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A BUG OR A FEATURE?: EXCLUSIVE STATE-COURT  
JURISDICTION OVER FEDERAL QUESTIONS

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## INTRODUCTION

On August 5th, 2017, while enjoying the thrills and frills of a Six Flags theme park, Hugo and Sharon Soto used their debit cards to purchase food five separate times during their outing.<sup>1</sup> After processing each payment for their food purchases, Six Flags issued them a receipt that contained all twelve digits of their debit card number.<sup>2</sup> The Sotos sued in state court on behalf of themselves and a putative class arguing that these receipts violated the federal Fair Credit Reporting Act (FCRA), amended by the Fair and Accurate Credit Transactions Act (FACTA), which prohibits the printing of more than the last five digits of a credit or debit card number on an electronically printed receipt.<sup>3</sup> The Sotos argued that their injury consisted of the *chance* that the receipts that they had thrown away could compromise their payment card information; however, they did not allege that their credit or debit card information had actually been compromised.<sup>4</sup>

After the Sotos filed their complaint in state court, the defendants removed the case to federal court on the basis of federal question jurisdiction and the Class Action Fairness Act.<sup>5</sup> Even though the statute created a federal cause of action and Six Flags' action arguably violated congressional directive, the federal district court held that it lacked subject matter jurisdiction to hear the claim.<sup>6</sup> The court reasoned that a recent Supreme Court holding in *Spokeo, Inc. v. Robins*<sup>7</sup> controlled and determined that the plaintiffs did not satisfy *Spokeo*'s legal test for establishing Article III standing.<sup>8</sup> The plaintiffs simply failed to allege a sufficiently concrete injury.<sup>9</sup> However, the court's finding regarding the Sotos' ability to establish federal standing did not put an end to the Sotos' attempt to vindicate their statutory rights. Instead, the court remanded the case to Illinois state court to determine whether the state court had jurisdiction to entertain the suit.<sup>10</sup>

How could the Sotos, and the class, lack standing to pursue their federal cause of action in federal court but potentially be able to assert their claim in state court? As the district court described, "Illinois is not bound to follow

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<sup>1</sup> *Soto v. Great Am. LLC*, No. 17-6902, 2018 WL 2364916, at \*1 (N.D. Ill. May 24, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*2-5.

<sup>7</sup> 578 U.S. 330, 334 (2016) [hereinafter *Spokeo*]. In this case, the Supreme Court held that "[Plaintiffs cannot] allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 341.

<sup>8</sup> *Soto*, 2018 WL 2364916, at \*2-3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*4-5.

Article III's requirements in the same way that federal courts are."<sup>11</sup> The court noted that the Supreme Court's standing jurisprudence had created a notable twist in the system: "Although this means that a state court potentially has jurisdiction over a federal statutory violation in an instance where a federal court does not, this is in fact a notable quirk of the United States federalist system."<sup>12</sup>

University of Missouri law professor Thomas Bennett recently analyzed this aspect of our judicial system: there are some state courts, specifically those that have a standing doctrine distinct from federal courts, that can exert exclusive jurisdiction over federal question claims.<sup>13</sup> However, he is skeptical that this feature of our judicial system is a "quirk" as much as it "produce[s] an outcome at best bizarre and at worst harmful to the integrity of federal law."<sup>14</sup> He argues that "the more significant reason to be wary of *Spokeo* and its progeny is that they work a massive transfer of federal claims from federal to state courts, where federal law will develop largely without the participation of federal courts."<sup>15</sup> While he sees potential costs to plaintiffs and defendants, the biggest consequence, in his view, is "the possibility of disuniformity in federal law."<sup>16</sup> His solution to this perceived problem is for the Supreme Court to overturn its decision restricting standing in *Spokeo*.<sup>17</sup>

The Supreme Court ultimately declined that path; instead, it reaffirmed *Spokeo*'s core holding five years later in *TransUnion LLC v. Ramirez*—another case involving the FCRA.<sup>18</sup> The majority came to its decision despite the dissent's warning that "[b]y declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions."<sup>19</sup>

In this Essay, I argue that Bennett's predictions concerning the effects of the Supreme Court's recent opinions on the standing doctrine and his criticisms of this dimension of judicial federalism are overstated. The data on

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<sup>11</sup> *Id.* at \*4 (relying on *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)).

<sup>12</sup> *Id.* at \*5 (quoting *Miranda v. Magic Mountain LLC*, 2018 WL 571914, at \*3 (C.D. Cal. Jan. 25, 2018) (internal quotation marks omitted)).

<sup>13</sup> Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211, 1212 (2021) [hereinafter Bennett, *Paradox*]. I will note that my use of the phrase "exclusive jurisdiction" in this sentence, and in other places in this Essay, is a little imprecise as the United States Supreme Court may still exercise appellate jurisdiction over the federal question claim—at least where the defendant has lost at the state supreme court level. See *infra* Part III. However, for purposes of above-the-line brevity and coherence, please accept this footnote disclaimer.

<sup>14</sup> *Id.* at 1213.

<sup>15</sup> *Id.* at 1214.

<sup>16</sup> *Id.* at 1216. Bennett's other concerns regarding the alleged costs to plaintiffs and defendants are not addressed in this Essay.

<sup>17</sup> *Id.* at 1215.

<sup>18</sup> 141 S. Ct. 2190, 2204-07 (2021) [hereinafter *TransUnion*].

<sup>19</sup> *Id.* at 2224 n.9 (Thomas, J., dissenting).

the initial impact of *Spokeo* and *TransUnion* do not paint as stark a “massive transfer” of cases as Bennett suggests. State courts that have jurisdiction to entertain these cases are well suited to adjudicate federal questions, will not create substantial disuniformity in federal law, and will not usurp the federal sovereign’s power to create and interpret federal law. As such, the potential of exclusive state-court jurisdiction over federal question claims is a feature and not a bug of the Constitution’s design, or at least the Supreme Court’s interpretation of it. This Essay proceeds in three Parts. First, I give background on the development of the federal standing doctrine. In the process, I briefly describe how standing in state and federal courts may differ, which results in some state courts entertaining federal question claims that federal courts cannot exert jurisdiction over. Second, I detail Bennett’s argument that this enterprise is a bug and not a feature of our judicial system. Third, I argue that his fears of disuniformity of federal law and usurpation of the federal sovereign’s power to create and interpret federal law are misguided. I report initial data from state courts entertaining these types of cases, which demonstrate that there has not been a mass transfer of federal question cases from federal courts to state courts. Further, Bennett’s criticisms fall flat given evidence of state and federal court parity adjudicating federal questions, and the Supreme Court’s retention of the power to review state-court judgments, at least when the defendant has lost below.<sup>20</sup>

## I. FEDERAL COURT STANDING AND FEDERAL QUESTION JURISDICTION

This Part traces the interaction between the Supreme Court’s standing and federal question jurisdiction doctrines which lay the foundation for the situation in which our judicially federalized system now finds itself: some state courts exercising exclusive jurisdiction over federal question claims.

### A. *Federal Court Standing: Doctrinal Developments from Lujan to TransUnion*

The standing doctrine serves a gatekeeping function for the federal courts and “identif[ies] those disputes which are appropriately resolved through the judicial process.”<sup>21</sup> This Essay focuses on what injuries suffice to confer standing as it is the “core of Article III’s requirement for cases and

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<sup>20</sup> The Supreme Court is empowered to review judgments, not opinions. *See* 28 U.S.C. § 1257(a) (“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .”).

<sup>21</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). For an extensive overview of the robust scholarship analyzing the rise of the federal standing doctrine and arguing that modern judges—not the founders—invented the standing doctrine, see Bennett, *Paradox*, *supra* note 13, at 1217 n.23, 1219 nn.28-30.

controversies.”<sup>22</sup> The Supreme Court has generally restricted access to federal courts through tightening what qualifies as an injury in fact.<sup>23</sup>

Justice Scalia succinctly articulated the modern standing doctrine in *Lujan v. Defenders of Wildlife*.<sup>24</sup> In *Lujan*, the plaintiffs challenged a rule that the Secretary of the Interior promulgated which interpreted the Endangered Species Act.<sup>25</sup> The plaintiffs relied on a citizen-suit section of the Act that read “any person may commence a civil suit . . . to enjoin . . . any . . . agency . . . alleged to be in violation of any provision” of the Act.<sup>26</sup> The Court addressed the question: can Congress statutorily grant a plaintiff standing solely through creating a cause of action, i.e., did the plaintiffs have standing under Article III to sue?<sup>27</sup> The Court found that the plaintiffs did not have standing to sue in federal court,<sup>28</sup> and in effect, the Court held that even though a plaintiff may have a statutory right to sue, such plaintiff is not guaranteed Article III standing.<sup>29</sup>

Justice Scalia, speaking for the Court, argued that for a plaintiff in federal court to satisfy the “Cases and Controversies” requirement of Article III,<sup>30</sup> she must (1) have suffered an “injury in fact” (2) that is “fairly traceable” to the defendant’s conduct—that the defendant caused the injury—(3) which a court can remedy.<sup>31</sup> The Court emphasized that the “injury in fact” must be (1) concrete and particularized and (2) actual or imminent—not conjectural or hypothetical.<sup>32</sup> Because the Court stated that the necessary harm needed to be “concrete and particularized” to confer standing, it created a disjunctive test, implying that a harm could be concrete but not particularized, or, on the other hand, particularized but not concrete.<sup>33</sup>

Even though it described the disjunctive test, the Court held that the plaintiffs failed to allege an actual or imminent harm, and the novel theories

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<sup>22</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 64 (3d ed. 2006).

<sup>23</sup> See Bennett, *Paradox*, *supra* note 13, at 1218 (“[A] series of slow but steady changes to standing doctrine have conspired, over the last fifty years, to restrict access to federal courts. Almost all of the doctrinal changes to this requirement involve the ‘injury’ prong of that three-part test for standing.” (footnotes omitted)).

<sup>24</sup> 504 U.S. at 560-61.

<sup>25</sup> *Id.* at 557-58.

<sup>26</sup> 16 U.S.C. § 1540(g)(1)(A).

<sup>27</sup> *Lujan*, 504 U.S. at 558; Bennett, *Paradox*, *supra* note 13, at 1221.

<sup>28</sup> *Lujan*, 504 U.S. at 578.

<sup>29</sup> Bennett, *Paradox*, *supra* note 13, at 1223-24.

<sup>30</sup> U.S. CONST. art. III, § 2.

<sup>31</sup> *Lujan*, 504 U.S. at 560-61 (citations and internal quotation marks omitted).

<sup>32</sup> *Id.* at 560 (citations and internal quotation marks omitted).

<sup>33</sup> Bennett, *Paradox*, *supra* note 13, at 1223 (“By setting the requirements of concreteness and particularization apart, *Lujan*’s formulation thus subtly expanded the doctrinal test for standing. By enumerating these sub-elements conjunctively, *Lujan* suggested that they have different content and must be satisfied separately.”).

of standing the plaintiffs alleged failed to establish a particularized harm.<sup>34</sup> A particularized harm is one that “is more acute than [that suffered by] the public at large,” and the plaintiffs in *Lujan* failed to demonstrate that their injuries were unique to them.<sup>35</sup> The Court said little, however, about whether the harms the plaintiffs alleged were sufficiently concrete.<sup>36</sup> It left the question, and analysis, of what harms are concrete enough to confer Article III standing unanswered for over two decades.

The Court took up that question and fleshed out the standing doctrine when it agreed to hear arguments in *Spokeo* and *TransUnion*, both of which involved the FCRA.<sup>37</sup> The FCRA regulates agencies that compile and disseminate consumers’ personal information, aiming to protect consumer privacy and promote fair and accurate credit reporting.<sup>38</sup> To enforce these provisions, the FCRA “creates a private cause of action, imposes statutory damages of up to \$1,000 for each willful violation of the act, and authorizes awards of punitive damages and attorney’s fees to successful plaintiffs.”<sup>39</sup>

The Court’s first cut at defining the contours of the concreteness requirement came in *Spokeo*.<sup>40</sup> The case involved Spokeo, a firm that operates a “people search engine.”<sup>41</sup> Spokeo ran a search on the plaintiff, Thomas Robins, which returned inaccurate information.<sup>42</sup> Robins filed a class-action complaint alleging, among other things, violations of the FCRA.<sup>43</sup> Spokeo moved to dismiss the case for lack of standing and argued that Robins failed to plead a concrete injury.<sup>44</sup>

Justice Alito, speaking for the majority, ruled narrowly on the issue presented, while reasoning loudly about the concreteness requirement. First, the Court emphasized the conjunctive nature of the injury requirement—a plaintiff’s injury must be particularized *and* concrete.<sup>45</sup> He wrote that “[p]articularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be ‘concrete.’”<sup>46</sup> Second, the Court articulated a concreteness standard. A concrete harm must be *de facto*—it must actually exist; further, “[w]hen [the Court has] used the adjective

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<sup>34</sup> *Lujan*, 504 U.S. at 564, 567.

<sup>35</sup> Bennett, *Paradox*, *supra* note 13, at 1220.

<sup>36</sup> *Id.* at 1224.

<sup>37</sup> *Spokeo*, 578 U.S. 330, 333 (2016); *TransUnion*, 141 S. Ct. 2190, 2202 (2021).

<sup>38</sup> 15 U.S.C. § 1681(a); *TransUnion*, 141 S. Ct. at 2200.

<sup>39</sup> Bennett, *Paradox*, *supra* note 13, at 1225; *see also* 15 U.S.C. § 1681n(a)(1)(A), (a)(2), (c).

<sup>40</sup> 578 U.S. 330 (2016).

<sup>41</sup> *Id.* at 333.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 336.

<sup>44</sup> *Id.* at 336-37.

<sup>45</sup> *Id.* at 339-43.

<sup>46</sup> *Id.* at 339.

‘concrete,’ [it has] meant to convey the usual meaning of the term—‘real,’ and not ‘abstract.’”<sup>47</sup> Third, the Court emphasized that a concrete harm need not necessarily be tangible. In fact, the Court had recognized intangible, concrete harms in other cases.<sup>48</sup> To determine whether or not an intangible harm satisfies the concreteness requirement, Justice Alito instructed one to look to history and the judgment of Congress.<sup>49</sup> But, fourth, Congress cannot create a cognizable harm out of thin air. In the Court’s view,

Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.<sup>50</sup>

Therefore, Congress cannot legislatively specify, create, or designate harms as concrete for Article III purposes. However, on the record before it, the Court could not decide if Robins experienced a concrete harm and did not discuss exactly what role Congress had in its power to identify or elevate intangible harms.<sup>51</sup> The Court decided to vacate the Ninth Circuit’s decision and remand for further analysis.<sup>52</sup>

The Court answered these outstanding questions and rounded out its standing-doctrine jurisprudence and analysis of concrete harms in *TransUnion*.<sup>53</sup> A putative class of over eight-thousand people sued TransUnion for an alleged failure to use reasonable procedures to ensure accuracy of their credit files in violation of the FCRA.<sup>54</sup> There were essentially two groups of claimants—those who had a misleading and erroneous file given to a third party and those who did not.<sup>55</sup> The Court held that those who had their files disseminated to third parties did allege a particularized and concrete injury. Yet, those whose alleged harm was having erroneous information on file that was not given to a third party did not sustain the requisite injury needed to establish standing in

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<sup>47</sup> *Id.* at 340.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 340-41.

<sup>50</sup> *Id.* at 341.

<sup>51</sup> *Id.* at 342-43.

<sup>52</sup> *Id.* at 343; Bennett, *Paradox*, *supra* note 13, at 1227.

<sup>53</sup> 141 S. Ct. 2190 (2021).

<sup>54</sup> *Id.* at 2200.

<sup>55</sup> *Id.*

federal courts.<sup>56</sup> The Court held this *even though* the statute explicitly created substantive privacy rights and authorized both types of plaintiffs to sue.<sup>57</sup>

The Court emphasized that the central role in determining concreteness is whether the alleged harm has a “close relationship” to a harm traditionally recognized by American courts, “such as physical harm, monetary harm, or various intangible harms including . . . reputational harm.”<sup>58</sup> The Court stated that “[the] inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury.”<sup>59</sup> In a lengthy passage, Justice Kavanaugh, writing for the majority, then analyzed Congress’s role in conferring standing by creating certain rights. He wrote:

In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court in *Spokeo* said that Congress’s views may be “instructive.” Courts must afford due respect to Congress’s decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant’s violation of that statutory prohibition or obligation. In that way, Congress may “elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” But even though “Congress may ‘elevate’ harms that ‘exist’ in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.”

Importantly, this Court has rejected the proposition that “a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” As the Court emphasized in *Spokeo*, “Article III standing requires a concrete injury even in the context of a statutory violation.”<sup>60</sup>

Consequently, a plaintiff may have a federal statutory cause of action to sue a defendant for allegedly violating a federal law, without experiencing any concrete harm caused by the defendant’s conduct.<sup>61</sup> In essence, “under Article III, an injury in law is not an injury in fact.”<sup>62</sup> The Court justified this analysis by arguing that such a distinction was essential to the Constitution’s separation of powers.<sup>63</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> Erwin Chemerinsky, *What’s Standing After TransUnion, LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 280 (2021).

<sup>58</sup> *TransUnion*, 141 S. Ct. at 2200.

<sup>59</sup> *Id.* at 2204.

<sup>60</sup> *Id.* at 2204-05 (citations omitted).

<sup>61</sup> *Id.* at 2205.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2207; *see also id.* at 2206 (“[I]f the law of Article III did not require plaintiffs to demonstrate a ‘concrete harm,’ Congress could authorize virtually any citizen to bring a statutory



However, the dissenters were not persuaded. Justice Thomas's dissent pointedly argued that “[n]ever before has this Court declared that legal injury is *inherently* insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots.”<sup>64</sup> Justice Kagan echoed this concern in her dissent as well. She wrote, “[t]he Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III.”<sup>65</sup>

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This brief discussion of the trio of standing cases brings to light three important points. First, the Court's analysis of the particularization prong focuses on the characteristics of the plaintiff—that they felt the injury personally and individually.<sup>66</sup> Second, a concrete harm inquiry asks, instead, “whether the plaintiff's injury is sufficiently tangible, even assuming it is particular to her.”<sup>67</sup> As such, the concreteness prong focuses on the characteristics of the injury itself. If a court considers one category of injuries to be non-concrete, no one can sue in federal court to redress it.<sup>68</sup> Third, and most importantly for purposes of this Essay, these cases apply to standing in federal courts, where Article III constrains jurisdiction. They do not necessarily apply in state courts—an issue to which this Essay now turns.

### B. *Standing in State Courts*

As discussed above, *Lujan*, *Spokeo*, and *TransUnion* illustrate a standing doctrine that finds its grounding in the “Cases and Controversies” clause of the United States Constitution.<sup>69</sup> Those constraints, including the particularity

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damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent.”). While not the focus of this Essay, one may wonder, instead, whether this ruling is a further extension of the Court's contempt for Congress. See generally Pamela S. Karlan, Foreword, *Democracy and Disdain*, 126 HARV. L. REV. 1 (2012).

<sup>64</sup> *Id.* at 2221 (Thomas, J., dissenting) (footnote omitted).

<sup>65</sup> *Id.* at 2225 (Kagan, J., dissenting).

<sup>66</sup> See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 567 (1992) (“It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.”).

<sup>67</sup> See Bennett, *Paradox*, *supra* note 13, at 1220.

<sup>68</sup> *Id.*

<sup>69</sup> See *supra* Section I.A.

and concreteness requirements, do not bind state courts.<sup>70</sup> State courts are free to determine standing in their jurisdiction.<sup>71</sup> Some have followed the Supreme Court's articulation of the doctrine.<sup>72</sup> However, others have opted to develop their own doctrine without certain requirements imposed by federal courts.<sup>73</sup>

State courts often define their standing doctrine in reaction to federal developments.<sup>74</sup> Bennett observed that “[s]tate courts’ varied reception to

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<sup>70</sup> *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“[T]he state judiciary here chose a different path, as was their right, and took no account of federal standing rules in letting the case go to final judgment in the [state] courts. That result properly follows from the allocation of authority in the federal system. We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.”).

<sup>71</sup> *Id.*

<sup>72</sup> Delaware, Georgia, and Missouri are among the states that follow the federal standing doctrine. *See, e.g.*, *Dover Hist. Soc’y v. City of Dover Plan. Comm’n*, 838 A.2d 1103, 1111 (Del. 2003) (“This Court has recognized that the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware.”); *Sons of Confederate Veterans v. Newton Cnty. Bd. of Comm’rs*, 861 S.E.2d 653, 657-58 (Ga. App. 2021) (“And under federal and Georgia law, standing requires (1) an injury in fact; (2) a causal connection between the injury and the causal conduct; and (3) the likelihood that the injury will be redressed with a favorable decision. An injury in fact is one that is both concrete and particularized and actual or imminent, not conjectural or hypothetical.” (footnote and internal quotation marks omitted)); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 573-74 (Mo. Ct. App. 2017) (“‘The requirement that a party have standing to bring an action is a component of the general requirement of justiciability’ in both the federal context and in Missouri.” (quoting *Harrison v. Monroe County*, 716 S.W.2d 263, 265 (Mo. 1986) (en banc))).

<sup>73</sup> Colorado, Illinois, and Iowa are among the states that have paved a distinct standing doctrine path. *See, e.g.*, *Rocky Mountain Gun Owners v. Polis*, No. 20CA0997, 2021 WL 5227247, at \*8 (Colo. App. Nov. 10, 2021) (“*Spokeo, Inc. v. Robins*, on which the Governor relies, doesn’t require a contrary conclusion. In that case, the Court held that a ‘bare procedural violation’ of the Fair Credit Reporting Act would not be sufficiently ‘concrete’ to confer standing on the plaintiff. But that case was decided based on Article III federal standing concepts, which are of limited utility in considering standing under Colorado law. . . . [O]ur cases ‘reflect a more expansive view of standing under Colorado law than that expressed under federal law.’” (citations omitted)); *Soto v. Great Am. LLC*, 165 N.E.3d 935, 941-42 (Ill. App. Ct. 2020) (“Accordingly, Illinois courts may interpret the federal standing criteria less restrictively than federal courts do. . . . Guided by the above principles and FACTA’s plain language, we hold that plaintiffs had standing to pursue their statutory claims without pleading an actual injury beyond the violation of their statutory rights.”); *Kline v. SouthGate Prop. Mgmt., LLC*, 895 N.W.2d 429, 437 n.4 (Iowa 2017) (“We are not persuaded that the Article III limit on Congress’s power to authorize private litigation in the federal courts identified in *Spokeo* applies to the same extent when the general assembly authorizes private litigation in Iowa courts.”).

<sup>74</sup> *See* Bennett, *Paradox*, *supra* note 13, at 1232 (“Regardless of their impetus or motivation for doing so, state courts react to federal standing cases so that the doctrinal lines drawn in federal cases become inscribed in state law—either affirmatively or negatively.”); *see also* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE AGRIC. & NAT’L RES. L. 349, 398 (2015) (“Nevertheless, development of constitutional standing requirements in federal courts undoubtedly prompted state courts to take up the issue and develop approaches following the path blazed by federal decisions.”).

*Lujan*'s revised standing doctrine led to a kaleidoscope of state standing rules.<sup>75</sup> Bennett, building on the impressive work of Wyatt Sassman, categorized state standing rules into camps that either adopted or rejected *Lujan*'s framework.<sup>76</sup> In his count, roughly half of states have adopted *Lujan*'s framework, while the others have charted a different course.<sup>77</sup> But given the reactionary nature of how state courts address standing in their own tribunals, it is unsettled whether those states that have adopted or rejected *Lujan* will continue those trends in light of *Spokeo* and *TransUnion*.<sup>78</sup> Recent case law, though, suggests that some states have rejected *Spokeo* and will entertain federal questions in state courts that would not survive in federal courts.<sup>79</sup>

### C. State Courts' Duty to Entertain Federal Question Claims

The standing doctrine, derived from Article III, is not the only restriction on federal court jurisdiction. Federal courts have limited jurisdiction and may only entertain "such cases as are within the judicial power of the United States as defined in the Constitution and entrusted to them by a jurisdictional grant by Congress."<sup>80</sup> The Constitution's grant of judicial power for federal courts extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their authority."<sup>81</sup> Congress has implemented the Constitution's grant of authority by passing 28 U.S.C. § 1331 with almost identical language.<sup>82</sup> The statute allows federal courts to adjudicate federal questions.<sup>83</sup> Further, a number of federal statutes, like the FCRA, contain their own jurisdictional provision authorizing suit in federal court.<sup>84</sup> Therefore, "true federal question jurisdiction is accomplished by § 1331 and many jurisdictional provisions in other pieces of legislation."<sup>85</sup>

<sup>75</sup> See Bennett, *Paradox*, *supra* note 13, at 1232.

<sup>76</sup> *Id.* at 1233 fig.1. While Bennett also categorizes the standing rules against a prudential-constitutional dimension, that perspective is not the focus of this article. *Id.*

<sup>77</sup> *Id.* at 1233.

<sup>78</sup> See *id.* ("But for many reasons—including change in court composition, a general lack of standing cases in state courts, and the politicization of standing as a legal issue—a state's adherence to *Lujan* is no guarantee that *Spokeo*-type claims will be barred there. . . . Instead, *Spokeo* gives state courts a new chance to decide whether to follow federal doctrine. Just as with *Lujan*, we should expect states to make different choices—and indeed they already are.")

<sup>79</sup> See, e.g., cases cited *supra* note 73.

<sup>80</sup> Lawrence H. Cooke, *Waste Not, Wait Not—A Consideration of Federal and State Jurisdiction*, 49 FORDHAM L. REV. 895, 897 (1981).

<sup>81</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>82</sup> 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.")

<sup>83</sup> John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 250 (2007) [hereinafter Preis, *Reassessing the Purposes*].

<sup>84</sup> E.g., 15 U.S.C. § 1681p.

<sup>85</sup> Preis, *Reassessing the Purposes*, *supra* note 83, at 251.

Absent specific circumstances, state courts are obliged to open their doors to federal questions and have done so historically.<sup>86</sup> Supreme Court case law coupled with constitutional scriptures make this so. First, the Constitution's Supremacy Clause commands that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."<sup>87</sup> Thus, the Constitution commands state-court judges to enforce federal law.<sup>88</sup> Second, scholars point to the "Madisonian Compromise" etched into the first clause of the Constitution's third article.<sup>89</sup> Succinctly put, because the Constitution does not require Congress to create inferior federal courts, state courts would be the de facto tribunal to adjudicate federal rights if Congress decided not to create lower federal courts.<sup>90</sup> Finally, the Supreme Court has spoken authoritatively on the issue. In *Clafin v. Houseman*,<sup>91</sup> the Supreme Court held that state courts are presumed competent to adjudicate federal claims and that there is a default presumption of concurrent jurisdiction—that state courts and federal courts have jurisdiction over federal questions unless Congress says otherwise.<sup>92</sup> In the words of Redish and Sklaver, *Testa v. Katt*<sup>93</sup> held that "the Supremacy Clause required the state courts to obey a valid federal law which obligated them to adjudicate federal claims."<sup>94</sup> The Court framed the question as "concern[ing] only the

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<sup>86</sup> *Testa v. Katt*, 330 U.S. 386, 389-91 (1947); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1152-53 (1984); Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1323-24 (2005).

<sup>87</sup> U.S. CONST. art. VI, cl. 2.

<sup>88</sup> See *Printz v. United States*, 521 U.S. 898, 907 (1997) (explaining that the Supremacy Clause instructs state judges to enforce federal law); Katz, *supra* note 86, at 1322 ("When state judges exercise . . . jurisdiction over federal claims, the Supremacy Clause directs them to uphold the federal law over contrary state law.").

<sup>89</sup> U.S. CONST. art. III, § 1, cl. 1. See generally Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

<sup>90</sup> Collins, *supra* note 89, at 47-49; Hart, *supra* note 89, at 1363-64.

<sup>91</sup> 93 U.S. 130 (1876).

<sup>92</sup> *Id.* at 136-37; see also Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 76 MICH. L. REV. 311, 314 (1976) ("[I]t must have been clearly understood at the time [of the Founding] that state courts would be competent to hear federal causes of action, since there was a possibility that no extensive federal judiciary would be formed."); Gordon & Gross, *supra* note 86, at 1160.

<sup>93</sup> 330 U.S. 386 (1947).

<sup>94</sup> Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 76 (1998); *Testa*, 330 U.S. at 389-92, 393 ("For the policy of the federal Act is the prevailing policy in every state."); see also Gordon & Gross, *supra* note 86, at 1159-60 ("*Testa* finds a state court obligation to hear federal claims that overcomes any policy of judicial restraint against hearing those claims, and it forbids discrimination by the states against federal claims when the state courts can hear analogous state claims.").

right of a state to deny enforcement to claims growing out of a valid federal law.”<sup>95</sup> And it answered it in the negative—the state could not refuse to adjudicate such claims.<sup>96</sup> Therefore, the Court’s jurisprudence has created an obligation for state courts to hear federal question claims unless either Congress has excluded them from doing so or they have a valid excuse for refusing their jurisdiction.<sup>97</sup>

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This Part highlighted the design of our constitutional system that allows for state courts to entertain claims emanating from federal law. Federal standing restrictions do not bar state courts from entertaining claims in their forum. And the Founders, the Constitution, and Supreme Court precedent presume that state courts are competent to hear claims arising out of federal law. Therefore, the fact that some federal question claims are adjudicated in state courts when they are barred from federal court is less of a bug in the system as much as it is a predictable feature of judicial federalism.<sup>98</sup>

## II. CRITICISMS OF THE POST-*SPOKEO* AND *TRANSUNION* LANDSCAPE

This aspect of our judicial system—the potential of exclusive state-court jurisdiction over federal claims—troubles Professor Bennett. While his critique is largely of this development of federal standing doctrine,<sup>99</sup> he articulates a fear that this design threatens federal law. He argues that “[t]he potential costs to the federal judiciary and its ability to superintend the development of federal law are grave.”<sup>100</sup> He predicts “a massive transfer of federal claims from federal to state courts, where federal law will develop largely without the participation of federal courts.”<sup>101</sup> The foremost issue to

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<sup>95</sup> *Testa*, 300 U.S. at 394.

<sup>96</sup> *Id.*; *cf.* *Tafflin v. Levitt*, 493 U.S. 455, 460 (1990) (finding that state courts have presumptive authority to adjudicate federal claims); sources cited *infra* note 97.

<sup>97</sup> *Gordon & Gross*, *supra* note 86 at 1165 (explaining that *Testa* has come to stand for “the proposition that state courts of general jurisdiction must hear all properly-presented federal claims when jurisdiction is concurrent”). In the rare event that there is a “disabling incompatibility between the federal claim and state court adjudication,” *Testa* and its progeny provide an escape hatch from a state court’s obligation to hear federal claims. *Id.* at 1153 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981)); *see also id.* at 1153 n.25 (collecting authority describing the exceptions to this obligation).

<sup>98</sup> For a brief discussion of the themes inherent in judicial federalism, see Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 335 (2002) and Sandra Day O’ Connor, *Our Judicial Federalism*, 35 CASE W. L. REV. 1 (1984).

<sup>99</sup> I do not necessarily disagree with him, and the army of others, who have persuasively critiqued and questioned the Supreme Court’s standing doctrine.

<sup>100</sup> Bennett, *Paradox*, *supra* note 13, at 1244.

<sup>101</sup> *Id.* at 1214.

him is the “possibility of disuniformity in federal law, a problem the Supreme Court alone cannot solve. If the guiding principle for claim allocation in the federal system is that federal law should be mainly decided by federal courts . . . , the present state of affairs flips that presumption on its head.”<sup>102</sup> Finally, he argues that the fallout from the Court’s standing decisions was “unforeseen,” and that the only way out of this “paradox” is for the Court to overrule *Spokeo*.<sup>103</sup>

### III. A FEATURE AND NOT A BUG

Bennett’s criticisms are misplaced and overstate the effects that *Spokeo* and *TransUnion* may have on the state and federal judicial system. The initial data from the post-*Spokeo* world does not indicate a massive transfer of cases. Rather, the data show that the Supreme Court cases affected a limited number of federal statutes, and even then, plaintiffs have not inundated state courts. Further, state courts that entertain these federal question cases are (1) well-suited to adjudicate federal questions, (2) will not create substantial disuniformity in federal law, and (3) do not warrant critiques stemming from federalism concerns—namely, that federal law should be created and interpreted solely by the federal sovereign. The Framers might not have envisioned this exact situation, but constitutional insight may help understand the situation not as a “paradox” but as a feature of federalism.<sup>104</sup>

First, an analysis of cases citing *Spokeo* and *TransUnion* support an initial conclusion that there has not been a massive transfer of federal cases to state court. Out of the 5,565 cases that cite *Spokeo*, which the Court decided in 2016, only fifty-three, or 0.95%, are state-court decisions.<sup>105</sup> However, out of these fifty-three cases, only six involve plaintiffs bringing federal statutory causes of action.<sup>106</sup> And these cases only entertained certain federal claims—

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<sup>102</sup> *Id.* at 1216.

<sup>103</sup> *Id.* at 1244, 1267-68.

<sup>104</sup> Chief Justice Burger once observed in reference to an ALI study that “[u]narticulated, but implicit, in the Institute’s study was that the state courts of this country are the basic instrument of justice under our system, and this, of course, is the heart of what we call federalism.” Cooke, *supra* note 80, at 898.

<sup>105</sup> To conduct this search, I retrieved *Spokeo* on Westlaw and narrowed its citing references to cases. I excluded cases that came from the District of Columbia Circuit Court of Appeals, Washington D.C. Superior Court system, “Specialty” Courts, or courts from the Territories when deriving the total number of decisions that cite *Spokeo* (5,565). To find the number of state-court decisions, I then filtered by jurisdiction to “State.” Following the same method, *TransUnion* has been cited in 432 cases since the Supreme Court announced its decision. Only three have been state-court decisions. These searches were run on April 6, 2022.

<sup>106</sup> See *Soto v. Great Am. LLC*, 165 N.E.3d 935, 942 (Ill. App. Ct. 2020) (finding standing for the plaintiff to assert their FACTA claim); *Lee v. Buth-Na-Bodhaige, Inc.*, 143 N.E.3d 645, 665 (Ill. App. Ct. 2019) (holding that the state court properly exerted jurisdiction over the plaintiff’s

not an avalanche of the entire United States Code. These claims were based on the FCRA and FACTA, and in two cases, the plaintiffs' claims were dismissed for lack of standing.<sup>107</sup> *Spokeo*'s true impact may not be fully felt until the dust settles from the *TransUnion* opinion. But there have only been three cases decided by state courts that cite *TransUnion*—and in each case, the plaintiffs brought a state-law cause of action.<sup>108</sup> Five years after *Spokeo*, though, there has been a slight, arguably negligible, transfer of cases from federal to state courts, based on a narrow set of federal statutes.<sup>109</sup>

Second, state courts are equipped to decide federal question cases and are not likely to create disuniformity with federal law. As discussed above, state courts of general jurisdiction are presumed competent to hear claims based on federal law.<sup>110</sup> They regularly entertain and adjudicate significant federal questions predicated on the Constitution—specifically the Bill of Rights and the Fourteenth Amendment.<sup>111</sup> This is likely due to state-courts' handling of criminal and habeas dockets, which present rights-based claims that may have

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FACTA claim); *Smith v. Ohio State Univ.*, No. 17AP-218, 2017 WL 6016627, at \*4 (Ohio Ct. App. Dec. 5, 2017) (dismissing the plaintiff's FCRA claims for lack of standing); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 575-76 (Mo. Ct. App. 2017) (finding that the plaintiffs lacked standing to bring their FCRA claim); *Campbell v. Adecco USA, Inc.*, 561 S.W.3d 116, 124 (Mo. Ct. App. 2018) (finding that the plaintiffs lacked standing as to one of their claims under the FCRA, but that they established a concrete injury to support standing for two of their other claims); *Courtright v. O'Reilly Auto.*, 604 S.W.3d 694, 704 (Mo. Ct. App. 2020) (finding standing for the plaintiff to assert his FCRA claim).

<sup>107</sup> See cases cited *supra* note 106. *But see* Chemerinsky, *supra* note 57, at 284 (“The implications of *TransUnion* apply to a myriad of federal statutes.”). While this Essay does not attempt to evaluate Dean Chemerinsky's concerns, they do not seem warranted either based on this initial assessment.

<sup>108</sup> *Laws v. Grayeyes*, 498 P.3d 410 (Utah 2021); *State ex rel. W. Va. Univ. Hosps.-E., Inc. v. Hammer*, 866 S.E.2d 187 (W. Va. 2021); *Dohlen v. City of San Antonio*, No. 20-025, 2022 WL 983764 (Tex. Apr. 1, 2022).

<sup>109</sup> This analysis is arguably incomplete. There are other ways to investigate the potential transfer of cases. For example, one could search for cases citing various federal laws or their subsections, including the FACTA, FCRA, Telephone Consumer Protection Act, etc. However, the results are fairly similar. As of April 6, 2022, on Westlaw, only 62 of the 2,931 cases citing the first provision of the FCRA, 15 U.S.C. § 1681—which courts often cite when adjudicating FCRA claims—after May 16, 2016, the day the Supreme Court decided *Spokeo*, are from state courts. However, the percent of state-court decisions, 2.11%, overstates potential state-court involvement because many involve decisions that are not about the merits of a plaintiff's claim. *See, e.g.*, *Shasteen v. ABC Phones of N.C., Inc.*, No. 685 WDA 2020, 2021 WL 4704156, at \*2 (Pa. Super. Ct. Oct. 8, 2021) (affirming arbitration panel's decision on the basis that a court may not retry issues addressed in arbitration); *Richardson v. Murray*, No. 120,680, 2020 WL 4723097, at \*1 (Kan. Ct. App. Aug. 14, 2020) (affirming the district court's award of attorney's fees for a breach of contract claim and its denial of attorney's fees under the Kansas Consumer Protection Act); *Alston v. Schuckit & Assocs., P.C.*, No. 3048, 2020 WL 3639868, at \*4 (Md. Ct. Spec. App. July 6, 2020) (finding that the lower court “did not abuse its discretion in denying [the appellant's] motion and dismissing his case with prejudice”). My goal with these empirical observations is not to be exhaustive but to begin the conversation on how to measure the impact of *Spokeo* and *TransUnion* on our judicial system.

<sup>110</sup> See *supra* Section I.C.

<sup>111</sup> See, e.g., Preis, *Reassessing the Purposes*, *supra* note 83, at 283.

analogous state constitution provisions.<sup>112</sup> State courts have more limited experience handling claims based on federal statutes.<sup>113</sup> While state courts may initially lack experience in these matters,<sup>114</sup> it is something that can be gained and is not innate in any court system. State courts do not ignore federal courts' experience interpreting and applying federal law when adjudicating statutory federal questions in their own forums.<sup>115</sup> State-court judges can, and do learn, from their federal counterparts.<sup>116</sup> As Preis has observed, "state courts routinely rely on federal precedent in making their decisions, suggesting that their decisions will often comport with those of the federal courts, and [] even when state courts judge in the comparatively unconstrained field of state common law, the variability in their results remains quite limited."<sup>117</sup> And, as always, the United States Supreme Court still retains the *final* say if state courts deviate too far from constitutional or federal law commands.<sup>118</sup>

Further, state courts will be confined to an even narrower set of statutory cases than appears on first blush. The only cases that will find a pulse in state courts are those in which a plaintiff does not allege, or a defendant cannot prove when attempting to remove to federal court, more than a bare procedural violation.<sup>119</sup> This limits the potential reach of state-court decisions on these federal questions.

Exclusive state-court jurisdiction will also not result in the level and extent of disuniformity in law that Bennett predicts.<sup>120</sup> Baked into this premise is the assumption that federal law, as interpreted by federal courts, is uniform (or at least arguably so). However, circuit splits pervade the federal system. It would be a comically long footnote to capture the extent of circuit

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 285-86.

<sup>114</sup> Bennett, *Paradox*, *supra* note 13, at 1238-39 ("[F]ederal judges have more experience and knowledge of . . . federal statutory claims—and are collectively better suited to ensure uniform interpretation of federal laws—than their state counterparts."); Redish & Muench, *supra* note 92, at 312 ("[S]tate court adjudication of certain federal causes of action might threaten the evolution of federal rights because state judges often lack the expertise to deal with problems unique to federal law."); William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 893, 906, 912 (1967) (discussing federal courts' expertise in federal law as a general matter).

<sup>115</sup> Preis, *Reassessing the Purposes*, *supra* note 83, at 265 ("[S]tate courts rely more heavily on federal precedent in resolving statutory federal questions than constitutional federal questions. In these cases, state courts rely on federal precedent over seventy-five percent of the time.").

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 263.

<sup>118</sup> See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). I discuss this in further detail below.

<sup>119</sup> See *supra* Part I.

<sup>120</sup> See *supra* Part II.



splits.<sup>121</sup> But, just for example, class certification might be granted in one circuit and not another based on whether or not an administratively feasible mechanism exists to identify class members<sup>122</sup>; the equal terms provision of the federal Religious Land Use and Institutionalized Persons Act of 2000 would allow a synagogue to be built in a Florida city despite a local zoning ordinance limiting them to residential areas but not in Long Branch, New Jersey if it had adopted a similar zoning restriction<sup>123</sup>; and if a plaintiff sued the federal government under the Federal Tort Claims Act alleging wrongful removal under immigration laws, the Ninth Circuit would exert jurisdiction over that claim, but the Eighth Circuit would not.<sup>124</sup>

This is not to say that because disuniformity exists in the federal level, potential exclusive state-court jurisdiction over certain questions of federal law is unimportant. However, Bennett fails to grapple with the reality that there is no measure of how much disuniformity is enough to destabilize federal law. And because the background of federal law is already disjointed it is unclear whether state courts will have much of an impact in adjudicating federal question claims, especially because “in the federal and state systems, where hundreds of thousands of federal questions are decided in civil cases each year, a single errant decision by a state trial court does little to affect the overall uniformity of federal law.”<sup>125</sup>

Even if state courts were apt and would not disuniformly interpret federal law, Bennett posits that this regime poses a threat to federalism: “[T]he current state of the law threatens to assign a discrete class of federal claims exclusively to state court, frustrating both the benefits of the federal sovereign’s control over its own law and the possibility of cross-fertilization in one go.”<sup>126</sup> This critique persists, in his view, even though the United States Supreme Court has the authority to review state supreme court decisions that disrupt federal control of federal law.<sup>127</sup> The United States Supreme Court’s power to review state supreme court decisions is asymmetrical: losing defendants in state court may bring a case before it, but plaintiffs who lose at

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<sup>121</sup> Preis reports that there were a total of 1017 new circuit splits from an analysis combining the splits from 1998, 1999, 2002, and 2003. Preis, *Reassessing the Purposes*, *supra* note 83, at 261 tbl.1. For an overview of circuit splits, see BLOOMBERG L., <https://www.bloomberglaw.com/home> [https://perma.cc/2Y3P-QE7K] (enter “Circuit Splits Reported in U.S. Law Week” in the search bar).

<sup>122</sup> Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354, 2357, 2357 n.14 (2015) (collecting cases and discussing the circuit split).

<sup>123</sup> Compare *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004), with *The Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 268 (3d Cir. 2007).

<sup>124</sup> Compare *Arce v. United States*, 899 F.3d 796, 799-801 (9th Cir. 2018), with *Silva v. United States*, 866 F.3d 938, 942 (8th Cir. 2017).

<sup>125</sup> Preis, *Reassessing the Purposes*, *supra* note 83, at 268.

<sup>126</sup> Bennett, *Paradox*, *supra* note 13, at 1246.

<sup>127</sup> *Id.* at 1248-49.

the state supreme court level and lack federal standing cannot.<sup>128</sup> This, then, in Bennett's view, is a suboptimal equilibrium of a sovereign's "control" of its law.<sup>129</sup>

I am not as persuaded. First, while Bennett did not have the benefit of *TransUnion*, he suggests that this fallout from the standing cases was likely unforeseen from the bench.<sup>130</sup> However, Justice Thomas, in dissent, directly addressed the "paradox" that the majority had created.<sup>131</sup> Instead of charting a different path, the majority buckled down and allowed for state courts to assume their constitutional role in adjudicating federal question cases.<sup>132</sup>

Second, the Constitution, as a baseline, presupposes that state courts would have concurrent jurisdiction over federal questions, without any other lower federal courts, and that the Supreme Court would have the final power to say what the law is.<sup>133</sup> Over time, the Court has reaffirmed the principle that state-court doors must generally be open to federal causes of action.<sup>134</sup> And the Court has identified certain categories of gatekeeping mechanisms, like standing, to effectuate the Constitution's other commands that limit its jurisdiction.<sup>135</sup> In essence, the equilibrium the Court has created is the result of tradeoffs—the push and pull of constitutional commands. However, that does not mean that it lacks control of federal law.

Third, it is undisputed that the Supreme Court retains the power to review and decide questions of federal law stemming from state supreme court decisions.<sup>136</sup> I do not disagree that it is odd that defendants, but not plaintiffs, who lose at the highest state-court level can petition the United States Supreme Court for review. But this alone does not threaten federal control of federal law as much as it presents an unfair reality for plaintiffs.<sup>137</sup> Yet, this unfairness may itself be outweighed when a plaintiff has their case heard on their terms in state court and is not dragged by a defendant into federal court through removal.

Relatedly, this asymmetry will not unacceptably skew the development of federal law.<sup>138</sup> Similar to the discussion involving uniformity above, no baseline exists to measure what level of asymmetrical appellate review will

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1244.

<sup>131</sup> *TransUnion*, 141 S. Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting).

<sup>132</sup> See generally *id.* (majority opinion).

<sup>133</sup> See *supra* Section I.C; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>134</sup> See *supra* Section I.C.

<sup>135</sup> See *supra* Part II.

<sup>136</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816).

<sup>137</sup> Bennett, *Paradox*, *supra* note 13, at 1248.

<sup>138</sup> *Id.* at 1249 ("The Court's asymmetric jurisdiction thus ensures that its already-limited supervisory power is also structurally biased against expansive readings of federal law, at least to the extent that the Court is more likely to reserve than affirm . . .").

inappropriately skew federal law or threaten federalism. It is difficult to understand how this asymmetry qualitatively or quantitatively differs from historical examples of asymmetric review. Prior to 1914, the Supreme Court could only review a state supreme court case when it ruled against a federal rights claim.<sup>139</sup> The system survived that asymmetry and will likely survive the asymmetry presented here, even though it cuts in the opposite direction. This is because control of federal law does not stem from reviewing all “Cases or Controversies.” Instead, it comes from reviewing only those decisions that the Supreme Court deems a threat to the uniformity or supremacy of the system, which was made clearer after the Court was granted discretion over which cases to review.<sup>140</sup> The Supreme Court still retains sovereign control of federal law, and if the asymmetry begins to threaten that control, the Court retains the power to overrule precedents to eliminate the asymmetry. Instead of seeing the Supreme Court as sacrificing sovereignty, it has invited, or at least blessed, a new form of cooperative judicial federalism.<sup>141</sup>

#### CONCLUSION

This Essay seeks to temper some of the reservations regarding the situation in which our system now finds itself: some state courts can exercise exclusive jurisdiction over federal question claims. The impact of the Court’s standing doctrine has not altered or destabilized our judicial system. The preliminary data do not support the contention that there has been a huge transfer of cases from federal court to state court or that a wide swath of federal statutes is at risk of being trapped in state courts. And while asymmetrical, if the Court seeks to assert its control of federal law, it has the power to police the boundaries of state behavior when analyzing and deciding questions of federal law.

The potential for, and now the reality of, certain state courts exercising exclusive jurisdiction over federal question claims is a feature of our judicially federalized system and not a bug. At bottom, it is an example of cooperative judicial federalism that the Constitution endorses.

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<sup>139</sup> Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87.

<sup>140</sup> Saul Brenner, *Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies*, 92 LAW LIBR. J. 193, 193, 197-98 (2000) (describing variables associated with the granting of certiorari).

<sup>141</sup> For a discussion of cooperative federalism, see generally Frank R. Strong, *Cooperative Federalism*, 23 IOWA L. REV. 459 (1938), Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893 (2019), and Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001).