NO HARM, NO PROBLEM (IN STATE COURT): WHY STATES SHOULD REJECT INJURY IN FACT

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ABSTRACT

New judicial federalism urges states to extend their constitutional protections beyond the federal Constitution's. Yet the scholarship has largely ignored justiciability doctrines—including standing—that dictate the requirements for suing in court. Meanwhile, the federal injury in fact requirement has been debated for years, with critics claiming it is ahistorical and overly restrictive. States, though, are not bound by Article III and can reject the federal standing doctrine. Some states have. In fact, the same year the Supreme Court doubled down on injury in fact by stating "no concrete harm, no standing," the North Carolina Supreme Court rejected injury in fact and adopted a more permissive legal injury requirement. But the North Carolina Supreme Court's main rationale was that the federal doctrine is wrong itself. This rests on the mistaken assumption that state and federal courts should have the same standing doctrines. On the contrary, states are not tied to the federal doctrine in any way. This Note explains why states should reject the federal doctrine regardless of whether it is right for federal courts: injury in fact addresses uniquely federal concerns. Federal power grew in response to federal crises and political realities, and, in reaction, the Court used injury in fact to pull the federal judiciary back within its intended limits. Thus, the concerns and values underlying injury in fact are inapplicable to states. Instead of adopting injury in fact, states should adopt more permissive standing doctrines. Such doctrines would be consistent with states' broader judicial power and would effectuate the goals of the new judicial federalism.

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INTRODUCTION

Since at least the 1970s, scholars and activists have urged states to expand their constitutional protections beyond those of the federal Constitution.[1] Recently, this movement for states to fill the gaps left by federal law—dubbed the "new judicial federalism"[2]—has been reinvigorated by Supreme Court decisions.[3] Whether it comes to abortion, education, physician-assisted suicide, or voting, the main focus of the new judicial federalism has been on expanding individual rights at a state level.[4] This focus on individual rights means that

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495–98 (1977) [hereinafter Brennan, *State Constitutions*].

2. *New Judicial Federalism*, U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, https://www.ojp.gov/ncjrs/virtual-library/abstracts/new-judicial-federalism [https://perma.cc/6KK6-KDVP]; *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021) (describing "a 'new judicial federalism' in which state courts would step in as the federal judiciary receded").

3. For example, since *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), activists on both sides of the abortion issue have called on states to either recognize or explicitly reject that their state's constitution protects a right to abortion. *See, e.g.*, Lawrence Friedman, *Protecting Women's Choice Post-Dobbs: State Constitutional Law*, HILL (July 7, 2022, 12:00 PM), https://thehill.com/opinion/judiciary/3548700-protecting-womens-choice-post-dobbs-state-constitutional-law [https://perma.cc/MJJ9-KNEP] (noting that state constitutional amendments and state court decisions recognizing a right to abortion "represent potential responses to the U.S. Supreme Court's decision in Dobbs"); Margot Cleveland, *Post-Dobbs, the Abortion Battle Hits Activist State Courts*, FEDERALIST (June 27, 2022), https://thefederalist.com/2022/06/27/post-dobbs-the-abortion-battle-hits-activist-state-courts [https://perma.cc/RZR5-ATN8] (calling on pro-life citizens, in the wake of *Dobbs*, to lobby for state constitutional amendments that clarify no right to abortion is protected in their states and to elect pro-life governors and state judges).

4. *See generally, e.g.*, Brennan, *State Constitutions*, *supra* note 1 (arguing that state courts should more vigorously protect individual rights after the U.S. Supreme Court pulled back from doing so); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1004 (2003) (arguing that "state constitutional rights can serve as a mechanism by which state governments can resist and, to a degree, counteract abusive exercises of national power"); Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 767 (2008) (arguing for states to recognize a state constitutional right to education in juvenile detention); Annamarie Kempic, *The Right To Refuse Medical Treatment Under the State Constitutions*, 5 COOLEY L. REV. 313, 313 (1988) (same for the right to refuse medical treatment); Stan Keillor, *Should Minnesota Recognize a State Constitutional Right to a Criminal Appeal*, 36 HAMLINE L. REV. 399, 401, 425 (2013) (arguing the Minnesota Supreme Court could recognize a right to criminal appeal, although the federal constitution does not); Joshua A. Douglas, *The Right To Vote Under State Constitutions*, 67 VAND. L. REV. 89, 89 (2014) (urging that states recognize expansive voting rights to compensate for federal underenforcement); Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RSRV. L. REV. 997, 998, 1001 (2010) (arguing state constitutions should not be read to mirror the federal Constitution when it comes to socioeconomic rights and that states can and should recognize a "right to health"). Although advocating for state expansion of individual rights has been the main

justiciability doctrines, including standing, have largely been left out of the discussion.[5] But what is the point of having expanded rights if you cannot get into court to vindicate them?

Article III requires that every plaintiff have an "injury in fact" to sue in federal court.[6] The barrier injury in fact can pose—as well as claims it is atextual, ahistorical, and antidemocratic—have motivated calls for a more permissive, or easier to satisfy, "legal injury" rule at the federal level for years.[7] States, however, are not bound by Article

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focus of the new judicial federalism, state constitutions and institutions have also been lauded as a way to further democratic legitimacy, *see generally, e.g.*, Bulman-Pozen & Seifter, *supra* note 2; Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275 (2022), and as more legitimate expanders of individual rights than federal courts, *see, e.g.*, JEFFREY SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 15–29 (2021) [hereinafter SUTTON, WHO DECIDES?].

5. *See supra* note 4. Some scholars have addressed the differences in state procedural doctrines and have recognized how the differing doctrines can inform both federal and state doctrinal development. *See generally, e.g.*, William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163, 1169 (2023) (surveying state forum non conveniens doctrines and defining "procedural federalism" to mean "relationships between state and federal actors that affect the development of procedure"). Still others have "identifie[d] potential state responses to the apparent regression in federal court access" that resulted from Supreme Court decisions on procedural law, including standing, and have "evaluate[d] the extent to which state courts . . . have engaged in these responses," yet have not advocated for or given reasons to support abandoning injury in fact. *See generally* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 414 (2018) (exploring state reactions to the Roberts Court's procedural law decisions, including standing). Regarding standing specifically, other scholars have considered whether states should follow federal standing rules and have encouraged states to develop justiciability doctrines based on state and local concerns rather than the federal doctrine. *See generally, e.g.*, Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1834 (2001) (explaining why states may diverge from federal justiciability doctrines and arguing that "rather than automatically adhere to a federal model, state courts should independently construct judicial access rules to promote the purposes of state and local governance"); James W. Doggett, Note, *Trickle Down Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law*, 108 COLUM. L. REV. 839, 839 (2008) (arguing states should "be hesitant to restrict legislative conferral of standing," mostly for the reasons Professor Hershkoff identified). This Note stands apart from this scholarship by affirmatively urging state courts to reject federal injury in fact—whether right or wrong for the federal system itself—because injury in fact is a uniquely federal development inapplicable to state systems.

6. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); Ass'n of Data Processing Servs. Org. v. Camp, 397 U.S. 150, 152 (1970).

7. *See, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (asserting that history shows "[A]rticle III was not limited to the kinds of private disputes" to which injury in fact limits federal courts); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 305 (2002) (contending that the injury in fact requirement should not "be used to restrict the powers of Congress to authorize jurisdiction"); Cass R. Sunstein, *Standing and the Privatization of Public*

III, so they can reject injury in fact and set their own standing rules based on their own constitutions.[8] Yet states often interpret their constitutions in lockstep with the federal Constitution.[9]

Some states have held that their standing rules are more permissive than the federal courts', although these holdings have largely flown under the radar of new judicial federalism literature. In fact, in 2021—the same year the Supreme Court doubled down on injury in fact in *TransUnion LLC v. Ramirez*,[10] stating "[n]o concrete harm, no standing"[11]—North Carolina rejected injury in fact for its state courts.[12] In *Committee to Elect Dan Forest v. EMPAC*,[13] North Carolina instead adopted a largely more permissive legal injury rule.[14] In other words: no harm, no problem.

While *Dan Forest* gave some state-specific reasons for rejecting injury in fact,[15] the opinion's main reason for adopting a legal injury rule was not about the North Carolina constitution at all. It was that the federal doctrine is wrong itself.[16] In implying that North Carolina rejected injury in fact primarily because it is wrong for the federal system, the court based its reasoning on the assumption that state and federal courts should have the same standing rules. That assumption is wrong.[17] Nothing mandates nor suggests state and federal courts must

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Law, 88 COLUM. L. REV. 1432, 1433 (1988) (distinguishing public law from private law and arguing that Article III does not require an injury in fact in the latter); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (proposing that federal courts "abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of 'injury in fact'" and arguing "standing should simply be a question on the merits of plaintiff's claim").

8. ASARCO v. Kadish, 490 U.S. 605, 617 (1989).

9. *See* SUTTON, WHO DECIDES?, *supra* note 4, at 101–02 (noting that "many state judges start with the assumption that the meaning of their own constitution parallels the meaning of the US Constitution").

10. TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).

11. *Id.* at 2200.

12. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 728 (2021).

13. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698 (2021).

14. *Id.* at 728.

15. *See infra* note 80 and accompanying text.

16. *See infra* notes 81–82 and accompanying text.

17. To be sure, there are some practical reasons why identical state and federal standing doctrines may be desirable. Most simply, litigants (and law students) would only need to learn one doctrine. Identical standing doctrines would also eliminate issues of standing in Supreme Court review of state court decisions. *See infra* Part IV.C (discussing the concern of standing on appeal and how it is ameliorated). Finally, state court litigants would no longer need to worry

share standing doctrines; to the contrary, state courts can formulate their standing rules without any regard to the federal doctrine.[18] So regardless of whether injury in fact is correct for the federal system, states can reject it for themselves.

Building on these principles, this Note posits a new reason why states not only *can* reject injury in fact but *should*: injury in fact is uniquely federal. Although the Framers of the federal government intended federal courts to have limited judicial power compared to state courts,[19] that limited power shifted in the centuries that followed.[20] Federal power both expanded and contracted during Reconstruction, the New Deal, and the Warren Court era in order to respond to pressing, nation-wide issues. In response, standing rules became stricter, then more permissive.[21] Then, to balance the expansion of judicial power that occurred in the 1960s and 1970s, subsequent Courts sought to pull the federal judiciary back to the Framers' intended limits and used injury in fact as a way to do so.[22] Because injury in fact was born out of uniquely federal concerns and principles, state courts have no reason to adopt the doctrine themselves.

This Note does not stop at urging states to reject injury in fact in favor of any alternative doctrine. Rather, it argues states should instead adopt standing doctrines that are more permissive than injury in fact.[23] More permissive state standing rules are consistent with the broader judicial power state courts have vis-à-vis federal courts and would effectuate the goals of judicial federalism. Such doctrines would allow more litigation over state constitutional rights, give people more power to enforce statutory rights, and increase citizens' involvement in state law. Further, more permissive state standing doctrines may allow

about *Fidelity National Bank & Trust Co. of Kansas City v. Swope*, 274 U.S. 123, 130–31, 133–35 (1927), which says state court decisions that are not reviewable in federal court are not binding in future federal court litigation. But, not only are concerns overstated, *see infra* Part IV.C, the possible benefits of identical standing doctrines do not override the principle that state courts are independent from federal courts.

18. ASARCO v. Kadish, 490 U.S. 605, 617 (1989).

19. *Infra* Part III.A.

20. *Infra* Part III.B.

21. *See infra* notes 119–142 and accompanying text.

22. *See infra* notes 146–162 and accompanying text.

23. To be sure, there is nothing stopping states from having stricter standing rules than federal injury in fact. But this Note argues broader state standing rules are more consistent with the history and modern reality of state judicial power vis-à-vis federal power.

people without an injury in fact to vindicate rights granted by federal statutes in state court, effectively filling any gap that injury in fact has left.[24]

This Note proceeds as follows. Part I briefly summarizes the new judicial federalism movement and how justiciability has largely been left out of the discussion. Part II explains and illustrates the federal injury in fact requirement and the common alternative, the legal injury rule. It does so through the facts and reasoning of *TransUnion* and *Dan Forest*. Part III shows that states should reject injury in fact regardless of the federal doctrine's merits because the doctrine serves uniquely federal values that do not apply to the states. Part IV urges states to adopt more permissive standing doctrines. It explains how such doctrines are consistent with many states' judicial power and would effectuate the goals of the new judicial federalism. It also rebuts fears that divergence between states and federal court standing requirements would undermine federal law.

To be clear: this Note is agnostic on the merits of injury in fact for federal courts. It leaves that well-trodden debate to others and focuses solely on how injury in fact is incorrect for state courts.

I. NEW JUDICIAL FEDERALISM'S SUBSTANTIVE FOCUS

New judicial federalism advocates for states to expand their constitutional protections beyond those of the federal Constitution.[25] Yet, until now, the movement has largely focused on individual rights rather than justiciability.

New judicial federalism was born in the 1970s after Chief Justice Warren Burger replaced Chief Justice Earl Warren.[26] In his seminal article *State Constitutions and the Protection of Individual Rights*, Justice William Brennan encouraged states to "be the guardians of our

24. Note that the hole injury in fact leaves is indeed more of a gap than a chasm. Injury in fact is relatively simple to satisfy in many federal claims because the harm plaintiffs suffer have common law analogues. The requirement is most difficult to satisfy when Congress creates a statutory right that does not have a common law analogue. *See* Part IV.C.

25. *See supra* note 2 (collecting sources).

26. G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS 63, 63 (1994). The "new" federalism that began in the 1970s came after "[t]he 'old' federalism [that] began in the era of the New Deal" and consisted of "the Supreme Court rel[ying] on the Due Process Clause of the Fourteenth Amendment to nationalize selected portions of the Bill of Rights." Kermit L. Hall, *Of Floors and Ceilings: The New Federalism and State Bills of Rights*, 44 FLA. L. REV. 637, 638 (1992).

liberties" because state "protections often extend[] beyond those required by the Supreme Court's interpretation of federal law."[27] State courts heeded the call. Before Justice Brennan's article, state supreme courts averaged two rulings per year that interpreted the state constitution more expansively than the federal constitution.[28] Those rulings "increased at least tenfold" in the decade after the article's publication.[29]

Like Justice Brennan's article, most of the new judicial federalism urges states to recognize and protect individual rights beyond those protected by the federal Constitution. For example, even before *Dobbs v. Jackson Women's Health Organization*,[30] which overturned the right to an abortion found in *Roe v. Wade*,[31] several states expanded protections for abortion beyond what *Roe* required.[32] Now, litigation aimed at protecting a right to abortion is pending in at least seven additional states,[33] and constitutional amendments recognizing the right to abortion, or foreclosing judicial recognition of such rights, have been passed or are pending.[34] Similarly, scholars have called on states

27. Brennan, *State Constitutions*, *supra* note 1, at 491.

28. James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 357 (2016).

29. *Id.*

30. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

31. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

32. *See generally State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS. (July 2022) (summarizing how seven state supreme courts expanded abortion rights beyond the federal minimum in the decades before *Dobbs*).

33. *See* Jordan Smith, *The Fight for Abortion Rights Turns to State Constitutions*, INTERCEPT (July 3, 2022, 6:00 AM), https://theintercept.com/2022/07/03/abortion-rights-state-constitutions [https://perma.cc/2PPM-J2QU] (summarizing litigation pending in Florida, Idaho, Utah, Oklahoma, Mississippi, and Kentucky).

34. *See, e.g.*, Alice Miranda Ollstein, *Michigan Votes To Put Abortion Rights into State Constitution*, POLITICO (Nov. 9, 2022, 3:43 AM), https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-00064778 [https://perma.cc/Z268-3FSL] ("Michigan voters . . . approved a sweeping amendment to the state's constitution guaranteeing the right to abortion and other reproductive health services."); *Pa. Voters Could Face Anti-Abortion Constitutional Amendment Like in Kansas*, CBS PITTSBURGH (Aug. 4, 2022, 7:52 PM), https://www.cbsnews.com/pittsburgh/news/pennsylvania-anti-abortion-constitutional-amendment [https://perma.cc/LT95-T9NB] (describing a constitutional amendment making its way through the Pennsylvania legislature that would deny any right to an abortion exists in the state). In August 2022, Kansas voters rejected an amendment that would have eliminated the state constitution's recognition of a right to abortion. *Voters in Kansas Decide To Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/Kansas-voters-abortion-legal-reject-constitutional-amendment [https://perma.cc/3SPJ-ZB6J].

to recognize a right to health, a right to refuse medical treatment, and a right to criminal appeal, among others.[35]

New judicial federalism has focused less on justiciability, despite the fact states have greater flexibility to craft justiciability doctrines than individual rights. Unlike the guarantees of the Bill of Rights, federal justiciability doctrines mandated by Article III (such as standing) do not provide a floor for state justiciability.[36] States can thus experiment with such doctrines more readily than with individual rights by making requirements either stricter or more lenient than those of federal courts.

There is one notable exception to the new judicial federalism's justiciability blind spot. In *Rucho v. Common Cause*,[37] the Supreme Court held that a challenge to North Carolina's allegedly-politically-gerrymandered map was a political question not justiciable under the federal Constitution.[38] But the Court noted that its holding did not mean the plaintiffs' claims could not be heard anywhere: states could pass laws forbidding political gerrymandering or interpret their own constitutions to forbid such gerrymandering.[39]

In fact, in 2022, the North Carolina Supreme Court reversed a lower court's holding that a challenge to the state's electoral maps was a nonjusticiable political question, asserting that "simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are

35. *See supra* note 4 (collecting articles).

36. States are not bound by Article III of the Constitution, which means states do not have to consider federal standing doctrine when crafting their own. ASARCO v. Kadish, 490 U.S. 605, 617 (1989). In contrast, states are bound by most of the Bill of Rights. *See* McDonald v. City of Chicago, 561 U.S. 742, 764–65, 791 (2010) (noting that "almost all of the provisions of the Bill of Rights" have been applied to the states via the Fourteenth Amendment and holding the Fourteenth Amendment also incorporates the Second Amendment). That means "the Supreme Court, interpreting the Bill of Rights, sets the minimum floor for rights, while state supreme courts, interpreting their state bills of rights, fix the ceiling." Hall, *supra* note 26, at 638.

37. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

38. *Id.* at 2506–07 (holding that claims of political gerrymandering are political questions because there are no judicially manageable standards for resolving such claims). *Rucho* involves justiciability rather than individual rights because it addresses whether plaintiffs can *bring a claim* that political gerrymandering is unconstitutional in federal court. The question of whether any substantive federal constitutional right *forbids* political gerrymandering is distinct but has thus far been answered in the negative. Hunt v. Cromartie, 526 U.S. 541, 551 (1999).

39. *Rucho*, 139 S. Ct. at 2507.

nonjusticiable in North Carolina courts."[40] The North Carolina Supreme Court noted the differences between the state and federal constitutions and concluded that *Rucho* did not foreclose state courts hearing questions of political gerrymandering under their own constitutions.[41] Ultimately, the court struck down the maps, holding that the state constitutional right to equal voting power prohibits political gerrymandering.[42] And North Carolina was not the only state to do so.[43]

This Note brings justiciability further into the new judicial federalism conversation by explaining why states should reject the federal standing doctrine and adopt more permissive standing doctrines. The following Parts show how this call, like those of the new judicial federalism, would expand state constitutional rights beyond the federal Constitution's.

II. FEDERAL INJURY IN FACT VERSUS LEGAL INJURY

Standing dictates who can have their claim heard in court. Two standing theories dominate doctrine and scholarship: federal injury in fact and legal injury. North Carolina adopted the latter in *Dan Forest*. This Part describes each theory and uses the facts of *TransUnion* and *Dan Forest* to show how legal injury can be more permissive than injury in fact.

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40. Harper v. Hall, 868 S.E.2d 499, 533 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (2022). The petitioners appealed to the U.S. Supreme Court on federal constitutional grounds, claiming that the Election Clause gives state legislatures, not state courts, the power to draw legislative maps. Brief for Petitioner at 13, *Moore*, 142 S. Ct. 2901 (No. 21-1271). The appellants have federal standing because they lost below, ASARCO v. Kadish, 490 U.S. 605, 619 (1989), and because they are legislatures who suffered the factual injury of the loss of their legislative power, *see* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 803 (2015) (determining that state legislators had standing to sue, as the state constitution nullified legislators' votes regarding redistricting). Had the plaintiffs originally brought their claim in federal court, it would have been nonjusticiable. But because they first brought the claim in state court, it became justiciable on appeal to the Supreme Court. This is just another example of the safeguards protecting the uniformity of federal law even when there are different justiciability rules at the state and federal levels. *Infra* Part IV.C.

41. *Harper*, 868 S.E.2d at 533.

42. *Id.* at 559. The right to equal voting power is based in the state's free election and equal protection clauses. *Id.* The court held the maps also violated the state constitution's freedom of speech and assembly clauses. *Id.*

43. *See, e.g.*, League of Women Voters v. Commonwealth, 173 A.3d 737, 824 (Pa. 2018) (holding political gerrymandering is not a nonjusticiable political question in Pennsylvania state courts).

A. Injury in Fact and Legal Injury: The Rules and Their Differences

The injury in fact requirement means a plaintiff must show they suffered a factual injury—for example, a physical injury, monetary loss, or emotional harm—to get into federal court.[44] The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[45] In addition, the injury must be traceable to the challenged conduct and redressable by the requested relief.[46] The Court has insisted that injury in fact, traceability, and redressability form the "irreducible constitutional minimum" of standing under Article III.[47]

A frequently lauded alternative to injury in fact, which *Dan Forest* adopted for North Carolina courts,[48] is the legal injury rule.[49] Under that rule, a plaintiff need only show their legal right has been violated.[50] That could be a common law right ("the defendant trespassed on my property"), a constitutional right ("the government infringed my freedom of speech"), or even simply that a statute gives her the right to sue ("the statute says anyone can sue").[51]

In practice, a legal injury rule can allow plaintiffs to sue when injury in fact would not.[52] This is apparent when comparing

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44. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

45. *Id.*

46. *Id.*

47. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

48. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 728 (2021).

49. *See generally, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) [hereinafter Sunstein, *What's Standing?*] (arguing history and precedent backs the legal injury standard rather than injury in fact); Louis L. Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961) (positing that English and U.S. history most support a legal injury—or "legal right"—standard, allowing for public action lawsuits); Raoul Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969) (arguing the Constitution does not demand a plaintiff have a personal interest to have standing but merely a legal right).

50. *Dan Forest*, 853 S.E.2d at 734.

51. This Note uses "legal injury" to include when a plaintiff only needs a cause of action to sue. There is likely a difference between a "legal injury" requirement and "cause of action" standing, but as many scholars and the North Carolina Supreme Court use the terms interchangeably, this Note will too, and leaves their differences to be explored in later scholarship.

52. There are some situations in which injury in fact may allow plaintiffs to sue when legal injury would not. Consider if there were no statutory cause of action in *TransUnion*. Someone like Ramirez, who had the factual injury of being denied a car, would not have a legal right to sue, and therefore no legal injury. Hence, injury in fact may allow more beneficiaries of regulation to sue. *See* Sunstein, *What's Standing?*, *supra* note 49, at 185 (noting that injury in fact means

TransUnion to *Dan Forest*. In *TransUnion*, a car dealer refused to sell Sergio Ramirez a car after a credit check revealed Ramirez was on the "terrorist list."[53] Yet Ramirez was no terrorist; he was only on the list because credit reporting agency TransUnion mislabeled him (and over eight thousand other people) as one.[54] Ramirez thus sued under the Fair Credit Reporting Act[55] ("FCRA"), seeking to represent a class of all mislabeled individuals. The FCRA requires credit reporting agencies to follow procedures ensuring accuracy[56] and gives consumers a right of action against agencies that do not.[57] The class sought both statutory and punitive damages.[58] There were two groups within the class: 1,853 individuals like Ramirez whose reports had been given to third parties like car dealers, and 6,332 individuals who were mislabeled on their reports but whose reports had not been disseminated.[59]

Which group had standing came down to injury in fact. *TransUnion* explained that an injury is only concrete if it has "a close historical or common law analogue."[60] Those whose mislabeled credit reports had been disseminated to third parties had suffered like plaintiffs in common law defamation suits: false or misleading information "'that would subject [a person] to hatred, contempt, or ridicule' [was] published to a third party."[61] But because publication is what creates the harm in a defamation suit, not the misleading or false

"beneficiaries of regulatory programs would generally have standing[, b]ut they no longer were required to show any legal interest"). This Note focuses on statutory causes of action, where legal injury is more permissive, because there are a growing number of private enforcement mechanisms in regulatory statutes. *See* Lauren Henry Scholz, *Private Rights of Action in Privacy Law*, 65 WM. & MARY L. REV. 1639, 1647 (2022) ("Since the mid-twentieth century, there has been increasing reliance on private rights of action to achieve regulatory goals.").

53. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2201 (2021).

54. *Id.* at 2202.

55. Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970).

56. 15 U.S.C. § 1681e(b).

57. 15 U.S.C. § 1681n(a) (stating "[a]ny person who willfully fails to comply with any requirement . . . with respect to that consumer is liable to that consumer" for actual or statutory damages, punitive damages, and attorney's fees); 15 U.S.C. § 1681o(a) (stating "[a]ny person who is negligent in failing to comply with any requirement . . . with respect to any consumer is liable to that consumer" for actual damages, costs, and attorney's fees).

58. *TransUnion*, 141 S. Ct. at 2202.

59. *Id.*

60. *Id.* at 2204.

61. *Id.* at 2208–09 (quoting Milkovich v. Lorain J. Co., 497 U.S. 1, 13 (1990)).

information alone, the other 6,332 class members were out of luck.[62] As "[t]he mere presence of inaccuracy in an internal credit file . . . causes no concrete harm," the group lacked an injury in fact, and therefore lacked standing.[63]

In contrast, *Dan Forest* made suing simple. During a 2012 race for lieutenant governor between Dan Forest and Linda Coleman,[64] the Employees Political Action Committee ("EMPAC") ran a television ad for Coleman that violated the state's "Stand By Your Ad" law, which mandated full-screen, spoken disclosures by the organization's chief executive officer or the treasurer in television ads.[65] Even though Forest ultimately won,[66] three years later the Committee to Elect Dan Forest ("the Committee") sued EMPAC for its Stand By Your Ad law violations through the statute's private right of action.[67] The Committee did not allege it suffered a factual injury, like spending extra money or losing the election.[68] But the North Carolina Supreme Court held that plaintiffs in North Carolina state courts only need a legal injury to sue under a statutory cause of action.[69] Because Forest fell within the class to which the statute granted a legal right—in other words, the right to have his opponent follow the election standards—and had assigned this right to the Committee, the Committee had a legal injury.[70]

The fact the Committee had standing in *Dan Forest* shows the *TransUnion* plaintiffs who lacked standing in federal court would have it in North Carolina: they showed a legal injury because the FCRA granted them a right to accurate credit reports, and they alleged that

62. *Id.* at 2209.

63. *Id.* at 2210.

64. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 702 (2021).

65. *Id.*

66. *Id.*

67. *Id.* at 703. That provision stated that candidates who complied with the law "shall have a monetary remedy in a civil action against . . . an opposing candidate . . . [or] any . . . political action committee" that violated the statute. *Id.* (citing N.C. GEN. STAT. § 163-278.39A(f) (2011) (repealed 2014)). The basis of damages the Committee sought was unclear in the opinion, as well as in the parties' briefs.

68. *See* Brief for Defendant-Appellant at 9, *Dan Forest*, 853 S.E.2d 698 (No. 231A18) ("[T]he Forest Committee has been unable to identify a single penny of damage that was incurred as a result of the defendant's alleged noncompliance with the disclosure statute.").

69. *Dan Forest*, 853 S.E.2d at 728.

70. *Id.* at 733.

TransUnion violated that legal right when it mislabeled them as terrorists.

B. Injury in Fact Versus Legal Injury: The Rationale

The difference between injury in fact and legal injury raises the question of why each requirement was adopted. *TransUnion* shows the federal doctrine is largely rooted in the federal separation of powers, while *Dan Forest*'s main reasoning was that injury in fact is wrong for federal courts and thus wrong for North Carolina.

1. TransUnion: *Federal Injury in Fact and the Separation of Powers*. Aligning with federal standing cases of the past thirty-plus years,[71] *TransUnion* explained that injury in fact comes down to a "single idea": the separation of powers.[72] Article III limits the "judicial Power" to "cases" or "controversies," which the Court has interpreted to mean federal courts can only decide disputes involving rights of the individuals before the court.[73] In other words, for a dispute to be a "case" or "controversy," the plaintiff themself must "have suffered an injury that the defendant caused and the court can remedy."[74] The requirements of injury in fact, traceability, and redressability thus ensure "federal courts exercise 'their proper function in a limited and separated government.'"[75] Federal courts cannot "adjudicate hypothetical or abstract disputes[,] . . . publicly opine on every legal question[,] . . . exercise general legal oversight of the Legislative and Executive Branches, or of private entities[,] . . . [or] issue advisory opinions."[76]

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71. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992) (explaining that standing is rooted in the separation of powers because it limits federal courts to their intended role); Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (same); Raines v. Byrd, 521 U.S. 811, 820 (1997) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." (quoting Allen v. Wright, 468 U.S. 737, 752 (1984))).

72. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021). The Court has given other rationales for requiring injury in fact, including historical practice. The separation of powers rationale, though, predominates.

73. *Id.*; *see also id.* ("In sum, under Article III, a federal court may resolve only 'a real controversy with real impact on real persons.'" (quoting Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2067 (2019))).

74. *Id.* (quoting Casillas v. Madison Ave. Assocs., Inc., 926 F.3d 329, 333 (7th Cir. 2019) (Barrett, J.)).

75. *Id.*

76. *Id.*

This reasoning rests upon the text of Article III and the Framers' intention to limit the *federal* judicial power. Little evidence suggests that the Framers wished to limit *state* judicial power—or even judicial power generally. The Court in *TransUnion* invoked records of the federal Constitutional Convention and *Marbury v. Madison*,[77] which asserted that the federal judiciary only decides "the rights of individuals."[78] The Court has frequently cited these federal sources, along with the Federalist Papers, when explaining injury in fact.[79]

2. Dan Forest: *Legal Injury and the Federal Doctrine's Weakness*. *Dan Forest* gave several justifications for rejecting injury in fact in favor of legal injury. Some of the reasons were independent of the federal doctrine,[80] but most of the opinion focused on federal injury in fact's faults. Nearly 30 percent of the opinion summarized arguments of prominent injury in fact critics who assert injury in fact is contrary to history and precedent.[81] These arguments include that there was no such thing as standing in the early years of the federal courts,[82] that standing was a prudential—not constitutional—consideration when the Court introduced it,[83] and that the Court originally intended injury

77. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

78. *Id.*

79. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (citing THE FEDERALIST NO. 48 (James Madison)); United States v. Richardson, 418 U.S. 166, 191–92 (1974) (Powell, J., concurring) (citing *Marbury*, 5 U.S. (1 Cranch) 137); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 340–41 (2006) (same).

80. The reasons independent of the federal doctrine included the state constitution's text, standing in English and early U.S. courts, and North Carolina precedent. For example, North Carolina's judiciary article, Article IV, does not limit the "judicial power" to particular subject matter categories or to "cases" or "controversies" like the federal Article III. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 706 (2021); N.C. CONST. art. IV, § 1. Additionally, the notion that a plaintiff needs a "personal stake" in a lawsuit was absent in English common law, which the North Carolina colony and state adopted. *Dan Forest*, 853 S.E.2d at 707. Instead, English courts allowed suits by "strangers," meaning that people without a personal stake in the case could enforce public rights. *Id.* at 707, 709. Finally, the North Carolina precedent only required a factual injury—termed a "direct injury"—when a plaintiff sued for an injunction or challenged a statute as unconstitutional, and only as a matter of substantive law or constitutional avoidance. *Id.* at 723.

81. *See, e.g.*, *id.* at 714 n.27 (citing works critical of injury in fact by Professors Cass R. Sunstein, Steven L. Winter, and Raoul Berger). *Dan Forest* notably ignores other scholars' rebuttals. *See generally* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (rebutting claims that injury in fact is contrary to history).

82. *Dan Forest*, 853 S.E.2d at 713–14.

83. *Id.* at 714–16.

in fact to make standing more permissive, but then later Courts wrongly extended the doctrine to make standing stricter.[84]

The North Carolina Supreme Court's rationale that its state constitution does not require an injury in fact because the federal Constitution should not require one undermines the fact that states are not bound by federal standing rules—regardless if those rules are right or wrong as an interpretation of Article III—and rests on the assumption that state and federal standing rules should be the same. The next Part explains why that assumption is wrong and gives a stronger reason to reject injury in fact.

III. THE UNIQUELY FEDERAL NATURE OF INJURY IN FACT

States can and should reject injury in fact regardless of federal standing's merits because injury in fact is uniquely federal. Section A explains how the Framers limited federal courts' "judicial Power" compared to that of the preexisting state courts, which enjoyed broad inherent power. Section B describes how federal standing developed as a response to federal needs and federal political realities and how injury in fact can be framed as a tool used by the Court to return federal courts to their intended limited jurisdiction. The takeaway is that states should reject injury in fact because it reflects concerns and circumstances inapplicable to state courts.

A. The Intended Limited Power of Federal Courts Compared to State Courts

The Framers were not working on a tabula rasa when they wrote Article III. Rather, they had the preexisting state courts and state constitutions to use as a starting point.[85] Put differently, state courts were the judicial status quo. Yet when crafting the federal Constitution, the Framers limited the federal judicial power rather than making it equivalent to the broad judicial power of the states.

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84. *Id.* at 719.

85. *See* Ellen Ash Peters, *The Role of State Constitutions in Our Federal System*, 413 PROC. AM. PHIL. SOC'Y 418, 419 (1999) (explaining that all colonies created state constitutions after the United States declared independence in 1776 and that "the structure and the form of the new federal government of 1787 was the direct product of what had taken place in the making of the state governments during the previous decade" (quoting Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993))).

The judicial status quo at the time of the Constitutional Convention involved relaxed separation of powers and broad, inherent judicial power largely unlimited by state constitutions. North Carolina illustrates this.[86] North Carolina split its judicial power between precinct courts, a General Court, and a Court of Chancery.[87] These courts had expansive jurisdiction over not only civil, equitable, and criminal cases, but also administrative matters.[88] For example, the General Court "supervised the administration of estates, directed the laying out of roads, and ordered the establishment of a ferry," while the precinct courts appointed toll collectors.[89] Further, there was little separation between the courts, the executive, and the legislature. At first, the Court of Chancery and the General Court both consisted of the governor and his council.[90] This allowed for "arbitrary gubernatorial lawmaking" via court rulings, as the governor and his council could simply "resolve disputes or solve problems however [they] thought best."[91] Eventually, the governor appointed the chief justice of the General Court to sit on the court in his place, but the chief justice was also a member of the general assembly and assisted with executive matters.[92]

The transition to statehood did little to alter the relaxed separation of powers and broad judicial power of North Carolina. The state's brief constitution of 1776 only addressed the judiciary in two provisions,[93] one providing for selection of the state's judges by the general assembly,[94] and the other guaranteeing judges adequate

86. Although North Carolina was only one of the thirteen original colonies and states, scholars explain that the practices described here were typical of the colonies broadly. *See* Hershkoff, *supra* note 5, at 1880–81 ("Colonial charters . . . established functionally ambiguous institutions that blended executive, legislative, and judiciary activities . . . ."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 75–76 (1994) (describing how courts at the Founding had administrative powers many would consider proper for the administrative branch today).

87. WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: VOLUME II: THE MIDDLE COLONIES AND THE CAROLINAS, 1660–1730, at 87–89 (2013).

88. *Id.* at 88–91.

89. *Id.* at 91.

90. *Id.* at 86.

91. *Id.* at 90–91.

92. WALTER CLARK, HISTORY OF THE SUPREME COURT OF NORTH CAROLINA 5 (1919).

93. Such brevity was common with state constitutions of the time. *See* FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES 1776–1860, at 91–93 (1930) (describing the lack of robust detail about the judiciary in other new U.S. states' constitutions).

94. N.C. CONST. of 1776, art. XIII.

salaries.[95] There was no stand-alone article on the judiciary, no limit on the judiciary's jurisdiction, and no mention of the judiciary's composition. While the state's Declaration of Rights assured "[t]hat the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct,"[96] the rest of the constitution seemed to contradict it. The general assembly chose not only the judges, but the governor, state treasurer, attorney general, and other executive officers.[97] Contradictions like this likely led James Madison to observe in Federalist 48 that the "efficacy" of separation of powers provisions in state constitutions was "greatly overrated."[98]

Though North Carolina's relaxed separation of powers and broad, textually-unlimited judicial power was the status quo in 1787, the Framers did not adopt it for the new federal courts. Instead, they limited federal judicial power in order to maintain broad state judicial power. Although "there is surprisingly little on the subject [of the judiciary] to be found in the records of the convention,"[99] the main debate about the judiciary was the establishment of lower federal courts.[100] Initially proposed language would have affirmatively established them,[101] but some delegates objected out of fear of encroaching on state court jurisdiction.[102] Instead of lower courts, these delegates wanted state courts to try all cases in the first instance, arguing the Supreme Court's appellate jurisdiction would be enough to preserve "national rights and uniformity."[103] Madison countered that state court judges may be biased and that traveling for a federal appeal could be costly.[104] What resulted was the Madisonian Compromise: instead of "establishing such tribunals absolutely," the Constitution

95. N.C. CONST. of 1776, art. XXI.

96. N.C. DECLARATION OF RIGHTS of 1776, art. IV.

97. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1763 (1992).

98. THE FEDERALIST NO. 48 (James Madison).

99. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 154 (1913).

100. *Id.*

101. JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION KEPT BY JAMES MADISON 113 (E.H. Scott ed., 2004).

102. *Id.*

103. *Id.*; *see also id.* at 378–79 (observing that delegates thought lower federal courts would "create jealousies and oppositions in the State tribunals, with the jurisdiction of which they will interfere").

104. *Id.* at 113.

gave Congress "discretion . . . to establish or not to establish them."[105] Thus, the state courts would continue to be the primary judicial power at the first instance, unless Congress decided to create lower federal courts.

The Framers also limited the kinds of cases federal courts could hear. Unlike state constitutions like North Carolina's, which were silent on the scope of subject matter jurisdiction, the federal "judicial Power" extended only to "cases" and "controversies" involving specific subject matters or between specific parties.[106] Importantly, none of these changes were made at the expense of state court jurisdiction. The Framers were clear that states were to retain their existing authority and enjoy concurrent jurisdiction over all disputes not made exclusive to federal courts.[107]

The enumerated subject matter grants imply the Framers intended the federal judiciary to be limited compared to state judiciaries, even where jurisdiction was concurrent. While the Framers sparsely discussed the rationale behind the categories at the Convention, Professor Thomas Lee explains the Framers intended the categories to be "distinctively 'national.'"[108] In other words, the categories suggest the Framers sought to limit federal courts to disputes that impacted national interests or law to avoid encroaching on state courts.[109] Take, for example, admiralty jurisdiction. In Federalist 80, Alexander Hamilton noted that even the most ardent "idolizers of State authority" did not "deny the national judiciary the cognizances of maritime causes" because such cases "so generally depend on the laws of nations, and so commonly affect the rights of foreigners."[110] Therefore, there was little concern that federal jurisdiction might encroach on state court power.[111] The same logic can be applied to the other enumerated categories of subject matter jurisdiction, such as cases involving ambassadors, treaties, and citizens from different

105. *Id.* at 114; U.S. CONST. art. III, § 1.

106. U.S. CONST. art. III, § 2.

107. THE FEDERALIST NO. 82 (Alexander Hamilton).

108. Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–1792*, 89 FORDHAM L. REV. 1895, 1908–09 (2021).

109. *Id.* at 1940.

110. THE FEDERALIST NO. 80 (Alexander Hamilton).

111. Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 316 (1999).

nations or states.[112] These nationally focused categories led Lee to conclude "the federal courts were designed to have a small footprint" as there was "very little sense that the new national courts were to play a leading role in domestic governance."[113]

The First Judiciary Act confirmed that the Framers intended federal courts to have limited power vis-à-vis state courts. Indeed, the Act made "clear [] the First Congress was exceedingly parsimonious in doling out" federal judicial "power given the concerns about encroachment on state judicial power."[114] The Act contained no general "arising under" jurisdiction and limited diversity jurisdiction with an amount-in-controversy requirement.[115] And the Act limited the Supreme Court's appellate jurisdiction over state court decisions exclusively to decisions that were adverse to a claim of a federal right.[116] Thus, the Framers likely not only assumed state courts had the inherent power to be the default decision-makers on matters of federal law at the first instance, but that they would often have the final word, too.

In sum, the Framers limited the federal judicial power compared to state judicial power. The fact that federal injury in fact emerged as a way to keep the federal judiciary within *its* intended scope could alone justify states rejecting the doctrine. Yet, regardless of the Framers' intentions, one may argue that the scope of federal judicial power has since grown to match the states', and thus distinct standing

112. *See, e.g.*, Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 33–34 (2013) (explaining that, at the Founding, general commercial law was neither federal nor state law but an "extraterritorial body of customary principle" with a "distinctively 'national' aspect," and that federal jurisdiction "provide[d] a neutral forum for litigation among citizens of different states").

113. Lee, *supra* note 108, at 1940.

114. *Id.* at 1921. Lee explains Congress's grant of land-based federal judicial power as there was greater consensus among congressmen that federal courts should have admiralty and maritime jurisdiction. *Id.* However, the fear of encroaching on state court jurisdiction was a concern underlying the debate on the Judiciary Act of 1789 more broadly. *See* Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515, 1531 (2005) (explaining that, before and during the debates over the Judiciary Act, there was an "overriding concern . . . that lower federal courts, once established, would eventually 'absorb' the state judiciaries").

115. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 25–26 (7th ed. 2015).

116. *Id.*

requirements for federal and state courts are unwarranted.[117] The next Section undercuts any such argument.

B. The Uniquely Federal Development of Injury in Fact

State courts could reject injury in fact regardless of any difference in judicial power intended by the Framers because injury in fact is the product of expansions and contractions of federal jurisdiction (and thus federal judicial power[118]) that were caused by uniquely federal concerns. This Section does not purport to give an exhaustive history of federal power, federal judicial power, or standing; instead, it paints a broad picture of major turning points in each to show how the federal standing doctrine addresses federal concerns, which in turn leaves states free to craft their own doctrines.

The first period in which federal power expanded significantly was Reconstruction. The federal government grew more than it ever had before, in part because Congress extended federal court jurisdiction in response to state courts' failure to enforce national policy and new constitutional guarantees in the wake of the Civil War.[119] Southern state courts' hostility toward Black people and federal officers led Congress to prioritize a federal forum by expanding removal from state to federal court,[120] increasing federal courts' habeas corpus powers,[121] giving federal courts full federal question jurisdiction,[122] and creating a federal cause of action to sue state officials for violating federal law.[123]

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117. For descriptions of how federal judicial power has expanded since the Founding, see generally William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333 (1969) (describing the growth of federal judicial power during Reconstruction); David J. Garrow, *Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power, 1954–1968*, 82 ST. JOHN'S L. REV. 1 (2008) (describing the growth of federal judicial power during the Warren Court).

118. *See, e.g.*, Wiecek, *supra* note 117, at 333 ("To a court, jurisdiction is power: power to decide certain types of cases, power to hear the pleas and defenses of different groups of litigants, power to settle policy questions which affect the lives, liberty, or purses of men, corporations, and governments.").

119. *Id.* at 338.

120. *Id.* at 336–42.

121. *Id.* at 342–48.

122. *Id.* at 348–52.

123. Civil Rights Act of 1871, ch. 22 § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (providing an individual the right to sue when someone acting under color of state law deprives that individual of their federal constitutional or statutory rights).

During the New Deal, federal executive and legislative power expanded to address the Great Depression, while federal jurisdiction arguably contracted with the introduction of the modern standing doctrine. To solve the national economic crisis, Congress created new federal agencies,[124] bestowed new substantive federal rights,[125] and empowered federal agencies and federal courts to be the primary protectors of these rights.[126] Simultaneously, the Court started to develop the modern standing doctrine[127] with relatively restrictive rules: if Congress granted a statutory right to judicial review, a plaintiff could sue, even to vindicate the rights of the public; but without such a statutory right, a plaintiff could only challenge federal action if the action had infringed legal rights that were conferred particularly upon him.[128] Some argue the Progressive Court crafted these rules to restrict who could challenge federal action and thus protect the growing federal executive and legislative power.[129]

Yet between the 1940s and 1960s, the federal political tide shifted, and standing requirements became more permissive as a result. In part, these shifts were a reaction to the national "social and political movements" of the 1950s and 1960s, which sought "to improve quality of life through government action."[130] The federal judiciary was a key battleground for the Civil Rights Movement, as plaintiffs who distrusted state courts turned to the federal courts to vindicate their

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124. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1562 (1996).

125. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 438–42 (1987) (discussing President Franklin Delano Roosevelt's conception of substantive rights and the effectuation of those rights through increased presidential power and the creation of regulatory agencies). This was a response to the public's repudiation of the laissez-faire economic and social approach that had persisted since Reconstruction. *Id.*

126. *See* Brennan, *State Constitutions*, *supra* note 1, at 490 (noting that during the New Deal "federal law was not a major concern of state judges[, and]" instead, "[j]udicial involvement with decisions of the new federal agencies was the business of federal courts").

127. Sunstein, *What's Standing?*, *supra* note 49, at 179.

128. Curtis A. Bradley & Ernest A. Young, *Unpacking Third Party Standing*, 131 YALE L.J. 1, 10–11 (2021).

129. *See, e.g*, Sunstein, *What's Standing?*, *supra* note 49, at 179–81 (positing that the "early architects of what we now consider standing limits" wanted to "insulate progressive New Deal legislation from frequent judicial attack"). This theory of standing's origin is known as the "insulation thesis." For a greater explanation of the theory, see Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 597–99 (2010).

130. *See* Ho & Ross, *supra* note 129, at 646–47 (exploring the impact of these movements on the standing doctrine).

civil rights,[131] and Congress passed new civil rights laws that prioritized access to a federal forum.[132] In conjunction, the Warren Court positioned federal courts as the leading protector—and expander—of constitutional rights.[133] The arguably permissive standing rules of the 1960s[134] likely were not a coincidence; they were seen as a tool to expand federal rights by allowing more plaintiffs to sue.[135]

The shifts were also a reaction to the New Deal's expansive federal administrative state. In the 1940s, support for such broad federal agency power waned, leading Congress to pass the Administrative Procedure Act ("APA"),[136] which imposed procedural requirements on agencies and expanded federal courts' review of their decisions.[137] Though the APA arguably codified the standing law that preceded it,[138] the Act allowed the Progressive Justices who previously opposed more permissive standing rules (because they allowed for more challenges to federal action) to support such rules, for the APA's procedural

131. *See* ALEXANDER TSESIS, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW 251–79 (2008) (detailing the legal developments related to the Civil Rights Movement); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1952) (holding racial segregation laws in public schools unconstitutional); Garner v. Louisiana, 368 U.S. 157, 173–74 (1961) (holding that the conviction of peaceful Black protestors sitting at a whites-only lunch counter pursuant to a state breach of peace statute violated the protestors' Fourteenth Amendment right to due process); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (holding that the arrest of Civil Rights protestors marching outside of state house violated the First Amendment).

132. *See generally* Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 52 U.S.C.) (forbidding racial discrimination in voting and empowering the Attorney General to sue violators exclusively in federal court, among other reforms); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 51 U.S.C.) (expanding the protections and filling gaps of the 1957 Act); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.) (proclaiming itself as "[a]n Act . . . to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations").

133. *See* TSESIS, *supra* note 131, at 251–79 (detailing how the Warren Court expanded substantive rights); *see also* Robert G. McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229, 1239–47 (1965) (describing the cases in which the Warren Court expanded individual rights, particularly in the 1950s and 1960s).

134. *See* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1151 (2009) (noting the 1960s are seen as "a period of liberalization in the law of standing").

135. *See* Ho & Ross, *supra* note 129, at 646 ("Standing, for example, came to be associated more with notions about incorporation of constitutional rights against the states and the Warren Court's expansion of individual rights in the 'new property' and criminal contexts.").

136. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.) (stating the APA's effects).

137. Ho & Ross, *supra* note 129, at 645.

138. Magill, *supra* note 134, at 1150.

requirements now safeguarded the administrative state.[139] Then, in the 1960s and 1970s, a new concern about federal administrative power arose—agency capture.[140] The fear that federal agencies were being controlled by the very industries they were meant to regulate inspired Progressive support for more permissive standing rules that allowed more beneficiaries of federal regulation to sue.[141] Arguably, the Court shared this concern and made standing requirements easier to satisfy.[142]

But the expansion of federal judicial power in the 1950s and 1960s led to the birth of injury in fact. The requirement first appeared in *Association of Data Processing Service Organizations, Inc., v. Camp*[143] in 1970, when the Court, in the context of the APA, replaced the legal interest test with a test that asks if the plaintiff had an "injury in fact" and was "arguably within the zone of interests" of the law invoked.[144] The Court did not intend this test to make standing stricter—instead, "the Court treated [it] as a liberalization in the law of standing," because it allowed more beneficiaries of regulation to sue.[145]

Paradoxically, later Courts used injury in fact to make standing stricter in reaction to the growth of federal judicial power that preceded *Data Processing*. The Warren Court's perceived activism was met with political and scholarly criticism of an expansive federal judiciary[146] and corresponding calls to limit its jurisdiction.[147] While few

139. *See* Ho & Ross, *supra* note 129, at 645 (exploring this phenomenon).

140. Sunstein, *What's Standing?*, *supra* note 49, at 183–84.

141. *See id.* (discussing the effect of agency capture on popular notions of standing law).

142. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1728 (1975); *see* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 471–72, 476–77 (1940) (allowing a competitor to the object of regulation to sue the Federal Trade Commission without a legal right because a statutory review provision, which predated the APA, stated that any "person aggrieved" had the right to sue). *But see* Magill, *supra* note 134, at 1552–59 (arguing that the cases Professor Richard Stewart and others use to support the proposition that standing was more permissive during the 1960s actually marked the beginning of standing's contraction).

143. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

144. *Id.* at 152–54.

145. Magill, *supra* note 134, at 1162–63; *see also Data Processing*, 397 U.S. at 154–55 (noting the trend toward liberalized notions of standing).

146. *See, e.g.*, J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181, 196 (1959) (noting the flipped positions of Liberals and Conservatives with respect to the scope of judicial review). Regarding the public outcry, see MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 2–3 (2016) (explaining that "[t]he Court's activism produced public backlash," as many blamed the Court for high crime rates).

147. *See* Fallon et al., *supra* note 115, at 297 (describing various proposals to limit federal jurisdiction over matters such as state legislative apportionment, abortion, and more).

statutory reforms materialized,[148] political pressure led newly elected President Richard Nixon to appoint Justices wary of expansive federal judicial power.[149] In 1969, President Nixon appointed Warren E. Burger as Chief Justice,[150] and by 1971, he appointed three more Justices.[151] Some argue the more conservative Burger Court, in reaction to the Warren Court's activism, limited federal judicial power by refusing to expand and protect individual rights.[152] This is debatable.[153] What is evident, however, is that the Burger Court effectively limited federal judicial power by requiring an injury in fact beyond *Data Processing*'s APA context and arguably permissive intention.[154] By the late 1970s, "every challenger—relying on a statutory review provision or not—had to establish an injury in fact and its rapidly growing sub-elements," though an injury in fact was not explicitly a constitutional requirement.[155]

Ultimately, constitutionalizing injury in fact was a product of the uniquely federal tension between the Court's standing doctrine and Congress's attempt to address necessarily national concerns. As the Court increasingly required an injury in fact in the 1970s, Congress increasingly passed citizen suit provisions that, on their face, would allow people to sue without an injury in fact.[156] Many of these provisions addressed national environmental issues by allowing

148. *See id.* at 297–98 (explaining that statutory efforts to limit federal jurisdiction rarely succeeded).

149. *See* GRAETZ & GREENHOUSE, *supra* note 146, at 3–4 (explaining that Nixon ran on a promise to appoint Conservative Justices).

150. *Id.* at 4.

151. *Id.* at 5.

152. *See, e.g.*, Mary Cornelia Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, 8 PUBLIUS 55, 55 n.1 (1978) (noting the Burger Court's restriction of access to federal courts and the need to turn to state courts for vindication of individual rights).

153. Most obviously, the Burger Court did expand substantive constitutional rights in some arenas. One need look no further than *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

154. Magill, *supra* note 134, at 1165. For cases extending injury in fact and adding requirements, see, for example, Sierra Club v. Morton, 405 U.S. 727 (1972); Linda R.S. v. Richard D., 410 U.S. 614 (1973); Warth v. Seldin, 422 U.S. 490 (1975); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26 (1976); United States v. Richardson, 418 U.S. 166 (1976); Allen v. Wright, 468 U.S. 737 (1984).

155. Magill, *supra* note 134, at 1174.

156. *See id.* at 1185–89 (describing environmentally focused citizen suit provisions passed in the 1970s).

citizens to enforce federal environmental regulations.[157] The result was a flood of public interest litigation.[158] The tension between congressional power and federal courts' proper role thus collided in these cases. As the number of cases increased, so did the fear that public interest litigation improperly positioned federal "courts as an equal partner with the executive and legislative branches in the formulation of public policy."[159] As a result, the Court frequently invoked the separation of powers (and federal courts' intended limited powers) to justify injury in fact.[160] In the end, the federal tension between citizen suit provisions and intended federal judicial power led to *Lujan v. Defenders of Wildlife*,[161] which held that injury in fact is an "irreducible constitutional minimum," such that Congress cannot grant standing to people without factual injuries.[162]

Despite injury in fact being a constitutional requirement, the debate over Congress's power to grant standing in federal court continues. After *Lujan*, it was understood that although Congress could not grant standing to someone without an injury, it could create new rights via statute, and the violation of those rights would give rise to an injury in fact.[163] Some believe that *TransUnion* rejected that understanding by requiring the violation of the statutory right to have common law injury analogue.[164] Whether or not the fears of *TransUnion*'s negative ramifications are warranted, they rest in arguments of federal standing precedent and potential impact on federal law. State law and state standing are separate from this debate, just as they have been from the expansions and contractions of federal judicial power that led to injury in fact.

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157. *Id.*

158. *Id.* at 1195–98 (describing public interest litigation in the 1970s).

159. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 893 (1983).

160. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975) (explaining a plaintiff must show an injury to get into federal court because "Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party"); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 37–38 (1976).

161. Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

162. *Id.* at 560.

163. Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 269–70 (2021). For an argument that critics have read *TransUnion* too broadly, see generally Curtis A. Bradley & Ernest A. Young, Standing and Probability (Feb. 1, 2023) (unpublished manuscript), https://ssrn.com/abstract=4350160 [https://perma.cc/6DW9-T693].

164. *See generally* Chemerinsky, *supra* note 163 (arguing *TransUnion* violated federal standing precedent and that it risks jeopardizing various federal statutes).

IV. THE CASE FOR MORE PERMISSIVE STATE STANDING DOCTRINES

The uniquely federal nature of injury in fact shows states should reject the federal doctrine. This Part prescribes what states should adopt instead: more permissive standing doctrines such as legal injury. To be sure, state courts must build their standing doctrines based on their constitution's text, their history, and their precedent. But adopting more permissive standing doctrines would be consistent with the broader judicial power states have today and would effectuate the goals of the new judicial federalism. Although this recommendation would mean federal and state courts would have different standing doctrines, Supreme Court review and Congress's power to make federal jurisdiction exclusive mitigate any threats to the uniformity of federal law.

A. State Courts' Still-Broader Judicial Power

States rejecting injury in fact and adopting more permissive standing doctrines would align with the broader judicial power states have vis-à-vis federal courts. As Part III.A explains, the Framers limited the federal judicial power compared to the broad state judicial power that was the status quo at the time of the Constitutional Convention. While federal judicial power may have ebbed and flowed since 1787,[165] states retain broader judicial power today.

Several common attributes of modern-day states indicate their judicial power is broader than the federal judicial power.[166] First, many state court judges are elected.[167] Unlike non-politically-accountable federal judges, these state judges do represent—and are responsive to—the public, making any fears of judicial "lawmaking" less salient, as judges can be voted out of office.[168] Second, all states but one have

165. *See supra* Part III.B.

166. *See* Hershkoff, *supra* note 5, at 1841 (explaining that the state attributes she discusses "question conventional assumptions about judicial capacity and the idea that there are inherent limits to adjudication").

167. *Id.* at 1887 (explaining that "state courts generally depend to some extent on judicial election"). The vast majority of states either elect judges in the first instance or hold retention elections for appointed judges; only seven states do not have any sort of election process. *Judicial Election Methods by State*, BALLOTPEDIA, https://ballotpedia.org/Judicial_election_methods_by_state [https://perma.cc/3W28-GTX6].

168. Hershkoff, *supra* note 5, at 1887.

fully adopted the common law.[169] This gives courts policymaking power that "effectively 'blur[s] the lines of separation of powers.'"[170] Because state courts affirmatively make common law, they not only can, but must consider matters of public policy. Third, state constitutions have more expansive, policy-driven constitutional guarantees than the federal Constitution.[171] This includes amendments that mirror federal constitutional amendments but that state courts have interpreted more broadly (such as the right to free speech) and explicit rights that are simply absent from the federal Constitution (such as the right to vote).[172] When confronted with claims under some of these provisions, state court judges must decide issues of social policy that Article III courts traditionally cannot.[173] Fourth, many state courts have powers that would be reserved to the federal executive branch.[174] Lower courts perform ministerial tasks such as "endorsing uncontested matters, probating wills, and appointing local officials"[175] and supreme courts regulate rules of procedure and the legal profession.[176] Finally, some state supreme courts issue advisory opinions.[177] As the federal bar on advisory opinions is the bedrock of the federal justiciability doctrine,[178]

169. The one outlier is Louisiana, which has a civil law system (although some argue it has common law features). *See generally* Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 LA. L. REV. 1 (2002).

170. Hershkoff, *supra* note 5, at 1889 (quoting Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 619 (1999)) (alteration in original).

171. *Id.* at 1889–90. *See generally* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013) (explaining that state constitutions provide positive rights that the federal Constitution does not and specifically examining state constitutional protections of educational rights, workers' rights, and environmental rights).

172. *See* Bulman-Pozen & Seifter, *supra* note 2, at 861 ("In contrast to the federal Constitution, for example, state constitutions expressly confer the right to vote and to participate in free and equal elections, and they devote entire articles to electoral processes."); *see also* State v. Stummer, 194 P.3d 1043, 1048–49 (Ariz. 2008) (noting that Arizona's right to free speech is broader than the federal right); N.C. CONST. art. VI, § 1 (guaranteeing every state citizen who meets the stated qualifications the right to vote).

173. Bulman-Pozen & Seifter, *supra* note 2, at 861.

174. *See generally* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (holding federal courts cannot be assigned nonjudicial duties, such as making decisions about veterans' benefits that would be subject to revision by the secretary of war).

175. Hershkoff, *supra* note 5, at 1872.

176. *Id.* at 1873.

177. *Id.* at 1845.

178. *Id.* at 1844.

the fact states diverge from that bar signals a divergence from the federal concept of judicial power more generally.[179]

These indicators of broader judicial power suggest states that reject injury in fact should adopt a standing doctrine that is more permissive than the federal doctrine. More permissive doctrines such as legal injury let more people into court,[180] effectively broadening jurisdiction and thus judicial power.[181] In contrast, a standing doctrine that is stricter than injury in fact would make state judicial power *more* limited than the federal judicial power.

B. Effectuating the Goals of the New Judicial Federalism

State courts adopting more permissive standing doctrines would effectuate new judicial federalism's goals. These doctrines would open state courthouse doors to individuals seeking to enforce expansive state constitutional protections and public rights, inspire more state constitutional and legal reform, and not preclude experimentation in other states. In addition, individuals could turn to state court to sue under federal statutory causes of action without an injury in fact.

Scholars who embrace the new judicial federalism cite the more expansive state constitutional protections as a reason why states have great potential to protect individual rights.[182] Yet these rights hold less water if they are more difficult to vindicate because of strict standing requirements. A legal injury standard would make vindicating more expansive state constitutional protections simpler.[183] Take, for example, North Carolina's constitutional right to equal voting power.[184] It may be difficult for a plaintiff to show an injury in fact from political gerrymandering because the impact on her voting power may not be

179. *See id.* at 1842–44 (explaining that issuing advisory opinions is one way in which the state judicial power differs from the federal judicial power).

180. *See supra* Part II.A.

181. *See, e.g.*, Wiecek, *supra* note 117, at 333 ("To a court, jurisdiction is power . . . .").

182. *See, e.g.*, Brennan, *State Constitutions*, *supra* note 1, at 491 (lauding the "protective force of state law" in part because "[s]tate constitution[al] . . . protections often extend[] beyond those required by the Supreme Court's interpretation of federal law").

183. As Part II.A demonstrated, the injury in fact doctrine would require a plaintiff to show they have a factual injury that resulted from the state infringing one of these rights. In contrast, a more permissive requirement like legal injury would allow a plaintiff to sue if the right were impeded at all—even if they could point to no factual injury they suffered.

184. Harper v. Hall, 868 S.E.2d 499, 533 (N.C. 2022) (holding that the state legislature depriving a voter of substantially equal voting power violates the North Carolina state constitution).

"particularized." In contrast, political gerrymandering that dilutes a person's vote would be a legal injury on its own because legal injuries need not be particularized.[185]

Along with broad state constitutional protections, states may have broad statutory rights, which less-restrictive standing rules would make easier to vindicate. State legislatures could pass citizen suit provisions—which allow any person the ability to sue to enforce a statutory requirement regardless of their personal interest in the violation—that cannot be used in federal court without an injury in fact.[186] State citizens could lobby their elected officials to pass citizen suit provisions that reflect what they want further regulated. For example, North Carolina has a citizen suit provision that grants "any person" the right to sue someone who commits animal cruelty, regardless of whether the plaintiff was personally affected.[187] More expansive state standing rules could thus combat political and social issues important to the state's citizens.

To be sure, this opportunity also presents a risk. Citizen suit provisions paired with more permissive standing requirements can allow for greater enforcement of *any* law and may make pre-enforcement legal challenges difficult. For example, the Texas Heartbeat Act, also known as S.B. 8,[188] allows "[a]ny person" to bring a private action against someone who performs or assists an abortion.[189] By not requiring an injury in fact, anyone—regardless if they were impacted by the abortion—could sue a person who provided or assisted an abortion. And pre-enforcement review in federal court is difficult because a plaintiff must show there is a threat that the defendant will

185. The point of this example is to show how suing would differ under a pure legal injury regime. However, North Carolina's prudential direct injury requirement for constitutional challenges would mean the plaintiff would still have to show a personal injury. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 728 (2021).

186. *See* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2146–47 (2004) (explaining that citizen suit provisions allow "nongovernmental attorneys to enforce" statutes "if the government has not done so" and that in federal court, standing "limits the plaintiff's appearance in court to those instances in which she can show she pursues *her own injury in fact*").

187. N.C. GEN. STAT. §§ 19A-1 to -4 (2003).

188. Act of May 13, 2021, 87th Leg., R.S., ch. 62, 2021 Tex. Sess. Law Serv. 125 (West) (current version at TEX. HEALTH & SAFETY CODE ANN. §§ 171.005, .008, .012(a), .201–.212, 245.011(c) (West 2022); TEX. CIV. PRAC. & REM. CODE ANN. § 30.022 (West 2022); TEX. GOV'T CODE § 311.036 (West 2022)); *see id.* § 1 ("This Act shall be known as the Texas Heartbeat Act.").

189. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).

enforce the law against them[190]; the Supreme Court held plaintiffs who were challenged S.B. 8 did not have standing to preemptively sue a private individual, because that individual testified he did not have plans to sue the plaintiffs.[191] Moreover, the Texas Supreme Court held the state officials do not have power to enforce the law,[192] so plaintiffs likely will not be able to sue them, either.[193] Thus, the law is virtually unchallengeable[194]—at least in federal court. Indeed, a Texas state court enjoined S.B. 8 after holding that plaintiffs had standing and that some of legislation's civil procedures were unconstitutional.[195]

Some may argue S.B. 8 shows that more permissive state standing rules should not be adopted. However, the risks that citizen suit standing pose are a result of the same factor that ameliorates those risks: state systems are inherently more democratic than federal institutions. Professors Jessica Bulman-Pozen and Miriam Seifter have termed this the "democracy principle" of state constitutions.[196] They cite state constitutional provisions that provide for plurally elected executives, elected judges, checks on legislative authority, recall of elected officials, and voter-initiated lawmaking to assert that states are more committed to majoritarian democracy than the federal government.[197] The commitment to majoritarian democracy means statutes and constitutional protections are more likely to reflect the will of the majority. Moreover, if the laws do not reflect the majority's will, citizens can vote out not only the legislators who pass the laws but the judges who may misinterpret them. And unlike at the federal level, the same responsiveness is possible if citizens are unhappy with state

190. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–59 (2014). Put differently, the injury in fact, which is the threat of enforcement, must be fairly traceable to the defendant's conduct. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 537 (2021).

191. *Jackson*, 142 S. Ct. at 537.

192. Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022).

193. *See* Whole Woman's Health v. Jackson, 23 F.4th 380, 388–89 (5th Cir. 2022) (certifying the question of if state officials have authority to enforce S.B. 8 to the Texas Supreme Court and noting that the answer to the question "w[ould] be critical for potential issues of standing and ripeness").

194. *See* Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html [https://perma.cc/FLW9-LRPP] (noting that the Texas Supreme Court's decision effectively ended legal challenges to the law in federal court because state officials cannot be sued).

195. Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179 (Tex. Dist. Ct. Dec. 9, 2021).

196. *See* Bulman-Pozen & Seifter, *supra* note 2, at 862.

197. *Id.* at 869–90.

constitutional law decisions because state constitutions are generally easier to amend than the federal Constitution.[198] Thus, it is more democratically legitimate for state legislatures to pass—and state courts to enforce—broad constitutional amendments and citizen suit provisions.

Moreover, it would be beneficial rather than detrimental if more permissive standing rules lead to more state court litigation and controversy around that litigation. In another piece, Professor Seifter explains the benefits of state courts adjudicating so-called "power play" litigation, or cases in which state courts decide the legality of other branches' actions.[199] The litigation fosters the rule of law, improves deliberation and accountability, and develops structural state constitutional law.[200] The same results may accompany the litigation that results from more permissive standing rules. The Texas Heartbeat Act demonstrates how litigation, or potential for litigation, increased public attention to state law, forcing citizens inside and outside of Texas to deliberate their states' abortion laws and citizen suit provisions.[201] In addition, S.B. 8 forced Texas citizens to consider state officials' roles in the legislation, which increases accountability and state-centered grassroots activism. Looking at Texas, it is not hard to see that any controversial litigation that results from more permissive standing rules could lead to more deliberation of and attention to state law. Moreover, because state laws and constitutions are generally easier to change than federal law, the heightened attention can lead to more legal developments and experiments, furthering the goals of the new federalism.

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198. JEFFERY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 213 (2018) [hereinafter SUTTON, 51 IMPERFECT SOLUTIONS] ("[S]tate constitutions were, and remain, easy to amend. Unlike the Federal Constitution, the state constitutions are readily amenable to adaptation, as most of them can be amended through popular majoritarian votes, and all of them can be amended more easily than the federal charter.").

199. Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1225, 1237–38 (2019) (arguing that despite the risk of state courts reaching partisan outcomes, power play litigation may also yield benefits for state democracy).

200. *Id.* at 1237–43.

201. *See, e.g.*, *Memo: Fifteen States and Counting Poised To Copy Texas' Abortion Ban*, NARAL PRO-CHOICE AM., https://www.prochoiceamerica.org/report/memo-fifteen-states-and-counting-poised-to-copy-texas-abortion-ban [https://perma.cc/R3LZ-XW9B], (last updated Oct. 26, 2022) (noting that laws like S.B. 8 were introduced in other states after the law got media attention).

More permissive state standing doctrines also open the door to more litigation in state court rather than federal court, meaning there is no risk of limiting other states' experimentation. Another prominent advocate of state experimentation, Chief Judge Jeffrey Sutton, urges state courts to diverge from and go beyond federal constitutional limits because "[f]or too long, we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions."[202] According to Chief Judge Sutton, state courts should take on more responsibility than their federal counterparts, in part because their judges are more politically accountable[203] and their decisions only bind those within the state.[204] This alleviates risks of overly expanding rights to the detriment of state legislators and executives; federal Supreme Court and circuit court rulings have a larger precedential footprint, meaning their decisions can stymie experimentation across the country,[205] whereas if more permissive standing rules in state courts lead to more litigation, the resulting rulings would not bind other states.

Just as more permissive state standing rules could increase litigation of state law, it could increase litigation of federal law. As *TransUnion* demonstrates, injury in fact can make it difficult for some plaintiffs to sue under federal statutory causes of action.[206] But if states adopt more permissive standing rules, plaintiffs who do not have an injury in fact could sue in state court.[207] Recall that the plaintiffs in *TransUnion* whose false credit reports had not been sent to third parties would have been able to sue under the FCRA with North Carolina's legal injury rule.[208]

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202. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 198, at 20.

203. *See* SUTTON, WHO DECIDES?, *supra* note 4, at 69–70 (describing how many state judges are elected because unelected judges invalidating legislation sparked controversy over judicial power).

204. *See id.* at 132 (suggesting federalism provides opportunity for state courts to experiment with different legal interpretations and policy preferences).

205. *See id.* at 29 (noting that state courts leading in developing constitutional rights would allay some risks associated with the "growing balance-of-power risks to the federal judiciary of delegating too much responsibility to it to identify new constitutional rights").

206. *See supra* Part II.A (discussing treatment of injury in fact in *TransUnion*).

207. Of course, plaintiffs will not have standing if the federal statute provides for exclusive federal jurisdiction. *See infra* note 230 and accompanying text (noting Congress can grant federal courts exclusive jurisdiction over certain claims).

208. *Supra* Part II.A.

There are more federal statutes that plaintiffs who lack injury in fact could take advantage of in state courts with more permissive standing rules. Take the Clean Water Act ("CWA"), which authorizes "any citizen" to sue someone who violates the Act's standards.[209] Because of injury in fact, "any citizen" cannot sue in federal court; only plaintiffs who can show the violation has caused them a personal, factual injury can.[210] Showing environmental harm is insufficient.[211] A state court that does not require an injury in fact, in contrast, could give plaintiffs who are merely aware of a CWA violation standing to enforce the statute and protect the environment.[212]

The same would be true for the proposed American Data Privacy and Protection Act ("ADPPA"),[213] which is currently pending in Congress. Unlike previously proposed consumer privacy acts, ADPPA contains a private right of action that would allow "[i]njured individuals . . . to sue covered entities."[214] Yet the harm people suffer when their information is compromised is difficult to frame as an injury in fact. Because "information can be used by an infinite number of persons . . . it is often difficult to claim that any 'particular' individual suffers an injury different from those suffered by others."[215] It could

209. 33 U.S.C. § 1365(a). There is a split of authority on if § 1365(a) and similar statutes provide for concurrent jurisdiction or exclusive federal jurisdiction. *Compare* Davis v. Sun Oil Co., 148 F.3d 606, 612 (6th Cir. 1998) (holding jurisdiction is concurrent), *and* City of Hays v. Big Creek Improvement Dist., 5 F. Supp. 2d 1228, 1230 (D. Kan. 1998) (same), *and* Hooker v. Chickerling Props., LLC, No. 3:06-0849, 2007 WL 1296051, at *2 (M.D. Tenn. 2007) (same), *with* Nat'l Res. Def. Council v. EPA, 542 F.3d 1235, 1242 (9th Cir. 2008) (finding exclusive federal jurisdiction). If jurisdiction is exclusively federal, plaintiffs without injuries in fact plainly would not be able to take advantage of more permissive state standing rules. But for the purpose of this Note, the Author assumes jurisdiction would be concurrent.

210. Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 538 U.S. 167, 180–81 (2000).

211. *Id.* at 181–83.

212. Other environmental statutes include similar citizen suit provisions that, if they do provide for exclusive federal jurisdiction, could be used in state courts with less-restrictive standing rules. *See* Katherine A. Rouse, Note, *Holding the EPA Accountable: Judicial Construction of Environmental Citizen Suit Provisions*, 93 N.Y.U. L. REV. 1271, 1277 (noting that, in addition to the Clean Water Act, there are "at least fifteen other major environmental statutes with citizen suit provisions," including the Clean Air Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act).

213. *See* American Data Privacy and Protection Act, H.R. 8152, 117th Cong. § 403 (2022) (allowing civil suit by any individual suffering an injury resulting from a violation of the Act).

214. JONATHAN M. GAFFNEY, ERIC N. HOLMES & CHRIS D. LINEBAUGH, CONG. RSCH. SERV., LSB10776, OVERVIEW OF THE AMERICAN DATA PRIVACY AND PROTECTION ACT, H.R. 8152, at 3 (2022).

215. Seth F. Kreimer, "*Spooky Action at a Distance": Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CONST. L. 745, 754–55 (2016).

thus be difficult to use ADPPA's private right of action in federal court. But if Congress provides for concurrent jurisdiction, individuals could more readily enforce ADPPA in states with more permissive standing rules.

This not only helps plaintiffs but also Congress. One criticism of federal injury in fact is that Congress does not have the power to grant individuals standing to sue without a factual injury.[216] As Congress has the power to confer rights, some believe injury in fact unduly limits its power by not respecting the rights to sue that it has conferred.[217] If state courts adopt more permissive standing doctrines, Congress's broad grants of standing could be effectuated in court—albeit in state, not federal, court. This increases Congress's ability to grant rights to sue while respecting the limits on federal judicial power.

C. State Standing and the Uniformity of Federal Law

Not everyone embraces the "Federal–State Standing Gap."[218] Some fear it will "work a massive transfer of federal claims from federal to state courts, where federal law will develop largely without the participation of federal courts."[219] Scholars have therefore urged abandoning the federal injury in fact requirement[220] or applying federal standing rules to federal claims in state court.[221] Yet such concerns are overstated because Supreme Court review of state court decisions and Congress's power to grant exclusive federal jurisdiction protect federal law.[222]

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216. *See, e.g.*, Chemerinsky, *supra* note 163, at 291 ("If one starts with the premise that Congress has the constitutional power to create legally enforceable rights—which seems unassailable—then the Supreme Court's refusing to enforce them greatly undermines, not advances, separation of powers.").

217. *Id.*

218. Peter N. Salib & David K. Suska, *The Federal–State Standing Gap: How To Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1160 (2018).

219. Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1214 (2021).

220. *Id.* at 1215.

221. William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 294–303 (1990).

222. While this Note argues its recommendation would not threaten the uniformity of federal law, there is an argument that uniformity of federal law is both overvalued and impractical, in part because of the United States' federalist structure. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1571 (2008) (noting that "legal variations that accompany federalism are touted as one of this country's great strengths").

First, Supreme Court review of final state court decisions could fix most disuniformities of federal law.[223] True, an appellant must have Article III standing, and thus an injury in fact, to get Supreme Court review[224]; but defendants that lose in a state court generally have factual injuries that support standing on appeal,[225] so many cases will remain reviewable. The Court in fact crafted this rule to avoid "impos[ing] federal standing requirements on state court[s]," as unreviewable state court decisions may not have binding effect in future federal court litigation.[226] It is also true that the Supreme Court rarely grants certiorari.[227] Yet the Court is most likely to grant cert to resolve splits in authority,[228] including splits among state supreme courts.[229]

223. *See* 28 U.S.C. § 1257(a) (permitting Supreme Court review of final state court decisions).

224. *See* Hollingsworth v. Perry, 570 U.S. 693, 705 (2013) (explaining that "[m]ost standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an 'actual controversy' persist throughout all stages of litigation," including appeal (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013))).

225. ASARCO v. Kadish, 490 U.S. 605, 618–19 (1989).

226. *See* Fid. Nat'l Bank & Tr. Co. of Kan. City v. Swope, 274 U.S. 123, 130–31 (1927) (state court decisions on federal law are only res judicata if the "rights asserted, or which might have been asserted in that proceeding, could eventually have been reviewed" in federal court); *see also ASARCO*, 490 U.S. at 621 ("Although the judgment of a state court on issues of federal law normally binds the parties in any future suit even if that suit is brought separately in federal court . . . such a judgment may well *not* bind the parties if the state court's conclusions about federal law were not subject to any federal review."). It is true that while *Swope* protects the uniformity of federal law, it may also cut against judicial federalism because state court decisions do not receive binding effect.

227. *See The Odds of a Supreme Court Petition Grant*, COCKLE LEGAL BRIEFS (May 13, 2014), https://www.cocklelegalbriefs.com/blog/supreme-court/not-the-long-shot-you-thought [https://perma.cc/7DLF-HYTM] (noting that "[d]uring the Court's 2012 Term . . . the Court . . . granted only 92 petitions for oral argument—a rate of 1.21%").

228. Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 925 (2022); SUP. CT. R. 10(b).

229. *See id.* at 926 (noting that the Supreme Court's docket related to resolving splits of authority "encompasses . . . conflicts among *state* and federal appeals courts" (emphasis added)). For an example from the Supreme Court's docket at the time of publication, see *Counterman v. Colorado*, 497 P.3d 1039 (Colo. App. 2021), *cert. granted* 143 S. Ct. 644 (2023). The case will resolve a split among federal circuits *and* state supreme courts on what constitutes a "true threat unprotected by the First Amendment." Dan Schweitzer, *Supreme Court Report:* Counterman v. Colorado*, 22-138*, NAT'L ASS'N OF ATT'YS GEN. (Jan. 30, 2023), https://www.naag.org/attorney-general-journal/supreme-court-report-counterman-v-colorado-22-138 [https://perma.cc/EY8A-FUKC].

Second, Congress can and does grant federal courts exclusive jurisdiction over certain claims.[230] If Congress determines the risk of disparate state interpretation would be disruptive, it can channel all claims into federal court. Plaintiffs who lack an injury in fact under such statutes then will not be able to use the more permissive standing rules of state courts, because those state courts will lack jurisdiction.

Moreover, one should not fear exclusive jurisdiction will severely curtail state courts' presumed concurrent jurisdiction over federal claims[231] because Congress is only likely to use the power for a subset of statutory claims. For one, more permissive state standing doctrines will not channel many *constitutional* claims into state court: violations of constitutional rights are typically deemed to result in harms with historical common law analogues and thus cause factual injuries that support Article III standing.[232] So Congress will have no more incentive to make such claims exclusively federal than they do now. The biggest risk of federal claims being heard primarily in state court due to more permissive standing rules thus arises when Congress creates a new statutory right whose violation has no common law analogue.[233] It is only in such situations that Congress may be motivated to make federal jurisdiction exclusive. Regardless, the key is that it is *Congress's* choice whether to leave these statutory rights in the hands of state courts or, by granting federal courts exclusive jurisdiction, limit the rights' recognition to when a plaintiff can show concrete harm.

CONCLUSION

A plaintiff can only vindicate a right if they have standing. The new judicial federalism, however, has left standing out of the discussion about states' potential to expand rights beyond federal law. Meanwhile, federal injury in fact keeps some plaintiffs out of federal

230. *See, e.g.*, 28 U.S.C. § 1338(a) (granting federal courts exclusive jurisdiction over patent, copyright, and trademark claims); 18 U.S.C. § 3231 (same for federal criminal law).

231. *See* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.").

232. *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) (recognizing an alleged violation of the right to free speech causes an injury in fact); Heckler v. Mathews, 465 U.S. 728, 738 (1984) (holding unequal treatment caused by alleged violation of the equal protection clause causes an injury in fact); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (implicitly determining—by ruling on the claim without discussing standing—that the display of a cross caused an injury in fact that supported standing for an alleged violation of the free exercise clause); *but see id.* at 2098–101 (Gorsuch, J., concurring) (arguing the suit should be dismissed for lack of standing).

233. *See supra* notes 60–70 and accompanying text.

court, and states run the risk of keeping plaintiffs out of state court by defaulting to the federal doctrine. State courts not only can but should reject injury in fact, regardless if the doctrine is right for federal courts. Injury in fact is the result of uniquely federal concerns and values that are inapplicable to state courts. And by adopting more permissive standing doctrines instead of injury in fact, states can respect their broad judicial power and effectuate the goals of the new judicial federalism by fostering the development of and debate over state law. In short, no harm may be a problem in federal court, but in state court it should be no problem.