Clause). Although the appellants in *Quinn* were the defendants below, the context of a declaratory judgment action makes them akin to plaintiffs in an ordinary case.

is differently situated than a losing plaintiff. A losing plaintiff is in the same position he was in before commencing the action, whereas a losing defendant is subject to an order that compels him to act or to refrain from acting in a particular way.[182] But this argument conflates standing to sue with standing to appeal. Although standing to sue requires a plaintiff to show that she has suffered a concrete and particularized injury from defendant's conduct, standing to appeal simply requires that the appellant be aggrieved by the order of the lower court. As a general matter we recognize plaintiff's standing to appeal whenever the plaintiff has been awarded nothing by the Court below, or simply less than all the relief sought.[183]

Moreover, in other contexts, the Court has rejected the notion that standing to appeal requires that the lower court judgment compel a party to act or refrain from acting. Two cases illustrate the point. In *Quinn v. Millsap*,[184] the Court addressed the standing to appeal of defendants in a state declaratory judgment action initiated by state officials seeking a declaration that a state law did not violate the Equal Protection Clause. The state court had upheld the law, rejecting defendants' federal constitutional challenge. The state court judgment did not award money damages against the defendants or constrain or compel their action in any way. On appeal, the Supreme Court rejected a challenge to the appellants' standing, holding that the adverse judgment below was sufficient basis for appellants' standing to appeal, as the case presented the "essentials of an adversary proceeding, involving a real, not a hypothetical, controversy."[185] The Court accorded no significance to the absence of any compulsory or prohibitory order from the state court. Indeed, the Court rejected any such requirement, holding that any state court judgment denying a federal right provided sufficient basis for Supreme Court appellate jurisdiction: "When a state supreme court denies the existence of a federal right and rests its decision on that basis, this Court unquestionably has jurisdiction to review the federal issue decided by the state court."[186]

Similarly, and more famously, the Court in *Bush v. Gore*[187] permitted defendant-intervenor George W. Bush to appeal from a judgment of the Florida Supreme Court that in no way compelled him to act or refrain from acting.[188] Bush was permitted to raise federal constitutional arguments as to which he

182. *ASARCO*, 490 U.S. at 623–24.
183. *See, e.g.*, Steinman, *supra* note 175, at 916.
184. 491 U.S. 95.
185. *Id.* at 102–03 (internal quotation marks omitted).
186. *Id.* at 104.
187. 531 U.S. 98 (2000).
188. *See id.* at 100; *see also* Gore v. Harris, 772 So. 2d 1243 (Fla. 2000).

likely lacked standing to sue in federal court.[189] For our purposes the critical fact is that the state supreme court's order denying the Equal Protection claim neither compelled Bush to take any action nor constrained his actions. If standing to appeal requires those features, then Bush lacked standing to appeal. But the Court heard Bush's claims, thereby implicitly recognizing his standing to appeal.[190]

ASARCO's holding—that a losing state court defendant may appeal notwithstanding the nonjusticiability of plaintiff's claim—is not unreasonable. The problem lies, rather, in the Court's dictum to the effect that a losing plaintiff in such circumstances could not have appealed. Such an asymmetrical right of appeal is quite unusual, and the Court has steadfastly refused to extend into other contexts *ASARCO*'s regime of asymmetrical standing to appeal.[191] In sum, *ASARCO*'s notion that standing to appeal exists only if the appellant's actions are compelled or constrained by the order appealed from rests on unsupportable distinctions and is routinely ignored outside the context of *ASARCO*, *Pap's*, and their progeny.

3. The Principal Constitutional Basis for Restricting Standing to Sue Has Little Force With Respect to Standing to Appeal

Finally, it is worth noting that the separation of powers arguments that are generally offered to justify federal justiciability doctrines apply far less, if at all, in the context of standing to appeal. The principal justification for the Article III justiciability doctrines is preserving separation of powers.[192] Restrictions on standing to sue, for instance, are said to preserve the limited role of the judiciary in a democratic society by reserving certain issues for resolution by more democratic branches of government.[193] But these arguments have little, if any, bearing on restrictions upon standing to prosecute or defend an appeal. As

189. *See* Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1096–1102 (2001) (noting that Bush's "central claim"—the Equal Protection claim—was one as to which he likely lacked standing under federal law because he was not a Florida voter and none of the exceptions to the third party standing rule applied).

190. *See, e.g.*, Juidice v. Vail, 430 U.S. 327, 331–32 (1977) (noting the Court's duty to examine standing whether or not raised by a party); *see also* Campbell v. Louisiana, 523 U.S. 392, 400–02 (1998) (recognizing implicit holding in prior case on question of standing).

191. ASARCO Inc. v. Kadish, 490 U.S. 605, 623–24 (1989).

192. Allen v. Wright, 468 U.S. 737, 752 (1984) (noting that standing "is built on a single basic idea—the idea of separation of powers"); *see also* Elliott, *supra* note 137 (considering the various separation of power functions and their relationship to the standing doctrine).

193. *See* Flast v. Cohen, 392 U.S. 83, 95 (1968) (stating that justiciability doctrines serve to "assure that the federal courts will not intrude into areas committed to the other branches of government" and that Article III limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process").

Professor Steinman has noted, applying justiciability doctrines to limit appeals from lower court judgments does not "keep cases out of the judicial bailiwick, leaving them in the exclusive domain of the political branches."[194] Rather, cases that have been adjudicated in a lower court, whether state or federal, have, by definition, already gone to the judiciary. Limiting the Supreme Court's authority to hear appeals from such cases therefore does nothing to preserve the separation of powers.[195] This distinction between standing to sue and standing to appeal has led at least one commentator to suggest that restrictions on standing to appeal ought to be considered as primarily or exclusively discretionary matters of judicial prudence.[196]

The distinctions on which *ASARCO* and *Pap's* depend for their asymmetrical model of standing to appeal do not withstand scrutiny. Further, the very basis for limiting standing to sue applies in a far more attenuated fashion, if it applies at all, in the context of standing to appeal. A coherent conception of standing to appeal—which the Court has generally applied in other contexts—would recognize that the losing party in a state court action raising federal questions of law has standing to appeal regardless of that party's status as plaintiff or defendant, and similarly, that the prevailing party has standing to defend the judgment below, whether that party is plaintiff or defendant.

B. Supreme Court Appellate Jurisdiction and Federal Supremacy

The Supreme Court's principal purpose is to enforce the supremacy of federal law—to sit, that is, as the final arbiter of questions of federal law and ensure that all inferior courts treat federal law as supreme.[197] The Court from time to time acknowledges this role, speaking of its authority to review *all* state

194. Steinman, *supra* note 175, at 845.

195. *Id.* at 845–46; *see also* Honig v. Doe, 484 U.S. 305, 329–32 (1988) (Rehnquist, C.J., concurring) (arguing that existing doctrine implicitly permits Supreme Court review of cases rendered moot after grant of certiorari, and arguing that Article III does not mandate dismissal of such cases).

196. Steinman, *supra* note 175, at 846 ("The absence of significant separation of powers and federalism ramifications of standing to appeal doctrine could support an argument for deconstitutionalizing that doctrine, to the extent it is constitutional.").

197. *See* Claflin v. Houseman, 93 U.S. 130, 142 (1876) (noting the necessity of Supreme Court appellate review over state court determinations of federal law); *see also* Kansas v. Marsh, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility . . . and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions . . . is to ensure the integrity and uniformity of federal law."); Fletcher, *supra* note 63, at 283 ("[T]he Supreme Court's most important institutional function is to serve as the final appellate tribunal on questions of federal law. The Court's appellate function has been critically important in cases originating in state courts, whose loyalty to national values and expertise in federal substantive law is sometimes in doubt."); Pfander, *supra* note 15, at 212–19; *supra* Part I.A.

court determinations of federal law.[198] Preserving this crucial institutional function requires acknowledging that the Supreme Court's appellate jurisdiction is special—that when the Supreme Court exercises appellate jurisdiction there are powerful reasons to eschew an overly rigid application of justiciability doctrines.

As noted above, current doctrine is problematic in part because it bars the Supreme Court from policing state court determinations of federal law to curb underenforcement of federal rights and promote uniformity. The uniformity problem is easily solved by any change that makes Supreme Court appellate jurisdiction coextensive with state court jurisdiction over questions of federal law. Thus, both previous scholarly proposals and my approach solve the *uniformity* problem equally well—the former by shrinking state court jurisdiction, the latter by expanding the Supreme Court's appellate jurisdiction.

The principal advantage of my proposal is that it also solves the underenforcement problem by continuing to permit state courts to enforce claims of federal right under their own justiciability rules, while allowing the Supreme Court to review such decisions. Judge Fletcher's approach, in contrast, would exacerbate the underenforcement problem by depriving even willing state courts of the opportunity to enforce federal rights in cases that do not meet federal justiciability standards. Judge Fletcher's proposal thus would eliminate all possibility of enforcement of federal claims of right in this set of cases, contrary to the principle—which is nearly as old as the Constitution—that state courts ought to be permitted to enforce federal rights even in circumstances where federal courts lack jurisdiction to do so.[199]

Indeed, state court enforcement of federal rights in all cases that are within the state court's jurisdiction is a necessity, if states are to obey the Supremacy Clause's command that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[200]

198. *See, e.g.*, Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981) (noting that, absent exclusive federal jurisdiction, state courts stand ready to hear federal claims of right, "subject *always* to review, *of course*, in this Court" (emphasis added)).

199. *Id.* ("Permitting state courts to entertain federal causes of action facilitates the enforcement of federal rights. If Congress does not confer jurisdiction on federal courts to hear a particular federal claim, the state courts stand ready to vindicate the federal right, subject always to review, of course, in this Court." (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 346–48 (1816))).

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

In any case arising under a state law or policy, in which the defendant raises a defense or counterclaim based on federal law (or the plaintiff raises a federal law defense to a counterclaim), the state court not only may, but must, hear the asserted federal claim of right. A contrary rule would allow the state court to discriminate against the federal constitutional or statutory defense, which is forbidden by a long line of Supremacy Clause case law.[201]

In sum, our constitutional structure presupposes that state courts will at times address claims of federal right asserted in cases that would be nonjusticiable in federal court. For the Supreme Court to fulfill its fundamental institutional role, it must have jurisdiction to entertain appeals from such cases.[202]

C. Supreme Court Appellate Jurisdiction and Restrictions on the Federal Judicial Power

The Supreme Court's current stance—that standing, mootness, and ripeness doctrines apply at the appeal stage, including before the Supreme Court—has been criticized by scholars,[203] as well as by former Chief Justice Rehnquist,[204] as inefficient and unnecessary. I agree with these criticisms. Furthermore, as I explain in this Subpart, the Court's insistence that justiciability doctrines limit its appellate jurisdiction in the same manner as the original jurisdiction of lower federal courts is a surprising anomaly: The Court has interpreted numerous other restrictions on federal jurisdiction, including constitutionally mandated restrictions on the federal "judicial power," as applying either less strictly or not at all to its appellate jurisdiction.

For instance, the Eleventh Amendment provides that "[*t*]*he Judicial power of the United States* shall not be construed to extend to any suit . . . against one

201. *See* Testa v. Katt, 330 U.S. 386 (1947) (requiring state courts to hear federal claims if they have jurisdiction to hear analogous state law claims).

202. Strict federal justiciability rules have conventionally been defended as an element of the separation of powers. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 752 (1984) (stating that Article III standing is "built on a single basic idea—the idea of separation of powers"); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). The advantages of my proposal might be thought to come at the cost of undermining the separation of powers, but the separation of powers rationale for justiciability doctrines has far less relevance in the context of cases that originate in state court rather than federal court. Because current doctrine concedes that state courts possess jurisdiction to hear federal question cases regardless of whether federal courts could hear them, state courts are free to issue judgments that are binding on the parties and that establish precedent within the state court system, even when federal justiciability rules would say that the plaintiff lacked the requisite personal stake. Thus, any separation of powers harm is already done, and any additional marginal damage to the separation of powers from Supreme Court appellate review of the state court judgment is negligible.

203. *See, e.g.*, Hall, *supra* note 27, at 575–88.

204. Honig v. Doe, 484 U.S. 305, 331–32 (1988) (Rehnquist, C.J., concurring).

of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[205] This provision bars suits naming a state as a defendant from proceeding in federal trial and appellate courts and thus requires such suits to be filed in state court.[206] If restrictions on "judicial power" applied equally to the Supreme Court's appellate jurisdiction as to the original jurisdiction of federal district courts, the Supreme Court's appellate jurisdiction would not extend to state court determinations of federal law in cases naming a state as a defendant. But the Court has taken a broad view of its appellate jurisdiction in this context, holding that the Eleventh Amendment "does not constrain the appellate jurisdiction of the Supreme Court,"[207] because the Supreme Court must be the final arbiter of federal law.[208]

Similarly, the Court has taken a much broader view of its appellate jurisdiction over state court determinations of federal law than of the federal district courts' original federal question jurisdiction in the context of the well-pleaded complaint rule. A federal issue that does not appear on the face of the well-pleaded complaint will not provide a basis for federal trial court jurisdiction.[209] Yet the Supreme Court has again taken a broader view of its appellate jurisdiction under Article III, even though the statutory language conferring "arising under" jurisdiction is nearly identical to the relevant provision of Article III.[210] The Court has held that its appellate jurisdiction extends to the review of state court determinations of federal law raised, for instance, as a defense to a state law claim.[211] And again, the Court has

205. U.S. CONST. amend. XI (emphasis added).

206. Hans v. Louisiana, 134 U.S. 1, 18 (1890).

207. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31 (1990); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

208. *See McKesson*, 496 U.S. at 28–29, 31; *see also* FALLON ET AL., *supra* note 65, at 298 (discussing the possible recognition in *Cohens* of an "'exception' to the Eleventh Amendment for appellate review of state court judgments—an exception demanded by the need to ensure the supremacy of federal law"); Bernick, *Supreme Court Review of Federal Questions* (2009) (unpublished manuscript) (on file with author).

209. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

210. *Compare* U.S. CONST. art. III, § 2 (extending federal judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority"), *with* 28 U.S.C. § 1331 (2006) (granting to district courts jurisdiction over actions "arising under the Constitution, laws, or treaties of the United States"); *see also* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824) (interpreting Article III's grant of federal question jurisdiction broadly); CHEMERINSKY, *supra* note 25, § 5.2, at 267 (noting that "[a]lthough the statutory language is virtually identical to that found in the Constitution, the Supreme Court has adopted markedly different interpretations of these two provisions").

211. *See* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002) (reviewing a state court decision of federal law invoked as defenses to a State Commission's order, affirmed in the state court, that the plaintiff pay damages to a competitor); *see also* Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 296 (1970) ("[T]his Court does have potential appellate

defended this result based on its institutional role of promoting uniformity and preventing underenforcement of federal claims of right.[212]

Last, even with respect to the Cases or Controversies Clause itself and the federal justiciability doctrines that flow from it, the Court has at times treated its appellate jurisdiction as broader than the original jurisdiction of lower federal courts. In *ASARCO* and *Pap's*, as discussed above,[213] the Court held that it had jurisdiction to hear cases in which the plaintiff lacked standing (*ASARCO*) and in which the plaintiff's claim was apparently moot (*Pap's*), on the ground that the defendants in each case had a sufficient personal stake in the appeal to create a federal case or controversy.[214] In his separate opinion, then–Chief Justice Rehnquist noted the inconsistency between the majority's view of justiciability and the view the Court had articulated elsewhere. He observed that the plaintiff lacked standing on appeal to the Supreme Court just as much as he had lacked it at the trial court level and that the issues addressed by the Court were no less "in the rarified atmosphere of a debating society" than they had been below.[215] Whatever the merits of the results in those cases, they make clear that the Court reserves the right to apply a specialized and flexible view of the Cases or Controversies Clause when exercising appellate jurisdiction.

In areas as diverse as the Eleventh Amendment's restriction on the "federal judicial power," the constitutional and statutory grants of federal question jurisdiction, and even the Cases or Controversies Clause in some contexts, the Court has articulated a robust vision of its appellate jurisdiction that enables it to hear appeals from state court determinations of federal law, even in circumstances where lower federal courts would lack jurisdiction. Most telling, the Court has defended these various holdings based on the importance of preserving the Court's ability to enforce the supremacy of federal law,

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jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows this Court correspondingly broader authority . . . .").

212. *See, e.g.*, Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (emphasizing the importance of the Court's appellate jurisdiction over state court judgments in cases arising under federal law "to correct erroneous state-court decisions and to insure that federal law is interpreted and applied uniformly" and to ensure that "federal rights [will] be adequately protected").

213. *See supra* Part III.A.

214. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 288 (2000); ASARCO Inc. v. Kadish, 490 U.S. 605, 618–19 (1990).

215. *ASARCO*, 490 U.S. at 634–35 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (internal quotation marks omitted). Justice Scalia made a similar observation in *Pap's*, noting that the Court had performed "the neat trick of identifying a 'case or controversy' that has only one interested party." *Pap's A.M.*, 529 U.S. at 307 (Scalia, J., concurring in the judgment).

and to promote uniformity. These same arguments support interpreting the Cases or Controversies Clause more broadly than the Court recently has done with respect to Supreme Court appellate jurisdiction to review state court adjudications of federal law.

CONCLUSION

Until recently, the Supreme Court had the authority to review all state court decisions of federal law that threatened federal rights or interests. But in recent decades the Supreme Court has rendered itself powerless to hear appeals from such judgments in cases that do not meet federal justiciability standards, thus creating a troubling gap in its "supremacy" as final arbiter of federal law. Even after *ASARCO*, the Court's ability to correct erroneous applications of federal law by state courts remains limited—in a way that deprives the Supreme Court of its supremacy and disserves the policies that Supreme Court appellate review is intended to promote. This doctrine does not further the policies it purports to serve, and it has no basis at all in constitutional text or structure. Indeed, evidence from the ratification debates and early Supreme Court cases suggests an understanding of the Supreme Court's appellate jurisdiction as embracing any state court determination of federal law, or at the very least, any state court judgment rejecting a claimed federal right. By recognizing that a losing party's appeal from a state court judgment on a question of federal law presents an Article III case or controversy, the Court could solve these problems and restore the "supremacy" that, for the moment, exists in name only.