RESTORING CITIZEN SUITS AFTER *LUJAN V. DEFENDERS OF WILDLIFE*: THE USE OF COOPERATIVE FEDERALISM TO INDUCE NON-ARTICLE III STANDING IN STATE COURTS

INTRODUCTION

The United States Supreme Court's holding in *Lujan v. Defenders of Wildlife*[1] placed a substantial limitation on the scope of citizen suits which Congress may provide.[2] Specifically, it invalidated provisions which attempt to confer upon all citizens a right to judicial review solely for the purpose of ensuring government compliance with the law, without regard to whether the alleged non-compliance would result in a particularized "injury-in-fact" to the plaintiff.[3] While the injury-in-fact requirement had already been in existence for over twenty years,[4] *Defenders of Wildlife* was significant because, for the first time, the Court explicitly held that Congress was unable to legislatively remove this requirement.[5] "Injury in fact," the Court held, is a constitutional requirement that inheres in the "case or controversy" language of Article III,[6] and which serves the essential function of preserving the separation of powers between the three branches of the federal government.[7] The Court reasoned that congressional elevation of the generalized public interest in governmental compliance with the law into an individual right would transfer the duty to execute the law from the President to the courts.[8] Such a transfer of

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1. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

2. The breadth of this effect led one commentator to call the case "among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated." Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

Justice Blackmun, in dissent, characterized the decision as "a slash-and-burn expedition through the law of environmental standing," *Lujan*, 504 U.S. at 606, and commented that environmental plaintiff's should not suffer any "special constitutional standing disabilities." *Id.* at 595.

3. *See Defenders of Wildlife*, 504 U.S. at 576-77.

4. *See, e.g.*, Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) (holding that standing is dependent on the existence of injury in fact).

5. *See Defenders of Wildlife*, 504 U.S. at 576-77.

6. *See id.* at 560.

7. *See id.* at 576.

8. *See id.* at 576-77. Therefore, plaintiffs did not have standing, as citizens, to challenge the Secretary of the Interior's allegedly unlawful interpretation of the "consultation" provision of the Endangered Species Act. *See infra* notes 45-65 and accompanying text. Thus, *Defenders of Wildlife* continued the Court's recent trend of restricting standing to sue under environmental statutes. *See* Karin P. Sheldon, *Lujan v. Defenders of Wildlife: The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 ENVTL. L. REP. 10031, 10031-32 (1993) (noting that after *Defenders of Wildlife* and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), it is unclear what environmental plaintiffs must do to assure standing).

duties would violate the allocation of powers envisioned within the Constitution.

Because the bar to absolute[9] citizen suit provisions contained in *Defenders of Wildlife* rests on an interpretation of Article III, Congress is powerless to remove it—at least in regard to citizen suits in federal courts. Article III, however, has been held inapplicable to state courts.[10] Thus, state courts, because of their ability to employ standing rules which are less restrictive than those derived from Article III, are potential forums for suits by citizens who cannot demonstrate injury-in-fact.

This Note examines whether Congress may induce the courts of the states to provide for citizen suits unlimited by the injury-in-fact requirement. More specifically, it focuses on the constitutionality of accomplishing this through the strategy of "cooperative federalism."[11] This Note attempts to answer the question: May Congress offer a state a choice between, on the one hand, opening its doors to citizen suits challenging state implementation of a coopertative-federalist regulatory scheme, or on the other hand, being preempted in that regulatory area?[12]

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9. For lack of a better word, this term will be used to denote citizen suit provisions which eliminate the injury in fact requirement, rather than merely establishing the existence of a private right of action under the statute.

10. *See, e.g.*, Department of Labor v. Triplett, 494 U.S. 715, 721 n.** (1990) (holding that state courts are not bound by Article III).

11. "Cooperative Federalism" refers to the practice of allowing states "within limits established by federal minimum standards, to enact and administer their own regulatory programs." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981). Subject to the limitations imposed by the Commerce Clause, Congress may offer states the choice between adopting such regulatory programs or having regulation preempted by the federal government. *See* New York v. United States, 505 U.S. 144, 167 (1992). As used in this note, "cooperative federalism" also includes the practice of encouraging state adoption of regulatory programs by Congress' use of the Spending Power.

12. In *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996), the Fourth Circuit upheld the constitutionality of Congress' use of "cooperative federalist" methods to induce the application of Article III standing in state courts. *See id.* at 880-83. In *Browner*, Virginia challenged the U.S. Environmental Protection Agency's (EPA) interpretation of a citizen suit provision in the Clean Air Act Amendments of 1990. *See id.* at 872-73. Under the Act, each state is required to have an operating permit program for major sources of air pollution. *See* 42 U.S.C. § 7661a(d). States failing to submit an approvable program are subject to sanctions, *see id.* § 7661a(d)(2), which include the loss of highway funds and the requirement to find emission "offsets" for new sources of air pollution. *See id.* § 7509(b). To be approved by the EPA, state-run programs must contain numerous elements set out in the Act. *See id.* §§ 7661a-7661f.

Among these elements is Clean Air Act § 502(b)(6), under which a state must provide "an opportunity for judicial review of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." *See* 42 U.S.C. § 7661a(b)(6).

If this provision were read to confer standing to literally anyone who participated in the public comment process, it would purport to eliminate the injury in fact requirement. The EPA, however, interpreted it as requiring states to be at least as generous in granting standing as Article III would

Part I of this Note discusses the major constitutional doctrines relating to standing in state and federal courts. Part I.A reviews the constitutional elements of standing in federal courts (injury-in-fact, causation, and redressability), as derived by the Court from the "case" or "controversy" language of Article III. Part I.B discusses some of the arguments concerning whether Article III *should* control standing in state courts. Part I.B consists of two parts, considering separately the issues raised by state courts' standing rules which are more restrictive than Article III (part I.B.1), and those which are less restrictive (part I.B.2). Subpart I.B.1 concludes that, despite possible frustration of the implementation of federal programs, state courts are probably free, under the non-discrimination doctrine, to use strict standing rules to avoid hearing federal claims, at least in the absence of congressional action. Subpart I.B.2 concludes that the biggest obstacle to allowing liberal standing for federal claims in state courts is the possibility that some state court decisions will be unreviewable by the United States Supreme Court.

Part II examines the means by which Congress may dictate rules of standing for federal claims in state courts. Part II.A considers the power of Congress to control state courts' treatment of standing, and concludes that Congress' power to do so may extend no further than already provided by the non-discrimination doctrine. Part II.B considers whether,

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allow, but not necessarily more so. *See Browner*, 80 F.3d at 877, 879. EPA reasoned that Congress intended §502(b)(6) to establish minimum, nationwide standards for judicial review in state courts, Respondents brief at 21, Virginia v. Browner (4th Cir.) (No. 95-1052), and that Article III should provide that minimum standard because it would govern access to (federal) courts in an operating permit program administered by EPA, which would be required in the event a state refused to implement its own program. *See id.* at 28-29. For a discussion of EPA's interpretation of § 502(b)(6), see Maria Farinella, Note, *The Clean Air Act of 1990: Title V's Operating Permit Provision For Citizen Access to State Court Judicial Review*, 8 ADMIN. L.J. AM. U. 67 (1994).

EPA nonetheless rejected Virginia's proposed permit program, 59 Fed. Reg. 62,327 (Dec. 5, 1994), because Virginia's relevant judicial review provision would not meet the minimum standard defined by Article III. *See id.* Virginia's provision for judicial review of permit decisions requires parties seeking review to allege that "(i) such person has suffered an actual, threatened or imminent injury; (ii) such injury is an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized." VA. CODE ANN. § 10.1-1318 (Michie 1993).

Virginia argued that, due to the ambiguity of § 502(b)(6), any reasonable state interpretation must be accepted by the EPA. *See Browner*, 80 F.3d at 877. The Fourth Circuit rejected this argument, holding that EPA's interpretation of the provision was entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), even though the provision dealt with jurisdictional rules, not with EPA's area of expertise (the environment). *See Browner*, 80 F.3d at 878. The court then went on to hold that the methods used by Congress to encourage state adoption of the standing rules specified by CAA § 502(b)(6) were not unconstitutionaly coercive. *See id.* at 880-83.

This note addresses the question of whether the Supreme Court would similarly uphold a Congressional inducement of state court standing rules which went beyond replicating federal Article III standards. That is, may Congress induce in the state courts what it cannot prescribe for federal courts?

even if Congress lacks the power to directly set standing rules in state courts, it may be able to achieve the same results as part of a cooperative federalism scheme of regulation. In this regard, the Court's decision in *New York v. United States*[13] is relevant; its salient points are therefore recounted in part II.B.1. Parts II.B.2 and II.B.3 then apply *New York's* legal and policy lessons, respectively, to the issue of liberal state court standing rules as an element of a cooperative federalism program. Finally, Part II.B.4 considers Supreme Court reviewability of state court cases in the context of mandated liberal state court standing rules.

I. CONSTITUTIONAL ASPECTS OF STANDING IN FEDERAL AND STATE COURTS

The doctrine of standing addresses whether a particular litigant "is entitled to have the court decide the merits of the dispute or of particular issues."[14] For federal courts, the parameters of standing are derived from Article III of the U.S. Constitution.[15] While Article III does not contain an explicit "standing" requirement,[16] that requirement has been defined through the Supreme Court's interpretation of Article III's "case or controversy."[17]

State courts, in contrast, do not derive their authority from Article III and are not, therefore, subject to its limitations on standing.[18] Although the non-applicability of Article III is settled as a matter of law, some prominent scholars believe this result to be contrary to the intent of the Constitution's drafters.[19] This dissenting view would hold Article III's limitations on justiciability applicable to state courts, at least when these

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13. New York v. United States, 505 U.S. 144 (1992).

14. Warth v. Seldon, 422 U.S. 490, 498 (1975).

15. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

16. *See* Sunstein, *supra* note 2, at 168.

17. The Constitution provides:

> "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States; . . ."

U.S. CONST. art. III, § 2, cl. 1.

18. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983) ("[S]tate courts need not impose the same standing or remedial requirements that govern federal-court proceedings."); Doremus v. Board of Educ., 342 U.S. 429, 434 (1952) (stating that state courts may adjudicate federal constitutional questions "even under such circumstances that it can only be regarded as advisory").

19. *See infra* notes 82-85 and accompanying text.

courts entertain federal questions.[20] Part A surveys the Constitution's control over the rules of standing in federal and state courts.

A. Constitutional Limits On Standing In Federal Courts: Article III

The elements of a plaintiff's standing to sue in federal court are derived from an interpretation of the "case or controversy" language of Article III.[21] The Supreme Court's interpretation of this language in *Valley Forge Christian College v. Americans United for the Separation of Church and State* has become encapsulated in a three part test: at an "irreducible minimum," a plaintiff must show (1) "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (2) "that the injury fairly can be traced to the challenged action," and (3) that the injury "is likely to be redressed by a favorable decision."[22] In addition, courts may impose certain "prudential" standing requirements in the interest of judicial self government.[23]

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20. *See, e.g.*, William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 294 (1990) (arguing that autonomy-based defenses of the freedom of state courts from Article III cannot withstand scrutiny).

21. *See Lujan*, 504 U.S. at 560 (citation omitted); *see also* Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990); Whitmore v. Arkansas, 495 U.S. 149 (1990); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Sierra Club v. Morton, 405 U.S. 727 (1972).

22. Valley Forge Christian College v. Americans United for the Separation of Church and State, 454 U.S. 464, 472 (1982) (citations and internal quotation marks omitted).

23. The prudential elements of standing are not derived from Article III. *See Defenders of Wildlife*, 504 U.S. at 560. As such, they can be removed by congressional legislation. There are three basic prudential requirements. First, the claim must be within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). The second prudential bar precludes claims based on generalized grievance shared by all. *See* Flast v. Cohen, 392 U.S. 83, 106, 114 (1968) (Stewart, J., concurring); *see also* Frontingham v. Mellon, 262 U.S. 447, 488 (1923) ("The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."). Finally, with certain exceptions, claims on behalf of a third party are not allowed. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 429 (1961) (noting that, generally, plaintiffs may assert only their own constitutional rights or immunities).

1. Injury-in-Fact

a. Historical Development

The first *Valley Forge* criterion requires that a federal plaintiff show concrete injury. This requirement has been held to be "a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches."[24]

Although the Court emphasized the fundamental nature of the injury-in-fact requirement, its origin is quite recent, having first been articulated by the Burger Court.[25] When the Court first began to articulate the doctrine of standing in the 1920s and 1930s,[26] the pertinent question was whether a plaintiff had suffered a *legal* wrong to a common law or statutory interest.[27] With the passage of the Administrative Procedure Act in 1946,[28] standing was expanded to situations where the plaintiff was "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[29] By this language, Congress arguably intended to recognize a person's right to bring suit as a "private attorney general" (i.e., a citizen who, without having a personal stake in the outcome, seeks to enforce compliance with the law), at least where such a right was contained in another "relevant statute."[30] Under such an understanding, the Administrative Procedure Act expanded standing by granting it where the plaintiff had not suffered a legal wrong at all.[31]

The Court established injury-in-fact as a mandatory requirement, regardless of the existence of a legal interest, in its 1970 decision in

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24. *Defenders of Wildlife*, 504 U.S. at 576.

25. *See* David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 37 WIS. L. REV. 37, 42 (1984).

26. *See* Sunstein, *supra* note 2, at 179. According to Sunstein, the impetus for the creation of standing limits was the desire of Justices Brandeis and Frankfurter to "insulate progressive and New Deal legislation from frequent judicial attack." *Id.*

27. *See id.* at 181.

28. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-59, 701-06 (1988)).

29. *Id.* § 702.

30. Sunstein, *supra* note 2, at 186.

31. *See id.* at 182. In any case, whether or not the APA provided standing in the *absence* of a legal wrong, it is clear that it did not initially require the existence of an injury in fact. *See Sierra Club v. Morton*, 405 U.S. at 733 ("Early decisions under this statute interpreted the language as adopting the various formulations of 'legal interest' and 'legal wrong' then prevailing as constitutional requirements of standing.") (footnote omitted).

Association of Data Processing Service v. Camp.[32] There, the Court distinguished standing from the question of whether a plaintiff has a legal interest.[33] While the existence of a legal interest "goes to the merits"[34] (and is thus, presumably, inappropriate for consideration in determining standing), the existence of standing depends on "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."[35] Although the opinion in *Data Processing* left unclear whether the injury-in-fact standard was a constitutional requirement,[36] subsequent Supreme Court cases have unequivocally established that this criterion does orginate in the Constitution.[37]

Requiring a plaintiff to show injury-in-fact to obtain standing could have a very restrictive effect on citizen access to the courts, depending on what types of interests are recognized as capable of being injured "in fact."[38] For example, some courts might view injury-in-fact as encompassing only those injuries which can be reduced to economic terms.[39]

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32. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

33. *See id.* at 153.

34. *Id.*

35. *Id.* at 152. The opinion also noted that petitioners Data Processing Service were within the "zone of interest" of the relevant provisions of the substantive statute at issue (the Bank Service Corporation Act of 1962). *See id.* at 156. However, the Court appeared to treat the "zone of interest" test as a non-constitutional limit on standing. *See id.* at 154-56.

36. *See* Sunstein, *supra* note 2, at 185-86 (noting that the opinion is ambiguous as to whether the injury in fact standard arose from Article III or from the Administrative Procedure Act's "adversely affected or aggrieved" language, which had previously been interpreted by Kenneth Culp Davis as being synonymous with injury "in fact").

37. *See, e.g.*, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 260-261 (1977); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 499 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

38. *See* Sunstein, *supra* note 2, at 188-91. Sunstein argues that it is a conceptual impossibility to define "injury" in solely factual terms; injury must have a normative aspect and it is when this normative aspect is recognized by the law that courts are willing to recognize the injury as being factual. *See id.* at 188. Sunstein uses as an example of this concept *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), a case involving the standing of persons who pose as home or apartment renters or purchasers to test for unlawful discrimination. *See* Sunstein, *supra* note 2, at 188. Any psychological injury suffered by such "testors" exists regardless of whether or not it is recognized by law, but it is only the existence of a statutorily created right that allows the court to characterize this injury as injury "in fact." *See id.* at 190.

39. Such an approach was taken by the Virginia legislature in its citizen suit provision for judicial review of decisions of the Air Pollution Control Board, which requires injury to be "an invasion of an immediate, legally protected, *pecuniary* and substantial interest which is concrete and particularized." VA. CODE ANN. § 10.1-1318 (Michie 1993) (emphasis added); *see supra* note 12 for a description of litigation involving this provision.

The Court has not attempted to impose such a narrow interpretation of injury-in-fact on federal courts. In *Data Processing* itself, the Court recognized in dicta that the injury need not be economic.[40] In *Sierra Club v. Morton,* the Court addressed for the first time the question of whether harm to an interest in "[a]esthetic[s]" and "environmental well-being" could constitute an injury-in-fact.[41] The Court held that, because such interests are "important ingredients of the quality of life in our society," there was no question that detriment to them could satisfy the injury-in-fact requirement, regardless of whether the injury was widely shared among the general populace.[42]

Although the plaintiff need not show a unique injury, the plaintiff must be among the injured. In the context of environmental suits, this typically requires a showing of the plaintiff's "use" of the resource in question.[43] The Court's recent decisions have not rejected the validity of aesthetic and other intangible interests in the environment, but have increased the difficulty of showing injury by narrowing the definition of the term "use."

In *National Wildlife Foundation v. Lujan,* for example, the Court constricted the geographical aspect of use by holding that plaintiffs who used land "in the vicinity" of large areas of land affected by a land withdrawal review program did not have standing to challenge that program.[44] More recently, the Court in *Lujan v. Defenders of Wildlife*[45] limited the temporal dimension of use.[46] There, a coalition of environmental groups[47] challenged the Secretary of Interior's interpretation regarding the applicability of the Endangered Species Act[48] (ESA) to U.S. sponsored development in foreign countries.[49] Several of the plaintiffs, in support of their claim that they would be injured by the demise of particular endangered species, asserted an intention to visit the foreign

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40. *See Association of Data Processing*, 397 U.S. at 152.

41. *See Sierra Club v. Morton*, 405 U.S. at 734.

42. *See id.*

43. *See id.* at 735. Thus, plaintiff Sierra Club lacked standing in this case because it failed to allege any use by its members of the Mineral King Valley in Sequoia National Forest, the aesthetic values of which were threatened by planned development by Walt Disney Enterprises, Inc. *See id.* at 729, 735.

44. *See Lujan v. National Wildlife Fed'n*, 497 U.S. at 885-89. For a description of the effect of this case on the law of standing, see Karin Sheldon, *NWF v. Lujan: Justice Scalia Restricts Environmental Standing to Constrain the Courts*, 20 ENVTL. L. REP. 10557 (1990).

45. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

46. *See* Sheldon, *supra* note 8, at 10031.

47. *See id.*

48. Endangered Species Act, 16 U.S.C. § 1536 (1994).

49. *See Defenders of Wildlife*, 504 U.S. at 558.

habitats of these species in the future. The Court held that the existence of these future, indefinite plans was insufficient to demonstrate use of the resource and that the plaintiffs were therefore not susceptible to an injury in fact.[50]

b. Defenders of Wildlife: Elimination of Procedural Injury as Injury-in-Fact

Aside from the temporal limits it placed on the injury-in-fact requirement, *Defenders of Wildlife* was also significant for a more fundamental reason: its effect on statutory "citizen suit" provisions. In numerous instances, particularly in environmental laws, Congress authorized any "person" or "citizen" to sue for enforcement of the statute.[51] The decision in *Defenders of Wildlife* substantially limits the scope of these provisions.[52] Prior to *Defenders of Wildlife*, although the Court had recognized that Article III imposed a barrier on Congress' power to create standing, it had not required the showing of an injury other than a violation of the statute containing the citizen suit provision.[53]

In *Defenders of Wildlife*, the court below had held that, under the citizen suit provision of the ESA,[54] *any* person could sue to enjoin the government from violating the procedural requirements imposed by the ESA.[55] The Supreme Court rejected this view and held that a citizen suit provision could not create in all persons "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[56] Creating such a right would violate the separation of powers between the three branches of federal government, as it would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take care that the Laws be faithfully executed,' Art. II Sec. 3," and would enable courts "to assume a position of authority over the governmental acts of another and co-equal

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50. *See id.* at 564.

51. *See* Sheldon, *supra* note 8, at 10033. Professor Sheldon notes as examples: Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (1994); Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (1994); Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270 (1994); Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365 (1994); Resource Conservation and Recovery Act § 7002(a), 42 U.S.C. § 6972(a) (1994); and Clean Air Act § 304, 42 U.S.C.§ 7604 (1994).

52. *See* Sunstein, *supra* note 2, at 164-65.

53. *See* Sheldon, *supra* note 8, at 10033 n.36.

54. Endangered Species Act, 16 U.S.C. § 1540(g).

55. *See* Defenders of Wildlife v. Lujan, 911 F.2d 117, 121 (8th Cir. 1990).

56. *Lujan v. Defenders of Wildlife*, 504 U.S. at 573 (citation omitted).

department."[57] Therefore, the desire to see governmental compliance with a statute is not an interest the violation of which will give rise to an injury-in-fact.

The Court did not deny that Congress could create "procedural rights" in citizens, but it insisted that "this is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs."[58] In this respect, the Court distinguished the ESA procedural requirement at issue from the requirement of "an environmental impact statement before a federal facility is constructed next door" to the plaintiffs.[59] In the latter case, presumably, the proximity of the proposed federal facility would necessarily implicate separate, concrete interests of the plaintiff. Thus, a violation of a procedural requirement only confers standing where it may lead to injury to an interest of the plaintiff other than the "noninstrumental" interest of having the procedure observed, irrespective of the substantive outcome.[60]

The Court explained that this holding was consistent with its previously articulated principle that "[t]he injury required by Art[icle] III may exist solely by virtue of 'statutes creating [certain] legal rights, the invasion of which creates standing.'"[61] Such statutorily-created rights, the Court explained, have always consisted of the elevation of a de facto injury to a legally cognizable status.[62] Since injury to a citizen's interest in having the government abide by the law cannot be a de facto injury cognizable by the Courts, according to the Court's separation of powers analysis, a plaintiff must show particularized injury-in-fact.[63]

Thus, no longer does the injury requirement serve merely to insure that "the dispute sought to be adjudicated will be presented in an adversary

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57. *Id.* at 577 (citing Massachusetts v. Mellon, 262 U.S. 477, 489 (1923)).

58. *Id.* at 572. Note that the plaintiff's *were* seeking to enforce a procedural requirement (the consultation requirement of ESA § 7(a)(2)), the disregard of which could impair a separate concrete interest of theirs (their interest in the preservation of foreign endangered species for the future use of observation). Justice Blackmun, in dissent, was thus "mystified" by this "unsupported conclusion." *Id.* at 603 (Blackmun, J., dissenting). Perhaps what the Court meant by this assertion was that, because the plaintiffs failed to prove sufficient "use" to create a concrete interest, determination of standing under a "procedural rights" theory must proceed as if no underlying concrete interest were at stake.

59. *Id.* at 572.

60. According to the dicta in this case, however, the creation of a procedural right does help the plaintiff in that it allows an action without "meeting all the normal standards for redressability and immediacy." *Id.* at 572 n.7. For an analysis of this dictum and its potential applications to future cases, see Christopher T. Burt, Note, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275 (1994).

61. *Defenders of Wildlife*, 504 U.S. at 578 (citations omitted).

62. *See id.* at 578.

63. *See id.* at 572-78.

context and in a form historically viewed as capable of judicial resolution."[64] Instead, *Defenders of Wildlife* fully incorporated the view, long held by Justice Scalia, that the injury-in-fact requirement is a critical element in maintaining the separation of power between the judiciary and the other branches of government.[65]

2. Causation

The causation prong of standing was first discussed in *Flast v. Cohen*, in the context of determining whether taxpayers had standing to challenge the expenditure of federal funds allegedly in violation of the Establishment Clause of the First Amendment.[66] In *Flast*, the Court framed the causation requirement in terms of "a logical nexus between the status asserted and the claim sought to be adjudicated."[67] The test was subsequently restated in *Simon v. Eastern Kentucky Welfare Rights Organization* as requiring that the injury "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."[68] Under this standard, as the Court noted in *Defenders of Wildlife*, standing is not precluded but is more difficult to establish where the plaintiff challenges a government action causing injury only through "the allegedly unlawful regulation (or lack of regulation) of *someone else*."[69] In such a circumstance, the Court may easily find that

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64. *Flast*, 392 U.S. at 101.

65. *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 895 (1983).

66. *See Flast*, 392 U.S. at 85. The Court held that "a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Id.* at 105-06. Thus, the plaintiff in *Flast* had standing to challenge the use of federally appropriated funds to provide assistance to religious schools, allegedly in violation of the Establishment Clause. *See id.* at 85.

The Court distinguished this case from *Frothingham v. Mellon*, 262 U.S. 447 (1923), which had erected a barrier against federal taxpayer suits, but which was not clear on whether this barrier was constitutional or merely prudential. *See Flast*, 392 U.S. at 92-93. In *Frothingham*, the Court denied standing to a taxpayer who challenged as violative of the Tenth Amendment a Congressional program providing funds to states for reducing infant and maternal mortality. *See id.* at 91. The Court in *Flast* said that the plaintiff in *Frothingham* had lacked standing because "her constitutional attack was not based on an allegation that Congress . . . had breached a specific limitation upon its taxing and spending power." *Flast*, 392 U.S. at 105. In other words, because the Tenth Amendment merely reserves to the states those powers not delegated to the United States, *see* U.S. CONST. amend. X, a judicially cognizable claim must find some other basis for the assertion that the federal action is not pursuant to a delegated power.

67. *Flast*, 392 U.S. at 102.

68. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

69. *Lujan v. Defenders of Wildlife*, 504 U.S. at 562.

the injury is "highly indirect" and "attenuated at best."[70] It is reasonable to expect that the courts' application of this prong will vary according to other policy considerations presented by individual cases, perhaps explaining why "many courts, including the Supreme Court, have recognized standing for plaintiffs injured by third parties responding to government action."[71]

In suits challenging government action, the causation prong requires, at a minimum, that the government action be final.[72] This assures that the injury is reasonably imminent and not speculative,[73] and prevents courts from becoming entangled in "abstract disagreements over administrative policies."[74]

3. Redressability

The redressability prong of standing requires the plaintiff to demonstrate that the requested relief will likely remedy the alleged injury.[75] Were standing allowed to be based purely on a citizen suit provision without the additional requirement of injury-in-fact, redressability would always be satisfied because, by definition, the citizen's interest in having the government obey the law would be served by a favorable decision.

Even with the injury-in-fact standard in place, the conferral of procedural rights to citizens (via a citizen suit provision) should, according to dicta in *Defenders of Wildlife,* allow plaintiffs to establish standing "without meeting all the *normal standards* for redressability and immediacy."[76] However, a plurality of the Court in *Defenders* would have denied plaintiffs' standing on the basis of a lack of redressability.[77]

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70. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 757 (1983) (holding that parents of black public school students did not have standing to sue for enforcement of Internal Revenue Code provision that denied tax exempt status to racially segregated private schools, because the line of causation between tax exemptions at private schools and desegregation of public schools was "attenuated at best").

71. *See* Sheldon, *supra* note 8, at 10032.

72. *See id.* at 10032; *see also, e.g.*, Abbott Lab. v. Gardner, 387 U.S. 136, 149-51 (1967) (noting test of finality of agency action is a pragmatic one; Commissioner of Food and Drugs made final agency action where regulation was promulgated formally after announcement in the Federal Register and opportunity for comment, and was effective upon promulgation).

73. *See* Sheldon, *supra* note 8, at 10032.

74. *Gardner*, 387 U.S. at 148.

75. *See Valley Forge Christian College*, 454 U.S. at 472.

76. *Lujan v. Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added).

77. *See id.* at 571. The plurality opined that, because the Agency for International Development, as a non-party to the suit, might not consider itself bound to a decision requiring consultation with the Secretary of Interior, there was no guarantee that a favorable decision would

B. The Non-applicability of Article III to State Courts

The Court's Article III-derived elements of standing, particularly the requirement of an injury-in-fact, purportedly serve important functions in preserving the separation of powers envisioned by the Constitution. In state courts, however, standing to sue is governed by different considerations. This section will discuss the relationship of Article III to state court standing rules.

The Supreme Court has stated on numerous occasions that the rules of standing contained in Article III are not applicable to state courts, "even when [state courts] address issues of federal law."[78] Because Article III is directed only at establishing "[t]he Judicial Power of the United States,"[79] it is not, at least facially, concerned with the judicial power of the several states.[80] Accordingly, the extension of federal judicial power to only "cases" and "controversies" has no bearing on the standing rules of state courts.[81]

This literal reading of Article III is somewhat in tension with the widely-held view that the founders intended state courts to be utilized for federal questions.[82] This view is based on the fact that "the framers specifically chose to give Congress the option whether to create lower federal courts."[83] "[I]t must have been clearly understood . . . that state courts would be competent to hear federal causes of action, since there was a possibility that no extensive federal judiciary would be formed."[84]

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result in the requested consultations. *See id.* at 568-71.

78. Asarco Inc. v. Kadish, 490 U.S. 605, 617 (1989).

79. U.S. CONST. art. III, § 1, cl. 1.

80. *See, e.g.*, New York State Club Ass'n v. City of New York, 487 U.S. 1, 8 n.2 (1988) ("[T]he special limitations that article III of the Constitution imposes on the jurisdiction of federal courts are not binding on the state courts.").

81. *See* U.S. CONST. art. III, § 2, cl. 1.

82. *See, e.g.*, Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("[T]he state court has [federal question] jurisdiction where it is not excluded by express provision.").

83. Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 314 (1976).

84. *Id.*; *see also* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1027 (1995) (citing the First Congress' decision not to create "an army" of federal courts, thereby leaving most federal question jurisdiction in state courts, as evidence that state courts have always been consciously compelled to entertain federal claims); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1154 (1984) ("Congress' ability to restrict federal jurisdiction implies a state court obligation to assume jurisdiction over federal claims."); *but see* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 39 (1995) (arguing that, among the Founders, "there was a pervasive belief that state courts were not, in fact, constitutionally able to hear all Article III business; further, the prevailing

Allowing state courts to deny standing to plaintiffs who satisfy Article III standing would frustrate the intent of the Constitution's drafters to have state courts hear federal claims.[85]

In order to prevent such a thwarting of the founders' intent, some scholars argue for the applicability of Article III to state courts.[86] On the other hand, some defend the literal reading of Article III as applicable only to federal courts.[87] In order to evaluate the arguments for and against making Article III applicable to state courts, it is useful to consider separately the two possible ways a state court may vary from Article III: either by being less restrictive (allowing easier access) or by being more restrictive.

1. State Court Standing Requirements that are *More* Restrictive than Article III

The imposition of state court standing rules which are more restrictive than those contained in Article III creates a conflict between two ideals of federalism. On the one hand, the states' ability to determine access to its own courts might be seen as a basic feature of state autonomy. On the other hand, under the prevailing view regarding the intent of the founders, state courts are intended to share in the burden of enforcing federal laws.[88] However, the extent of a state court's duty to hear federal questions is not precisely defined.[89] This sub-part examines the source and limits of this duty and its possible effect on state court standing rules which are more restrictive than Article III.

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assumption was that they ordinarily had no obligation to assume unwanted jurisdiction, the Supremacy Clause notwithstanding").

85. The state courts' ability to refuse jurisdiction over federal *questions*, at least where the states requirements for standing have been met, is limited by the "Nondiscrimination Doctrine." *See infra* note 94 and accompanying text.

86. *See, e.g.*, Fletcher, *supra* note 20, at 279-94.

87. *See generally* Collins, *supra* note 84 (arguing that concerns for state autonomy require that Article III be interpreted to require no more of state courts than that they apply jurisdictional rules in a non-discriminatory manner).

88. *See supra* notes 82-85 and accompanying text.

89. *See* Fletcher, *supra* note 20, at 292 (noting that confusion remains as to whether the Constitution provides the states with a right to protect their courts from being overburdened by congressionally imposed obligations to hear federal cases); *see also* Gordon & Gross, *supra* note 84, at 1154 (noting that the "Supreme Court has not yet addressed the federal constitutional question whether a state court, applying state standards, can hold a justiciable federal question to be non-justiciable in state court").

a. The Supremacy Clause and the Non-Discrimination Principle

To the extent that state courts have a duty to accept jurisdiction over federal questions, their duty is derived from the Supremacy Clause of the Constitution.[90] The Supremacy Clause obligates states to decide cases before them in conformance with federal law, notwithstanding any conflict with state law. Some have argued that this obligation also implies that state courts have a duty to hear *all* cases brought by parties seeking to enforce federal law.[91] However, a duty to take jurisdiction over federal cases does not necessarily follow from a duty to obey federal law when it arises in cases over which the court already had jurisdiction.[92]

Nonetheless, it is settled that state courts generally are obligated to hear federal cases.[93] This obligation is limited by the principle of jurisdictional non-discrimination, which holds that a state court must hear a federal claim if it would have jurisdiction to adjudicate the same type of claim arising under state law.[94] This principle of non-discrimination is also sometimes referred to as the "valid excuse" doctrine: a court lacking jurisdiction over a similar state-law claim is said to have a "valid excuse" not to take the federal case.

If the law of standing is considered to be jurisdictional, rather than substantive, then a state court which imposed standing requirements more restrictive than Article III on all plaintiffs (regardless of whether their

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90. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

91. *See* Collins, *supra* note 84, at 40.

92. *See id.* at 190.

93. *See* Caminker, *supra* note 84, at 1024-25 (citing Testa v. Katt, 330 U.S. 386 (1947)).

94. See *Testa*, in which the Court held that a Rhode Island state court must hear a claim brought under the Federal Emergency Price Control Act, because it would have "jurisdiction adequate and appropriate under established local law to adjudicate" the same type of claim arising under Rhode Island law. *Testa*, 330 U.S. at 394. This quote, appearing in the last paragraph of the opinion, apparently narrowed the decision. *See* Gordon & Gross, *supra* note 84, at 1159. In prior portions of the opinion, the Court rejected the notion, subscribed to by the Rhode Island Supreme Court, that a state policy of not enforcing "penal" statutes of foreign jurisdictions could be a "valid excuse" to refuse jurisdiction under a federal statute. *See Testa*, 330 U.S. at 388-92; *see also* Gordon & Gross, *supra* note 84, at 1157-58.

The meaning of *Testa* is thus open to debate, depending on whether the last paragraph is read as limiting or merely illustrative. For example, Gordon and Gross argue that the Court, by citing the Rhode Island court's ability to hear similar claims under state law as evidence of the adequacy of the court's jurisdiction, did not intend to suggest that the duty to hear the federal claim was dependent on such analogous state claim jurisdiction. *See* Gordon & Gross, *supra* note 84, at 1162-63. Accordingly, *Testa* may be read to require any state court of general jurisdiction to hear federal claims, whether the state court would hear similar state claims or not. *See id.* at 1162-68.

claim was based on state or federal law) would have a "valid excuse" to deny jurisdiction to a federal claimant. Such denial would not violate the Supremacy Clause.

b. Standing Rules as a "Valid Excuse"

As the Court pointed out in *Howlett v. Rose*, the "valid excuse" exception is a narrow one: "On only three occasions have we found a valid excuse for a state court's refusal to entertain a federal cause of action."[95] The three "excus[es]" noted by the Court involved: (1) a state statute permitting discretionary dismissal where neither plaintiff nor defendant were a resident of the forum state;[96] (2) a municipal court denial of jurisdiction of a claim which arose outside its territorial jurisdiction;[97] and (3) application of forum non conveniens.[98] The Court emphasized that "[e]ach of [these] involved a neutral rule of judicial administration."[99]

The paucity of decisions finding valid excuses might be used to argue that the Court is unlikely to (or at least should not) consider standing a valid excuse.[100] However, at least in dicta, the Court has indicated that standing could provide a valid excuse: in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Court said that the state court could have chosen to close its doors to those who lacked an interest in the federal law more substantial than that of the plaintiffs, notwithstanding the fact that the plaintiffs satisfied the standing requirements for federal court.[101]

It may be that this expressed tolerance of a potential means for state courts to refuse jurisdiction over federal questions is due to the rarity with which states invoke it.[102] In any case, the possibility that standing rules may comprise a "valid excuse" to refuse federal question jurisdiction, together with the fact that Article III has been held inapplicable to state courts, presents the possibility that state courts may escape the duty to hear federal questions by imposing additional standing criteria on all plaintiffs,

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95. Howlett v. Rose, 496 U.S. 356, 374 (1990).

96. *See id.* at 375.

97. *See id.* (citing Herb v. Pitcairn, 324 U.S. 117, 123 (1945)).

98. *See id.* at 356 (citing Missouri *ex rel.* Southern R. Co. v. Mayfield, 340 U.S. 1, 4 (1950)).

99. *Id.* at 374.

100. *See* Fletcher, *supra* note 20, at 292.

101. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 262 n.8 (1977).

102. *See* Fletcher, *supra* note 20, at 291.

beyond the elements implied by the case or controversy language of Article III.[103]

2. State Court Standing Requirements which are *Less* Restrictive than Article III

State court standing rules may be less restrictive than Article III standing in that they need not require the existence of an injury-in-fact.[104] Furthermore, as previously noted, the Supreme Court has recognized the authority of state courts to adjudicate federal questions without being bound by the justiciability standards of Article III.[105] However, the use of such authority by state courts creates (or rather exposes) a gap in the

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103. For an argument that state courts should not be able to employ state standards of justiciability to refuse to vindicate federal rights, see generally Gordon & Gross, *supra* note 84.

104. *See* New York State Club Ass'n v. City of New York, 487 U.S. 1, 8 n.2 (1988) ("[T]he special limitations that article III of the Constitution imposes on the jurisdiction of federal courts are not binding on the state courts."). The Court went on to say: "States are thus left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution." *Id. New York State Club Ass'n* involved challenges under the First and Fourteenth Amendments of the U.S. Constitution to a New York City law prohibiting discrimination in certain quasi-public institutions. *See id.* at 4-5. Thus, the fact that the Court found it necessary to conduct its own determination of the plaintiff's standing clearly demonstrates that a state court may employ its own standing rules even when adjudicating a federal question.

105. *See, e.g.*, United States Dep't of Labor v. Triplett, 494 U.S. 715, 721 n.** (1990) (holding that state courts are not bound by Article III); Asarco Inc. v. Kadish, 490 U.S. 605, 617 (1989) (holding that state courts not bound by federal standing requirements may nonetheless adjudicate federal questions); *New York State Club Ass'n*, 487 U.S. at 8 n.2 (same); City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983) (same).

Prior to these relatively recent cases, the question of the applicability of Article III to state courts hearing federal questions appears to have been an open one. *See, e.g.*, Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978):

> Less clear is how the state courts should treat *federal* claims advanced by plaintiffs who would not be given standing to advance them in federal court but who would be recognized as having standing to advance similar state law claims in their state courts. While it is sometimes assumed that federal causes of action carry the incidents of federal justiciability doctrine . . . there are good reasons for adopting the contrary view. Certainly the strictures of article III do not run to state courts under any circumstances, nor do they necessarily attach themselves to federal causes of action. . . . Indeed, pursuant to the tradition of state court obligation to enforce federal rights endorsed in Testa v. Katt . . . it could be argued that state courts are required to apply their more liberal standing rules to federal claims.

Id. at 1401-02 n.99 (citations omitted). Sager went on to acknowledge the countervailing argument: liberal state court standing may lead to unreviewable state court decisions on federal questions. This provides an argument that state courts should be "required, or at least entitled, to respect federal standing requirements." *Id.*

scheme of judicial federalism: because the strictures of Article III are federal constitutional requirements not waivable by federal courts, a ruling by a state court on a federal question may be unreviewable by the Supreme Court where the parties in the state trial lacked Article III standing.[106] The ability of state courts to decide federally non-justiciable federal question cases thus raises the possibility that states might interpret federal statutes in a manner inconsistent with congressional intent, without being subject to federal judicial correction.[107]

In order to limit, though not eliminate, this possibility, the Court has held that it may review *some* state court cases where the plaintiff lacked federal standing. Specifically, in *Asarco v. Kadish*, the Court held that it may review a state court decision, despite the plaintiff's lack of Article III

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106. *See* Doremus v. Board of Educ., 342 U.S. 429, 434 (1952) (holding that although state courts may rule on federal questions in the form of an advisory opinion, federal appellate jurisdiction must be based on the existence of a "case" or "controversy").

For an argument, based on contemporaneous writings, that the founding generation never intended or understood the "case" or "controversy" language of Article III to provide a bar to Supreme Court review of state court decisions on federal claims, see Fletcher, *supra* note 20, at 265-72.

107. It is useful to recall that the Supreme Court is the only federal court authorized to hear an appeal from a state court. *See* 28 U.S.C. § 1257 (1994); *see, e.g.*, Elks Nat'l Found. v. Weber, 942 F.2d 1480, 1483 (9th Cir. 1991) (observing that the Supreme Court is the only federal court authorized to hear appeals from state courts) (citation omitted). Given the volume of cases before the Court, it is impossible for the Court to be the final arbiter of all questions of federal law, making the system of dual jurisdiction over federal questions dependent on the conscientious application by state courts of Supreme Court precedent. *See* Brian A. Stern, *An Argument Against Imposing the Federal Case or Controversey Requirement on State Courts*, 69 N.Y.U. L. Rev. 77, 108-11 (1994). Thus, the fact that the Supreme Court is *precluded* from reviewing a small subset of state court decisions on federal law may not be as problematic as it appears at first blush.

The opposite concern, that Congress might be able to utilize state courts in order to escape the checks provided by federal court review, is raised and rejected by Stern. *See id.* at 95-97. This might occur if Congress were to use state courts, with less restrictive standing rules, as supplemental instruments to impose its will on the outcome of particular factual disputes. In other words, because state courts would have jurisdiction over disputes which did not rise to the level of a "case" or "controversy," they would provide an opportunity for quasi-legislative decision making. In order for this to operate to *Congress'* advantage, however, Congress must be able to directly influence state court decision making. Thus, it has been argued that, because state courts possess an independence that is "inherent in our federal system where state judiciaries are part of distinct sovereignties" there is "little threat" that Congress will "conscript the state judiciary to interpret the law according to congressional will." *Id.* at 95.

This seems to imply that federal courts are subject to a greater degree of Congressional control. To the extent that "federal legislation depends on federal judiciary for enforcement and that denial of district court jurisdiction would subject congressional programs to inconsistent interpretation by 50 independent state judiciaries," *id.* at 95 n.82 (citing Lawrence G. Sager, *What is a Nice Court Like You Doing in Democracy Like This?*, 36 STAN. L. REV. 1087, 1102 (1984)), it may be that the critical role played by federal courts is due to their general allegiance to the federal government, not to their being subject to Congressional control or influence in particular cases. In other words, while it is the duty of *any* court that adjudicates a question involving a federal statute to interpret and enforce the will of Congress, federal courts' loyalty is not divided between state and federal interests, and they may be in a position to more accurately ascertain congressional intent.

standing, if the judgment of the state court resulted in "distinct and palpable" injuries to the defendant, and it is the defendant who seeks review.[108] The Court reasoned that it is the standing of the party who first seeks federal court jurisdiction that must comply with Article III; where a defendant-appellant seeks federal review, the state court judgment against him or her may be the source of the required injury-in-fact.[109]

The holding of *Asarco* creates an asymmetry of reviewability. Where neither party originally satisfied Article III, a loss for the defendant may confer standing on the defendant for federal review. In contrast, a losing plaintiff is no worse off than he or she was before the litigation and, not suffering an injury-in-fact, still has no standing in federal court. This asymmetry has been characterized as "perverse" because its effect is "to grant review when the state court is most to be trusted (when it strikes down a state statute), but to deny review when the state court is most to be distrusted (when it sustains a state statute)."[110]

On the other hand, *Asarco* has been praised for its reconciliation of disparate state and federal standing requirements and for its proper emphasis on the functional purpose of Article III standing—separation of powers—over the formalities of the alignment of the parties in the trial below.[111] According to *Asarco's* supporters, allowing state courts to entertain federal questions in non-Article III cases does not threaten the institutional role of the Supreme Court as the final arbiter of federal questions.[112] The Court, it is argued, has historically been precluded from reviewing certain classes of state court decisions on federal questions, and its review is limited by the sheer volume of cases in the modern federal judiciary.[113] Furthermore, the danger of allowing state courts to decide federal questions in federally non-reviewable cases is lessened by the fact that such a state court decision has no res judicata effect in federal court.[114]

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108. Asarco Inc. v. Kadish, 490 U.S. 605, 618 (1989). *Asarco* involved a claim that an Arizona state mineral leasing law violated requirements set out by Congress in the New Mexico-Arizona Enabling Act of 1910. *See id.* at 610.

109. *See id.* at 619.

110. Fletcher, *supra* note 20, at 281-82. This analysis, referring to challenges to state statutes on federal constitutional grounds, would presumably apply equally to challenges to state adminstrative actions on federal statutory grounds.

111. *See* Stern, *supra* note 107, at 101-08.

112. *See id.* at 108-11.

113. *See id.* (noting that from 1789 until 1875 the Court had jurisdiction only over those state court decisions which denied a federal claim, as against a state statute); *see also id* at 110-11.

114. *See* Fidelity v. Swope, 274 U.S. 123, 130-31 (1927); *see also Asarco*, 490 U.S. at 621 (same); Doremus v. Board of Educ., 342 U.S. 429, 434 (1952) (same); Stern, *supra* note 107, at 111-19.

In any case, under the present interpretation of the Constitution, state courts are *able* to hear federal questions, even where Article III standing requirements have *not* been satisfied. At the same time, however, they are not *required* to hear federal questions, even where Article III standing requirements *have* been met, if they would not hear a similar state claim. This balance results from current views of the Supremacy Clause and Article III. The next part of this Note examines Congress' ability to change this balance—to affect state court standing through legislation.

II. CONGRESSIONAL CONTROL OF STATE COURT STANDING LAW

Part II examines Congress' ability to regulate standing rules for state courts adjudicating federal claims. This Part focuses on the congressional imposition onto state courts of standing rules that are *more permissive* than Article III standing regulations. Inherent in this inquiry is the question of whether Congress may take the smaller step requiring that state courts' standing requirements be at least *as permissive* as those of Article III.

There are three conceivable means for Congress to effectuate particular standing rules in state courts. The first and most obvious means would be to simply require state legislatures to enact the desired standing laws. This option may be rejected outright, as the Supreme Court has held that "[n]o . . . constitutional provision authorizes the Congress to command state legislatures to legislate."[115] Thus, "Congress may not simply commandee[r] the legislative processes of the States by directly compelling them to enact" certain legislation.[116] A second means would be to enact federal legislation requiring that state courts adhere to specified standing rules when adjudicating federal claims, notwithstanding the state's own standing requirements. The third method would be for Congress to encourage state legislatures to enact the desired standing laws through "cooperative federalism."[117]

The constitutionality of the latter two strategies, in the context of implementing standing rules more liberal than Article III, is addressed in the following two parts.

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115. New York v. United States, 505 U.S. 144, 179 (1992); *see also infra* Part II.B.1.

116. *New York*, 505 U.S. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)). The word "commandeering" is a useful conclusory term for labeling unconstitutional attempts by Congress to control state governments and will be used to frame the issues throughout the remainder of this Note.

117. *See supra* note 11.

A. Congressional "Commandeering" of State Courts

Congress does not have the power to command a state legislature to enact particular legislation.[118] As a result, Congress may not simply require state legislatures to supply state courts with the standing rules preferred by Congress. However, because Congress has the power to create exclusive federal jurisdiction, it may be able to condition state court jurisdiction over particular federal claims on the satisfaction of federal rules of standing.[119] This section examines, very briefly, the possibility that Congress may bypass the state legislature and impose standing requirements different from Article III directly onto state courts (when they hear federal questions).[120]

1. The Supremacy Clause as a Source of Authority to "Commandeer" State Courts

As enforcers of federal law under the Supremacy Clause, state courts are subject to more direct congressional control than are state legislatures.[121] To some extent, it may be said that state courts, unlike state legislatures, may permissibly be "commandeered" by Congress.[122] However, the fact that the Supremacy Clause requires state courts to enforce federal law does not lead inevitably to the conclusion that Congress may dictate the parameters of state court jurisdiction over federal

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118. *See New York*, 505 U.S. at 179.

119. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 114 n.20 (2d ed. 1988) (Professor Tribe does not cite any cases in support of this proposition).

120. For an interesting discussion on the inability of Congress to control procedure in state courts, see Margaret G. Stewart, *Federalism and Supremacy: Control of State Judicial Decision-Making*, 68 CHI.-KENT L. REV. 431 (1992). Professor Stewart argues that the command of the Supremacy Clause that "[j]udges in every state shall be bound . . . by [t]his constitution and the Laws of the United States which shall be made in Pursuance thereof," U.S. CONST. art. VI, § 2, does not give Congress the authority to prescribe procedural rules for state courts. *See id.* at 440-41. In order for procedural rules to be binding on state judges, they must be made "in Pursuance" of the Constitution, and neither Article III nor the various grants of congressional authority over private behavior (e.g., the Commerce Clause) authorize procedural control over state courts. *See id.* at 438-39.

121. *See, e.g.*, *New York*, 505 U.S. at 178-79 (noting that the requirement of state courts to enforce federal law is "mandated by the text of the Supremacy Clause," whereas there is "[n]o comparable [] provision authoriz[ing] Congress to command state legislatures to legislate"); *but see* Federal Energy Reg. Comm'n v. Mississippi, 456 U.S. 742, 762 (1982), where the court suggested that the state judiciary may not be the only branch of state government over which Congress has "the power to enlist."

122. *See* Collins, *supra* note 84, at 189.

claims.[123] For one thing, state courts owe their existence, as well as the parameters of their jurisdiction, to state legislatures.[124] Therefore, arguments in favor of Congress' power to impose jurisdictional requirements onto state courts ultimately run into problems of legislative commandeering.[125] That is, the imposition of an absolute—as opposed to a merely non-discriminatory[126]—duty of state courts to take jurisdiction over federal questions "would impose a constitutional mandate on states to create courts and to supply them with a form of unlimited general jurisdiction."[127] On this issue, several commentators have argued that Congress' ability to affirmatively require state courts to exercise particular jurisdiction extends no further than already required by the non-discrimination principle.[128] In other words, Congress could mandate that state court jurisdictional rules not be applied discriminatorily against federal claims, but it could not insist that states "provide their courts with the requisite jurisdiction to carry out the enforcement of federal programs."[129] Under this reasoning, Congress could not require state courts to grant standing to plaintiffs with federal claims who satisfy Article III standing requirements.[130] Instead, in accordance with the non-

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123. *See id.* at 190.

124. *See id.* at 191.

125. *See id.* Such legislative commandeering would, of course, be prohibited by *New York*. *See New York*, 505 U.S. at 178-79.

126. See *supra* note 94 and accompanying text for discussion of jurisdictional non-discrimination.

127. Collins, *supra* note 84, at 191. Collins goes on to note that while such a duty on states may be arguable, if anything the Constitution is more explicit regarding the duty of Congress to create lower federal courts than it is regarding the duty of states to provide courts with federal question jurisdiction. *See id.*

128. *See id.* at 192; *see also* Redish & Muench, *supra* note 83, at 344 (stating that the limits of Congress' power to burden state courts "correspond closely to the content of the 'valid excuse' doctrine").

On the other hand, the Court has suggested, in dicta, that Congress might be able to affirmatively require state courts to take jurisdiction of specified federal claims. More specifically, in *Douglas v. New Haven R.R. Co.*, 279 U.S. 377 (1929), the Court stated:

> As to the grant of jurisdiction in the [Federal] Employers Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.

Id. at 387-88.

129. *See* Collins, *supra* note 84, at 192.

130. Note that the inability to require state courts to hear federal claims beyond the requirements of the non-discrimination doctrine would not preclude Congress from requiring those state courts which do take jurisdiction over federal claims to apply Article III standing. *See* TRIBE, *supra* note 119, at 114 n.20 (stating that Congress could "condition [] state jurisdiction on an undertaking

discrimination principle, state courts could deny standing to federal-question plaintiffs under the same standing rules applicable to plaintiffs with state law claims, even if such rules are more restrictive than are Article III requirements. It would follow from this that Congress would certainly lack the ability to impose on state courts standing rules which are *less restrictive* than are Article III requirements.

2. Other Constitutional Grants of Authority to Commandeer State Courts

The preceding section examined the degree to which the Supremacy Clause, in and of itself, obligates state courts to hear federal question cases. The Supremacy Clause requires that state courts enforce federal law. This requirement arguably implies that state courts have a duty to hear all federal question cases.[131] Absent such an implication, the Supremacy Clause alone would not be an authorization for Congress to control state court standing. The Supremacy Clause is not an independent grant of federal power, rather it merely establishes a hierarchy between federal laws and state laws.[132] The federal laws given supremacy must be based on powers granted elsewhere in the Constitution.[133] This section considers whether other provisions of the Constitution might grant Congress control over state judiciaries.

Article III does not explicitly provide authority for Congress to regulate state courts because it relates only to the judicial power of the United States, and not to that of the several states.[134] However, Article III empowers Congress to prescribe procedural rules for federal courts,[135] and under the "reverse-*Erie*" doctrine those procedural rules are sometimes also binding on state courts.[136] In general, state procedures may be followed unless a federal procedure may be said to be "part and parcel"

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to apply federal rules of standing").

131. Except, of course, where Congress has reserved jurisdiction exclusively to federal courts.

132. *See* Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1112-14 (1993).

133. *See id.*

134. *See id.* at 1112-13.

135. *See, e.g.*, Ex parte City Bank of New Orleans, 44 U.S. 292, 317 (1845) ("Congress possess[es] the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States.").

136. *See* Alfred Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem*, 17 OHIO ST. L.J. 384 (1956). Reverse-*Erie* issues involve the question of when federal procedural rules must be followed in state court, in lieu of the ordinary practice where state courts follow their own procedures in federal question cases. *See* Collins, *supra* note 84, at 130.

of the underlying federal claim.[137] To borrow from a case in the *Erie* line of cases, a procedure may be said to be part and parcel to a claim where it is "bound up with the definition of the rights and obligations of the parties."[138]

In the citizen suit context, the "procedure" at issue—the right to bring the action in the first place—is undoubtedly part and parcel to the claim. That is, the right to bring suit without demonstrating injury-in-fact is "bound up with the definition of the right[]" to ensure governmental compliance with its own laws, purely for non-instrumental ends. Thus an argument might be made that an absolute right to a citizen suit, where purportedly conferred by Congress, would have to be honored by state courts. The problem with this argument is that, under *Defenders of Wildlife*, Congress cannot confer this right to access to the federal courts. Because an absolute citizen suit provision is not among the procedural devices Congress can prescribe for federal courts, the indirect route to dictating state court procedure *via* reverse-*Erie* concepts is not available for the purpose of creating such suits in state courts.

An argument might also be made that the Neccessary and Proper Clause,[139] in conjuction with Article III, authorizes congressional control of state court standing. Because the Court has not addressed the issue of whether these two provisions, taken together, authorize federal control of state court proceedural rules,[140] assessment of the prospects for success of this argument is difficult.

Justice Marshall, in construing the Necessary and Proper Clause in *McCulloch v. Maryland*, held that "necessary"[141] did not mean "indispensably necessary," but rather merely "needful, requisite, essential, [or] conducive to . . . the execution of the powers of government."[142]

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137. Dice v. Akron, Canton & Young R.R. Co., 342 U.S. 359, 363 (1952) (federal right to trial by jury is "part and parcel" of the remedy afforded by the Employers Liability Act, and therefore may not be denied in state court as a mere "local rule of procedure").

138. Byrd v. Blue Ridge Coop., 356 U.S. 525, 536 (1958). *Byrd* involved the question of whether a federal court, in a diversity suit, was obligated to follow state practice regarding the allocation of decision making between judge and jury. *See id.* at 526-28. In both *Erie* and reverse-*Erie* cases, the issue is whether a foriegn court's procedural rules should be binding; therefore this language from *Byrd* should be equally applicable in the reverse-*Erie* context.

139. U.S. CONST. art. I, § 8, cl. 18 (Congress is empowered "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

140. *See* Steinman, *supra* note 132, at 1113.

141. Use of the word "proper" in the clause has apparently never served as the basis for invalidating a federal statute. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation Of The Sweeping Clause*, 43 DUKE L.J. 267, 291 n.99 (1993).

142. McCulloch v. Maryland, 17 U.S. 316, 418 (1819) (internal quotation marks omitted).

Requiring state courts to adopt absolute citizen suits arguably meets this definition of "necessary," notwithstanding the unconstitutionality of such suits in federal courts.

However, a finding that absolute citizens suit provisions for state courts were necessary in this sense would not end the enquiry. Marshall phrased the test of authority under the Necessary and Proper clause in the following terms: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.*"[143] Thus the Clause serves primarily as

> an explicit incorporation within the language of the Constitution of the doctrine of implied power: The excercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, so long as the ancillary power does not conflict with external limitations such as those of the Bill of Rights *and of federalism.*[144]

The question of the constitutionality of congressional control of state court standing thus reverts to whether principles of federalism prohibit such control; not much light has been shed by importing the Necessary and Proper Clause into the issue. The fact that puportedly necessary provision is unconstitutional at the federal level could only serve to further cloud the issue.

Consequently, unless the obligation imposed by the Supremacy Clause on state courts to enforce federal law is held to extend to a duty to hear federal questions whenever required to by Congress, it appears that Congress has no other source of authority to *directly* control state court jurisdiction.

B. Avoiding Commandeering: Introducing State Court Standing Through "Cooperative Federalism"

This section addresses the central issue of this Note: whether Congress may offer states a choice between being preempted or adopting rules of standing which eliminate the injury-in-fact requirement for certain federal claims arising under a state-implemented, federally-prescribed

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143. *Id.* at 421 (emphasis added).

144. Tribe, *supra* note 119, at 301 (emphasis added).

regulatory scheme.[145] It stands to reason that if Congress could directly require state courts to observe liberal standing rules, nothing would prevent it from asking states to enact such rules under a program of cooperative federalism. Thus, if the "commandeerability" of state courts provided by the Supremacy Clause includes the ability to dictate state court standing rules, the inquiry is at an end. However, even if Congress *does not* have such a direct power, it may still be able to obtain the desired state court standing rules by offering incentives and disincentives to state legislatures. This subpart considers the constitutionality of such a cooperative federalist approach to state court standing requirements.

1. A Limit to Cooperative Federalism: *New York v. United States*

Before discussing the constitutionality of inducing liberal state court standing through coorperative federalism, it is useful to first review a major recent Supreme Court case dealing with the limits of this approach to state-federal relations: *New York v. United States*.[146]

In *New York*, a federal law presented to states the choice between regulating low-level nuclear waste pursuant to congressional direction, or "taking title" to the waste and accepting liability for all damages which could accrue due to the failure to so regulate.[147] The Court concluded that this provision was unconstitutional because it forced "[a] choice between two unconstitutionally coercive regulatory techniques."[148] Such a coercive choice would "commandeer[] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program."[149] The Court held that nothing in the Constitution authorized such "commandeering."[150]

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145. For example, could Congress condition the delegation of authority to implement the Clean Air Act on states' agreement to provide for "pure" citizen suits (not requiring injury-in-fact) to challenge state permitting decisions made pursuant to the Act? The Fourth Circuit has held that Congress, using cooperative federalist methods, may induce state legislatures to enact Article III-equivalent rules of standing for state courts. *See* Virginia v. Browner, 80 F.3d 869, 880-83 (4th Cir. 1996); *see also supra* note 12.

This portion of this Note askes whether Congress may go one step further, and use cooperative federalist medthods to induce *non*-Article III standing in state courts.

146. New York v. United States, 505 U.S. 144 (1992).

147. *See id.* at 174-75.

148. *Id.* at 176.

149. *Id.* (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

150. *See id.* at 179.

A critical fact of *New York* was that the alternative to preemption was beyond Congress' power to impose. Specifically, because "the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments," Congress could not offer such a transfer as the only alternative to states declining to administer the federally designed program.[151] In contrast, the *New York* Court upheld two other provisions of the Low-Level Radioactive Waste Policy Amendments Act because the adoption of these provisions was encouraged by the conditional exercise of the spending power and the threat of federal preemption.[152] Thus, the Court in *New York* drew a bright line between the traditional carrot and stick approach of cooperative federalism and a congressional effort to command state legislatures to enact certain laws. The latter, the Court held, is contary to the intent of the founders and is unconstitutional simply because the Constitution does not authorize Congress to control state legislatures.[153]

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151. *Id.* at 175-76.

152. *See id.* at 171-74.

153. *See id.* at 179, 180. This holding settled a question left open in *Federal Energy Reg. Comm'n (FERC) v. Mississippi*, 456 U.S. 742 (1982). *FERC* involved, among other things, a challenge to a federal law which required state utility regulatory agencies to "consider" various specified standards and procedures relating to the setting of utility rates. *See id.* at 746-49. States were not, however, required to adopt the specified standards. *See id.* at 749-50. Because only "consideration," not adoption, of federal requirements was at issue, the Court stated: "[I]t plainly is not necessary for the Court in this case to make a definitive choice between competing views of federal power to compel state regulatory activity." *Id.* at 764.

While the Court in *FERC* thus did not reach the question of the constitutionality of commandeering state regulatory agencies, let alone state legislatures, some language in that case indicates that such commandeering might be upheld. Specifically, the Court stated:

> While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations . . . there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from certain actions. . . . And certainly *Testa v. Katt*, . . . reveals that the Federal Government has some power to enlist a branch of state government—there the judiciary—to further state ends.

Id. at 762. In *New York*, Justice O'Connor (who would have invalidated the "consideration" provisions at issue in *FERC*, 456 U.S. at 797), writing for the Court, quoted selectively from this language, including only the portion noting the lack of prior explicit sanction of commands to states. *See New York*, 505 U.S. at 161. Justice O'Connor also distinguished between any power Congress may have to "direct" the decisions of state courts, by virtue of the Supremacy Clause, from a possible power to direct state legislatures: "No comparable constitutional provision authorizes Congress to command state legislatures to legislate." *Id.* at 179.

For a criticism of the Court's reasoning in *New York*, see generally *Caminker*, *supra* note 84. Professor Caminker characterizes the Court's approach as "elegantly simple" but "misguided," and argues that nothing in the Constitution prohibits the extension to other branches of the authority to use state courts to enforce federal law. *See id.* at 1005-07. Professor Caminker further supports such an extension as desirable for the policy reasons of effectiveness and efficiency in the enforcement of federal law, and even, in some cases, of increasing state autonomy. *See id.* at 1006-07.

In order to fully appreciate the significance of *New York*, it is necessary to recall an earlier case involving issues of state autonomy: *Garcia v. San Antonio Metropolitan Transit Authority*.[154] In *Garcia*, the plaintiff sought to compel a state to pay certain state employees federally specified overtime wages.[155] The Court upheld the claim and announced that it would no longer attempt to delineate what "traditional government functions" are off-limits to federal intrusion, because such attempts were proven to be "unsound in principle and unworkable in practice."[156] After *Garcia*, the only protections of state autonomy would be those provided by the structure of the national political system—for example, the equal representation of each state in the Senate.[157] Absent some indication that the national political process did not provide states with adequate protection, the Court would not strike down federal laws to prevent federal intrusion into state autonomy.[158]

Thus, *Garcia* seemed to remove the Court altogether from the business of protecting state autonomy. The Court's decision in *New York*, which established that there are at least some means that are unavailable to Congress to exert control over state governments, may limit the sweeping breadth of *Garcia*, even if there are no traditional functions reserved wholly to the states.

2. Distinguishing *New York*: Sanctions and Program Elements

The holding in *New York* would not directly invalidate a cooperative federalist scheme which conditioned a state's ability to regulate on the

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Nonetheless, *New York* is valid law, and to the extent that state court standing law is a function of state legislatures, it remains a bar to Congressional mandates of particular rules of standing for state courts.

154. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

155. *See id.* at 534.

156. *Id.* at 546-47. *Garcia* overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held that federal minimum wage and maximum hour conditions were inapplicable to state employees because they would interfere with the state's ability to structure the operations of traditional government functions.

157. *See id.* at 551-52.

158. This holding was vigorously criticized by the dissent as an abdication of the Court's duty to rule on the constitutionality of congressional legislation, established since Marbury v. Madison. *See id.* at 568-70 (Powell, J., dissenting); *see also* Deborah Jones Merrit, *The Guarantee Clause and State Autonomy: Federalism For A Third Century*, 88 COLUM. L. REV. 1, 21 (1988) (criticizing *Garcia* for replacing the "amorphous" traditional state function test with an even more vague "failings in the national political process" test, thereby postponing the hard job of reconciling state sovereignty and federal supremacy).

adoption of liberal citizen suit provisions. Unlike the statute involved in *New York*, such a scheme would not present states with a choice between "two unconstitutionally coercive regulatory techniques."[159]

In *New York*, the constitutionally offensive provision—forced ownership of radioactive waste—was offered to the state as an alternative to implementing federal policy. In other words, Congress attempted to substitute the constitutionally permissible sanctions of preemption and the withholding of federal funds with a "take-title" provision, a provision it had no constitutional authority to impose. In this respect, *New York* simply stands for the proposition that any threat Congress wields in an attempt to induce "cooperative federalism" must be one which Congress has the power to carry out. In the situation under consideration here, the potentially problematic requirement—standing hurdles set lower than Congress could set for federal courts—would be required as *one of the elements* of state implementation of the federal policy. States choosing not to implement the federal plan could be subject to the traditional sanctions of preemption and the loss of federal funds, both of which have been upheld as constitutional.[160]

Because liberal standing would be offered as an element of the regulatory scheme, rather than a sanction for failure to adopt the scheme, Congress need not have the power directly to impose liberal standing in order to satisfy *New York*. Thus, although Congress cannot order state legislatures to enact certain standing rules, and may not even be able to order state *courts* to adopt such rules, *New York* does not preclude Congress from "asking" states to adopt such rules. Indeed, Congress has never had the power to command legislatures to legislate;[161] the whole purpose of a cooperative federalism program is to get states to do what Congress could not directly require them to do.[162] In this respect, there

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159. *New York*, 505 U.S. at 176.

160. *See id.* at 167-68.

161. *See id.* at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.").

162. *See* South Dakota v. Dole, 483 U.S. 203 (1987). In upholding a statute which withheld a percentage of federal highway funds from states with a drinking age of less than twenty-one the Court held: "Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that [this] encouragement to state action . . . is a valid use of the spending power." *Id.* at 212; *see also FERC*, 456 U.S. at 766 ("[T]he Court has recognized that valid federal enactments may have an effect on state policy—and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority.").

Indeed, the majority's opinion in *FERC* would seem to place no limit on the type of condition Congress may require: "[T]he partial dissent nowhere explains why—so long as the field is preemptible—the nature of the condition is relevant." *Id.* at 767-68 n.30. However, given the Court's subsequent retrenchment from other implications of *FERC* in *New York*, *see supra* note 153, it is worth

is nothing unique about liberal standing as an element of a cooperative federalist program.

Liberal standing as a price of avoiding preemption would be unusual, if not unique, in one sense: it is something that Congress cannot constitutionally implement at the federal level. The *New York* Court recognized "Congress' power to offer States the choice of regulating [] activity *according to federal standards* or having state law preempted by federal regulation," at least where "Congress has the authority to regulate [that] private activity under the Commerce Clause."[163] Because Congress could not prescribe absolute citizen suits for federal courts under *Defenders of Wildlife*, such citizen suit provisions arguably cannot be "federal standards" subject to imposition on states under a cooperative federalist scheme.

Thus, the fact that Congress could not eliminate the injury-in-fact element of standing in federal courts raises doubts, at least at an intuitive level, about the ability of Congress to implement such rules of standing in state courts. This is true even if accomplished by the voluntary method of cooperative federalism. Given the strong pressure Congress is able to bring to bear on states to implement cooperative federalist programs, such a move would implicate issues of state autonomy and the limits of the federal government's ability to dictate the structure of the instruments of state government. Because the national political process is now held to be the primary safeguard of state autonomy,[164] the issue of political accountability is relevant here, even if *New York* is not directly controlling.

3. Applying the Policy of *New York*: Political Accountability

One of the policy concerns at the heart of the Court's decision in *New York* was the need to preserve political accountability between the federal and state governments. This subpart examines the Court's discussion of political accountability and considers how this issue may effect the viability of mandating sub-Article III standing rules for state courts through a cooperative federalism program.

The Court in *New York* explained that when the federal government preempts state regulation of a field—such as nuclear waste disposal—in order to promote the national interest over local interests, political

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questioning whether the Court will adhere strictly to this permissive view of congressional power.

163. *New York*, 505 U.S. at 167 (emphasis added).

164. *See Garcia*, 469 U.S. at 556-57; *see also supra* notes 146-50 and accompanying text.

accountability for the potentially unpopular program rests properly on Congress.[165] When a state declines Congress' offer to regulate according to federal standards and the federal government then decides to preempt regulation of that area, it does so "in full view of the public."[166] Federal preemption of a given regulatory area will likely be apparent to all simply by virtue of the fact that it will be a federal agency (e.g., the Nuclear Regulatory Commission) and its employees who will be responsible for the decision making. Such agencies are readily identified with the federal government. Political accountability will therefore remain with the federal government.

In contrast, if federal officials are able to *direct* the state to regulate in a certain manner, "it may be [the] state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[167] In *New York*, the Court struck down the take-title provision because it attempted to force accountability onto the state government: whether the state government chose to take-title to nuclear waste or to regulate according to federal standards, it would have to accept responsibility. The Court distinguished the political aspects of this congressional attempt to "commandeer" the state legislature from the political calculas involved in normal, acceptable methods of encouraging state adoption of federal programs, including the threat of preemption and the conditional use of the spending power.[168] Congress' use of these traditional sanctions in bargaining with the states is constitutional because "the residents of the State retain the ultimate decision as to whether or not the State will comply."[169]

The *New York* Court's analysis suggests that political accountability will be preserved as long as Congress does not attempt to eliminate the state's ability to refuse to implement the federal regulatory program. The Court's treatment of political accountability is somewhat formalistic in that it assumes that, where Congress is successful in securing state implementation of its regulatory programs, the citizens of that state will be aware of the federal origin of the resulting state program. In reality, the public may not readily discern the difference between state government

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165. *See New York*, 505 U.S. at 168.

166. *Id.* at 168.

167. *Id.* at 169. In addition, accountability may be diminished even when the state consents to the coercive scheme, because it may be in the interest of state officials to avoid responsibility for decision making and instead to appear to be compelled in their actions by the federal government. *See id.* at 182-83.

168. *See id.* at 168.

169. *Id.*

actions which are based on laws originating solely in the state legislature and actions which are taken pursuant to state laws adopted under a cooperative federalism arrangement. In other words, the public may not know that a state law was adopted at the behest of Congress. Knowing only that it is the state which enforces the law, the public may impute political accountability for the law onto the state government. This might run afoul of the *New York* Court's concern that federal officials be held accountable for their policy choices.

While the democratic process assumes that voters know what they are doing, this assumption may not be justified in regard to every element of a cooperative federalist regulatory scheme. It may not be sufficient to reason that, because a state has the ability to reject implementation of a cooperative federalist scheme altogether, its citizens have given informed consent to every element within that scheme.

The law of standing may be an element which deserves special consideration.[170] Specifically, a citizen suit provision with more liberal standing requirements than Article III's obscures the allocation of political accountability not only between the state and federal governments, but within the state government itself. By allowing plaintiffs who cannot show injury in fact access to the courts, citizen suits may increase the ability of courts to act prospectively. This in turn might allow judicial activism into areas more properly belonging to the state legislature or state administrative agencies. Unlike the substantive elements of a cooperative federalist regulatory scheme, this result might not be understood by a state's citizens. Thus, the theoretical ability of the citizens of the state (acting through their legislature) to reject state implementation of the federal scheme may not be a sufficient safeguard of state autonomy.

This possibility arguably militates against requiring states to include "absolute" citizen suit provisions in their implementation of federal regulatory schemes. However, concerns in this regard could be alleviated by specifying the standard of review to be applied to agency actions in citizen suits. For example, the citizen suit provision of the Clean Air Act specifies that reviewing courts should reverse agency actions if it finds them to be arbitrary and capricious or an abuse of discretion.[171] Under

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170. Standing has been described as "permeated with sophistry." 4 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983), and as "a word game played by secret rules." *Flast*, 392 U.S. at 129 (Harlan, J., dissenting); *see also* Ann Althouse, *Standing, in Fluffy Slippers*, 77 VA. L. REV. 1177, 1182 n.21 (1991) (cataloging the long tradition of critical commentary on standing). It would, therefore, not be a slight to the citizenry to presume ignorance of this area.

171. *See* Clean Air Act, 42 U.S.C. §§ 7604, 7607(b)(9)(A) (1994). This provision authorizes suits against parties alleged to be in violation of emission limits promulgated under the Act; against parties alleged to be in violation of an EPA or state order; against the Administrator of the EPA for

this standard of review, an agency decision generally should be upheld if it "was based on a consideration of the relevant factors" and there has not been "a clear error of judgment."[172] While even an "arbitrary or capricious" standard of review calls for a "searching and careful" inquiry into the facts, it is ultimately a "narrow" standard: "The Court is not empowered to substitute its judgment for that of the agency."[173] Therefore, a relatively deferential standard of review should minimize undue judicial interference with state agency discretion and preserve the separation of power and accountability within state governments. At the same time, such citizen suits would provide a check against a state agency which takes an excessively lenient approach to enforcement by, for example, ignoring relevant factors when issuing permits. So limited, a citizen suit provision should not present significant problems of political accountability.

4. The Problem of Supreme Court Reviewability

Part I.B.2 noted that one effect of state court standing rules more liberal than Article III's is to create a category of state court decisions on federal questions which cannot be reviewed by the Supreme Court, the only federal court with jurisdiction to review state court decisions. This subpart considers the implications of this effect on the viability of state courts as a forum for pure citizen suits.[174]

As an initial matter, it should be noted that Supreme Court jurisdiction is now discretionary in all cases.[175] In cases applying the substantial evidence standard of review for formal rulemaking by administrative agencies, the "Court will intervene only in what ought to

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nonperformance of a non-discretionary duty; or against parties proposing to construct a major source of air pollution without a Title V pre-construction permit. *See id.* § 7604(a)(1)-(3). Thus, the standard of review specified in this section is not applicable to the category of citizens suits required by § 7661a(b)(6) (judicial review of final permit actions by a state agency). Section 7661a does not specify the standard of review to be applied in state court review of state permit actions, but nothing would prevent Congress from providing a standard of review at the same time that it required states to grant standing to non-Article III plaintiffs.

172. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (interpreting identical language in Administrative Procedure Act).

173. *Id.*

174. For a thorough discussion of the relationship between Supreme Court review and state court standing rules, see Stern, *supra* note 107, at 108-24. Stern argues, *inter alia*, that the concerns raised by the unavailability of Supreme Court review are mitigated by the fact that federal courts will not give federally unreviewable decisions their normal effect of claim preclusion (*res judicata*) and that, as advisory opinions, decisions rendered for plaintiffs lacking Article III standing have little precedential (*stare decisis*) effect. *See id.* at 117 n.187.

175. *See* 28 U.S.C. § 1254 (1994).

be the rare instance when the standard appears to have been misapprehended or grossly misapplied."[176] It should be expected that the Court would be similarly reluctant to hear cases involving the mere application of state administrative rules to particular parties. Given such a limited error-correction role for the Court, it will likely review few, if any, state court decisions involving challenges to a state agency's application of federally mandated environmental laws.

Notwithstanding the unlikeliness of Supreme Court review, under *Asarco Inc. v. Kadish*[177] such review will be available in those cases where it is most needed to guard against any excesses which may result from liberal standing rules. Specifically, the Court may find that where an environmental plaintiff wins in a suit against a state government, the judgment against the defendant state comprises the injury-in-fact which will confer standing in federal court.[178] Only decisions against the plaintiff remain unreviewable after *Asarco*. It seems unlikely that, where no plaintiff could show injury-in-fact to begin with, a loss by a plaintiff who brought the action under a citizen suit provision could result in the sort of frustration of federal policy which would warrant Supreme Court review. To put it another way, state administrative decisions which frustrated Congress' intent to protect the environment would, in all likelihood, result in an injury-in-fact to some appropriate plaintiff. Therefore, if no such plaintiff could be found, it would be unlikely that Congress' intent was being frustrated.

Of course, it is possible that a defeat by a plaintiff could be contrary to congressional intent or inconsistent with decisions of other states, thereby raising concerns about national uniformity. If such concerns were of a magnitude to justify Supreme Court review, the Court could conceivably claim jurisdiction, even if the plaintiff asserted no injury-in-fact below. The question of Article III standing is a federal question; the Court would not be bound by a state court's determination (implicit or explicit) of the existence of an injury-in-fact.[179]

This creation of an incentive for the Court to find an injury-in-fact might, in some cases, lead to the most significant effect of requiring state court citizen suits: encouraging the Supreme Court to re-evaluate its unwillingness to find injury-in-fact for environmental plaintiffs. While the Court has used the finding of a lack of injury as a device to dismiss the

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176. Universal Camera Corp. v. National Labor Relations Bd., 340 U.S. 474, 491 (1951).

177. Asarco Inc. v. Kadish, 490 U.S. 605 (1989).

178. *See id.* at 618; *see also supra* notes 99-102 and accompanying text.

179. *See* Liner v. Jafco, Inc., 375 U.S. 301, 307 (1964) (holding that a state court's holding of mootness is not binding on the Supreme Court).

claims of environmental plaintiffs without reaching the merits of the case, it may be less likely to do so if the finding of injury is necessary to give the Court jurisdiction over a state court decision on federal law that the Court wishes to review.[180] Creating pure citizen suits in state court would thus encourage the Supreme Court to "abandon the metaphysics of injury in fact," and instead "return to the question [of] whether a cause of action has been conferred on the plaintiff."[181]

CONCLUSION

The vagaries of the injury-in-fact standard allow courts to selectively deny standing, an effect that works to the particular disadvantage of environmental plaintiffs. Under *Defenders of Wildlife*, Congress is precluded from removing the injury-in-fact standard for federal court jurisdiction because the standard is held to inhere in the "case" or "controversy" language of Article III. State courts, whose jurisdiction is not governed by Article III, are not bound by the injury-in-fact requirement unless their own state constitution so requires. They therefore may provide a forum for the realization of Congress' intent to allow citizens to bring suit as "private attorneys general," seeking compliance with the law for its own sake.

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180. It may be asked: if Supreme Court review is available when the plaintiff prevails, and if the Court's restriction of standing is due to a hostility towards the claims of environmentalists, why would the Court be encouraged to find that a plaintiff who lost below could have satisfied federal standing requirements? One answer is that the plaintiff suing under the citizen suit provision of an environmental statute might not need to be an environmentalist. *See* Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995). In *Bennett*, the plaintiffs were Oregon ranchers who brought suit under the Endangered Species Act to challenge a Bureau of Reclamation biological opinion concluding that maintenance of reservoir levels was necessary to preserve two fish species. *See id.* at 916. The injury to the farmers was the loss of water for commercial and recreational use. *See id.*

The Ninth Circuit held that the plainitffs did not satisfy the prudential "zone of interest" test and thus did not have standing to sue. *See id.* at 922. The plaintiff's jurisdiction of the constitutional elements of standing was not at issue in *Bennett*. *See id.* at 917. Thus, the Court's decision of this case on appeal will not provide a basis for direct comparison of the court's treatment of environmentalist versus non-enviromentalist plaintiffs with regard to the injury-in-fact test. However, if the Court decides that prudential concerns do not bar the use of citizen suit provisions in environmental statutes by non-environmentalist plaintiffs, future cases may arise where "conservative" members of the court wish to stretch the bounds of injury-in-fact in favor of non-environmentalist plaintiffs.

While this may seem to be an overly cynical view of Supreme Court jurisprudence, it has been argued convincingly that the creation of the injury-in-fact standard was motivated by similarly result-oriented considerations. *See, e.g.*, Sager, *supra* note 105, at 1389-92 (arguing that the injury-in-fact requirment, as set forth in *Warth v. Seldin*, 422 U.S. 490 (1975) reflected the Court's desire to confine judicial review of zoning issues largely to state courts, even when federal constitutional rights are at issue).

181. Sunstein, *supra* note 2, at 191.

Because Congress' ability to control directly the jurisdictional rules of state courts is an unsettled area of law, it is uncertain whether Congress could prohibit states from adopting standing laws which are more restrictive than Article III, let alone require states to grant standing to any plaintiff who meets Article III standards. Congress' power to require state courts to be *more* generous than Article III is, therefore, even less clear.

However, it appears that Congress may constitutionally require states to implement non-Article III standing for specified federal claims as a condition for implementing a regulatory program. As long as the methods utilized by Congress to induce states to enact such standing laws were constitutional—such as the conditional use of the spending power or the threat of preemption—Congress' inducement of a liberal standing requirement would not suffer the same shortcomings of political accountability that were of concern in *New York*. Different issues of political accountability may be raised by the potential for liberal standing rules to interfere with the structure of state governments. These concerns, however, can be minimized by specifying a very deferential standard of review for state court evaluation of state administrative agency action. This would minimize the possibility of judicial activism while still providing citizens with the right to ensure government compliance with the law, at least within the bounds of permissible agency discretion.

The use of state courts for absolute citizen suits would ensure the existence of at least one forum to challenge alleged governmental non-compliance with its own laws. The elimination of the injury-in-fact standard in state courts would conserve the resources of litigants by allowing them to focus on the merits of the case from the outset, without litigating the preliminary issue of whether the plaintiff is an appropriate party to bring suit. Elimination of the injury-in-fact standard would save courts the disingenuous task of attempting to define an injury-in-fact, divorced from the normative values reflected in laws. Instead, courts would need only to look to the terms in which Congress defined the cause of action.

Finally, because categories of state court decisions on federal law may arise which the Supreme Court may only review if it concedes that the plaintiff suffered an injury-in-fact, such a provision might require the

Court to rethink its analysis of this prong of Article III standing. In this way, the Court might decide to return from its two decade old "slash and burn expedition" through the law of environmental standing.[182]

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182. *See supra* note 2.