STANDING IN DIVERSITY

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INTRODUCTION

Under current doctrine interpreting the "Cases" or "Controversies" provision in Article III of the U.S. Constitution, a federal court may hear a dispute only if the plaintiff has standing—that is, if the plaintiff has shown that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will "likely be redressed by a favorable decision."[1] According to the courts, these standing requirements are threshold jurisdictional determinations that are essential to maintaining the separation of powers.[2] Courts have demanded that these standing requirements be met for all suits brought in federal court,[3] irrespective of the basis for Article III jurisdiction.[4]

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1. Bennett v. Spear, 520 U.S. 154, 162 (1997); *accord* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining that the constitutional minimum of standing contains three elements: (1) an injury in fact (2) that is both fairly traceable to the defendant and (3) that a favorable decision will redress).

2. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–47 (2013); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[S]tanding is built on a single basic idea—the idea of separation of powers.").

3. Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 512–17 (1994).

4. Article III extends the judicial power to nine different types of disputes: "[1] Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall

One of the many contributions in Judge Fletcher's article, *The Structure of Standing*, is that, despite the courts' statements to the contrary, standing cannot be completely divorced from the merits.[5] Whether a plaintiff has standing depends on whether the law gives him standing. Likewise, standing defines the scope of the rights that a plaintiff may enforce. When a plaintiff lacks standing, he cannot seek vindication for the violation of his rights.

One consequence of understanding standing to be bound up in the merits is that, in cases involving state law brought under diversity jurisdiction, standing should turn on state law. As has been clear since *Erie Railroad Co. v. Tompkins*,[6] federal courts must apply substantive state law as interpreted by the state courts when applying that law in diversity. Federal courts cannot, for example, confer broader rights under state law than the state courts themselves recognize.

Recognizing standing to be a form of substantive law means that state law should control standing in federal court. State standing laws are not controlled by Article III; they vary from state to state. And just as federal standing laws define the scope of rights to be enforced in federal court, so too do state standing laws define the scope of state rights. Because those standing laws dictate the ability of a plaintiff to recover under state law, federal courts hearing cases involving those state rights in diversity cases should also apply state standing laws.

This Essay explores this argument. Part I begins by describing the current doctrine of standing. It then explains that, although current law describes standing as a threshold jurisdictional requirement imposed by Article III, standing tends to merge with the merits of the legal issues presented in the case. Part II argues that, because standing is bound up in the merits, federal courts sitting in diversity should be required to apply state law. It further explains that applying state standing law better achieves the goal of diversity jurisdiction to provide a federal forum for the enforcement of state law free from the biases that might affect state courts. Likewise, it argues, applying state standing law ensures that federal courts enforce rights to the same degree as state courts. Standing laws affect the scope of rights enforced in court; therefore, to the extent federal standing rules differ from state standing rules, imposing federal standing rules in

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be made, under their Authority;—[2] to all Cases affecting Ambassadors, other public Ministers and Consuls;—[3] to all Cases of admiralty and maritime Jurisdiction;—[4] to Controversies to which the United States shall be a Party;—[5] to Controversies between two or more States;—[6] between a State and Citizens of another State;—[7] between Citizens of different States;—[8] between Citizens of the same State claiming Land under Grants of different States, and [9] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art III, § 2.

5. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 236 (1988).

6. 304 U.S. 64, 78 (1938).

diversity cases results in different results in state and federal court and may encourage forum shopping—two consequences that federal courts sitting in diversity have sought to avoid. Part III addresses several objections to dispensing with the injury-in-fact test in diversity cases.

I. THE LAW OF STANDING

Standing is one of several doctrines that implement the "Cases" and "Controversies" provision in Article III.[7] For a plaintiff to have standing to bring suit, he must demonstrate that he has suffered "injury in fact."[8] That injury must be "distinct," "palpable," and "concrete,"[9] and it must have actually occurred or be imminent.[10] The injury must also be "fairly traceable" to the actions of the defendant, and it must be susceptible to "redress[] by a favorable decision."[11] These standing requirements apply in all types of suits brought in federal court.[12] If a plaintiff fails to meet these requirements, the federal court must dismiss the case for lack of jurisdiction.[13]

Standing, the Supreme Court has told us, is built on separation-of-powers principles.[14] It ensures that the courts do not usurp the role of the political branches of government by confining the judicial power to resolving disputes that were "traditionally amenable to, and resolved by, the judicial process."[15] According to the Court, the traditional role of the courts was to resolve the rights of individuals, and the injury-in-fact test ensures that courts stay within that role by acting only when necessary to remedy individual harms.[16]

Standing has not always been treated as a jurisdictional doctrine necessary to protect the separation of powers. For the first 150 years of our

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7. U.S. CONST. art. III, § 2. Other doctrines include ripeness, mootness, and the restriction on hearing political questions. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006).

8. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

9. Allen v. Wright, 468 U.S. 737, 751, 756 (1984).

10. *See* Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009).

11. *Lujan*, 504 U.S. at 561.

12. *See* Pushaw, *supra* note 3, at 448 (explaining how courts have imposed the same standing requirements in all types of "cases" or "controversies" under Article III).

13. *Lujan*, 504 U.S. at 560–61.

14. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–47 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); *Summers*, 555 U.S. at 492–93 ("[Standing] is founded in concern about the proper—and properly limited—role of the courts in a democratic society."); *Allen*, 468 U.S. at 752 ("[S]tanding is built on a single basic idea—the idea of separation of powers.").

15. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

16. *Lujan*, 504 U.S. at 576.

country, standing did not exist as a separate doctrine.[17] During that time, whether the federal court had power to hear a dispute depended on whether the plaintiff had invoked the appropriate form of action.[18] Although courts occasionally stated that a plaintiff lacked standing, that use of the term referred to the idea that the plaintiff did not have a remedial interest; it did not implicate Article III.[19] Standing thus was a determination on the merits of the plaintiff's claim. A finding of no standing was simply a conclusion that the plaintiff had failed to state a cause of action under which he was entitled to relief. The Court developed standing as a doctrine of Article III in the twentieth century to limit the ability of individuals to resort to the courts to challenge government actions.[20]

As this historical background suggests, although standing is now tied to the "cases" and "controversies" language of Article III, the text of Article III has not played a major role in defining the content of standing.[21] Instead, standing has grown through countless judicial decisions. Accordingly, it is not surprising that, since its creation, standing has evolved in response to changing perceptions about the appropriate role of the federal judiciary.[22] Even the current injury-in-fact test has evolved. Early cases defined injury broadly to expand access to the courts.[23] In more recent times, the Supreme Court has narrowed the category of injuries that will suffice in standing to some degree, concluding that expansive standing threatened the separation of powers because it allowed individuals to present in court matters more appropriately addressed to the elected

17. F. Andrew Hessick, *Standing, Injury In Fact, and Private Rights*, 93 CORNELL L. REV. 275, 290–91 (2008).

18. *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 819 (1824) (The judicial "power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the [C]onstitution declares, that the judicial power shall extend to all cases arising under the [C]onstitution, laws, and treaties of the United States."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1640 (Da Capo Press 1970) (1833).

19. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1424 (1988).

20. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458–59 (1996); *see also* Fletcher, *supra* note 5, at 224–28 (tracing the history of standing).

21. The terms "cases" and "controversies" are vague, and other parts of the Constitution do not define those terms. Nor do the debates of the Constitutional Convention provide any useful insight on the meaning of terms. The only statement on the matter is James Madison's statement that the judicial power ought "to be limited to cases of a Judiciary Nature." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1937).

22. The most significant recent change was the development in 1970 of the injury-in-fact test. *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). For a history of the evolution of standing, see Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–97 (1992) (identifying five eras of standing).

23. Hessick, *supra* note 17, at 293.

branches.[24] Now standing cannot be based on generalized grievances, such as a citizen's harm resulting from the government's illegal expenditure of taxes, nor can it be based on the distress felt from the government's refusal to enforce the law.[25]

The Court has explained that standing operates as a threshold requirement for a plaintiff to invoke the jurisdiction of the federal courts. Basing standing on the existence of an injury in fact serves as a way to distinguish standing from the merits. According to the Court in *Whitmore v. Arkansas*, whether a plaintiff has suffered a factual injury does not involve adjudication of his legal rights.[26] It asks only whether he has suffered a factual harm.

Although framed as a threshold jurisdictional question, standing cannot be so easily separated from the merits of the case. As Judge Fletcher explained in the article that this Symposium honors, injury in fact provides functionally no limit on standing because injury is in the eye of the beholder.[27] A plaintiff who files suit sincerely claiming that he has been injured has indeed been injured because he is upset enough to file suit.[28] He has at the least suffered an emotional harm. The consequence is that the rights invoked by the plaintiff inevitably determine whether there is standing.[29] Because standing turns on the nature of the substantive right invoked, it is itself a question of substantive law.

FEC v. Akins[30] provides an example. There, a group of voters sued the Federal Election Commission under the Federal Election Campaign Act of 1971 (FECA) for not requiring certain groups to disclose information about campaign involvement. The plaintiffs based their suit on FECA's provision stating that "'[a]ny person who believes a violation of th[e] Act . . . has occurred, may file a complaint with the Commission.'"[31] Ordinarily, one would think that the government's refusal to give something is not an injury; otherwise, anyone could drag the government into court for failing to honor his or her request for money or some other benefit. The plaintiffs

24. *Id*. at 296.

25. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 481 (2008).

26. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing 'in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal.'") (alteration in original) (quoting Warth v. Seldin, 422 U.S. 464, 471–76 (1975)).

27. Fletcher, *supra* note 5, at 231.

28. *Id*.

29. *Id.*

30. 524 U.S. 11 (1998).

31. *Id*. at 19 (quoting 2 U.S.C. § 437g(a)(1)).

could claim injury only because the statute gave them a right to that information.[32]

Indeed, some opinions explicitly acknowledge the role that legal rights play in standing. For example, the Court has stated that an injury in fact is sufficient only if it is "judicially cognizable"—that is, only if the injury involves the violation of a legal interest that the courts can redress.[33] Similarly, the Court has explained that the legislature has the power to define what constitutes an injury in fact.[34] Legislatures can convert what appears not to be an injury into an injury in fact—though the Court has explained that the Constitution limits that power by forbidding Congress from converting generalized grievances into sufficient injuries for standing.[35] The upshot of these statements is that injury in fact is inseparable from the law. Congress has the power to define injuries sufficient for standing, and an injury suffices for standing only if the law recognizes that injury. And resolving issues of standing requires a court to interpret the regulation, statute, or constitutional provision on which the plaintiff bases his claim.[36]

Further clouding the distinction between Article III standing and the merits is that standing inevitably affects the scope of substantive rights, at least in federal court.[37] Standing restricts federal courts to vindicating rights only when the plaintiff has established a sufficient injury in fact. That requirement functionally defines the scope of the right. As Justice Holmes stated, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."[38]

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32. Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 642–43 (1999) ("[T]he principal question after *Akins*, for purposes of 'injury in fact,' is whether Congress or any other source of law gives the litigant a right to bring suit."). To be sure, the Court's analysis did not focus on this right. Instead, the Court explained that the plaintiffs had suffered injury because they were deprived of information and, without the sought information, they were less able "to evaluate candidates for public office" and "to evaluate the role" that the financial assistance to candidates "might play in a specific election." *Akins*, 524 U.S. at 21. But it is hard to believe that that injury would have sufficed without the statutory provision.

33. Vt. Agency of Natural Res. v. U.S. *ex rel*. Stevens, 529 U.S. 765, 772–73 (2000).

34. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982).

35. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).

36. Fletcher, *supra* note 5, at 238.

37. Standing and other Article III doctrines do not apply to state courts. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989).

38. The W. Maid, 257 U.S. 419, 433 (1922); *see also* Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930) (Hand, J.) ("[A] right without any remedy is a meaningless scholasticism . . . ."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (arguing that rights are meaningful only to the extent that they are enforced).

II. STANDING IN DIVERSITY

One consequence of conceptualizing Article III standing as being bound up in the merits is that, contrary to the Supreme Court's suggestion,[39] standing should not necessarily be a question that turns solely on federal law. Under Article III, federal courts have the power to hear "Controversies . . . between Citizens of different States."[40] This diversity provision enables federal courts to hear suits that present no federal questions but depend solely on state law. So long as at least one of the plaintiffs hails from a different state than at least one of the defendants, Article III's diversity provision extends the federal judicial power over the dispute.[41] In these cases, the federal court sits merely as a substitute forum for state courts.[42]

As has been clear since *Erie Railroad Co. v. Tompkins*,[43] "The source of substantive rights [to be] enforced by a federal court under diversity jurisdiction . . . is the law of the States."[44] Federal courts cannot create a federal body of decisions interpreting state law that diverges from the state law. For example, when state substantive law dictates the dismissal of a claim, a federal court sitting in diversity must dismiss that claim, even if it would not do so under a similar federal law. Consequently, if federal standing involves an assessment of the merits of the plaintiff's claim, the standing of plaintiffs who invoke state law must depend on state law.

One might argue that state law should not control standing in federal court because standing is based on an interpretation of Article III's case and controversy language; instead, standing should be solely a question of federal law. It is true that, if standing is based on an interpretation of

39. Hollingsworth v. Perry, 133 S. Ct. 2652, 2667 (2013) ("[S]tanding in federal court is a question of federal law, not state law.").

40. U.S. CONST. art. III, § 2(1). A closely related provision extends the judicial power to controversies "between a State and Citizens of another State." *Id*. One reason for this provision is that a citizen of one state may face bias in litigation against another state in that latter state's own court. A federal forum could avoid that bias.

41. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967). Satisfying Article III is not the only requirement for a federal court to exercise diversity jurisdiction. It must also satisfy the statute regulating diversity jurisdiction, 28 U.S.C. § 1332. Unlike Article III, § 1332 requires complete diversity between the parties: none of the plaintiffs may be a citizen of the same state as any of the defendants. *State Farm*, 386 U.S. at 530–31. Section 1332 also requires that the amount in controversy requirement exceed $75,000. 28 U.S.C. § 1332(a) (2006).

42. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426 (1996) ("Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights . . . .").

43. 304 U.S. 64, 78 (1938).

44. Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 112 (1945) ("The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States.").

Article III, it is a question of constitutional law.[45] But that conclusion does not preclude the application of state standing rules in diversity cases. The Constitution often incorporates aspects of state law. For example, state law determines what constitutes "property" under the Due Process Clause,[46] and it provides the prevailing local norms used to determine whether material is obscene under the First Amendment.[47] A similar approach should be used for determining standing in state law cases under diversity jurisdiction, because doing so would better achieve the purposes underlying diversity jurisdiction.

The reason behind the inclusion of a diversity provision was to provide an alternative federal forum for the resolution of claims between in-state and out-of-state litigants because of fear that state courts might be biased against the out-of-state parties.[48] Following federal standing law instead of state standing law in diversity cases thwarts this goal because federal and state standing law often diverge.

State courts are not bound by Article III.[49] They may fashion standing requirements that are broader or narrower than standing under Article III.[50]

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45. It is not clear, however, that standing should be tied to Article III if we conceive of standing as involving a question on the merits.

46. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law . . . .").

47. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 124–26 (1989). Similarly, whether the double jeopardy clause prohibits a second prosecution under state law depends on the specific elements of the two state law offenses. United States v. Lloyd, 361 F.3d 197 (3d Cir.2004) (holding that state law crime of criminal mischief is distinct from state crime of possession of unregistered explosives under *Blockburger*).

48. *See* Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809). The precise nature of the feared bias is a matter of some dispute. The traditional theory is that state courts would discriminate, or at least be perceived to discriminate, against all out of state litigants. Dodge v. Woolsey, 59 U.S. (18 How.) 331, 354 (1855) ("[Diversity] is to make the people think and feel, though residing in different states of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit."); *Deveaux*, 9 U.S. (5 Cranch) at 87; Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1800 (1992). Others have argued that the threatened bias was not against all out-of-staters, but instead against out-of-state creditors who had claims against in-state debtors. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 487 (1928).

49. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.").

50. In a different article than the one honored in this Symposium, Judge Fletcher argued that state courts should be bound by Article III justiciability doctrines when hearing cases involving issues of federal law, explaining that imposing those limits would avoid the situation of state courts being the final arbiter on some federal issues. *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263 (1990). Courts have not, however, adopted that proposal.

Many states have adopted standing rules that differ substantially from the federal ones based on their own conceptions of the appropriate role of the courts.

Under Michigan law, for example, injury in fact is a not a prerequisite to standing. Instead, the Michigan Supreme Court has explained, "a litigant has standing whenever there is a legal cause of action."[51] Moreover, when a litigant has not invoked a cause of action, it may still have standing if it has suffered an injury not commonly shared by the public.[52] Injury in fact thus is a sufficient, but not necessary, condition for standing in Michigan.

Other states have rejected the restriction on generalized grievances that the Supreme Court has imposed under Article III standing.[53] Under California's former prohibition on unfair business practices, for example, any individual could sue to prohibit an unfair business practice, even if that person had not been harmed by the practice.[54]

In addition, some state doctrines of standing are not compulsory like federal standing law.[55] For example, Arizona's standing doctrine is discretionary, and the courts will waive it when the case is of substantial importance,[56] and the legislature presumably may abolish it by statute.

These are only some examples of the divergence between state and federal standing law. Many states have adopted standing requirements that diverge from federal law.[57] And although some states have developed state

51. Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010). Michigan is not alone in adopting this standard. *See, e.g.*, Wang v. Wang, 393 N.W.2d 771, 775 (S.D. 1986) ("Standing . . . is statutorily controlled.").

52. *Lansing*, 792 N.W.2d at 699 ("Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.").

53. *See supra* note 50–51 and accompanying text.

54. CAL. BUS. & PROF. CODE § 17204 (West 2012) (authorizing civil action to enforce Unfair Business Practices Act, CAL. BUS. & PROF. CODE § 17200, by "any person 'acting for the interests of itself, its members or the general public'"); *see also* Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1090–91 (Cal. 1998) (discussing scope of standing under California law).

55. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1856–57 (2001) ("[C]ourts in some states allow broad citizen standing on the theory that standing must be viewed in part in light of discretionary doctrines aimed at prudently managing judicial review of the legality of public acts.") (internal quotation marks omitted).

56. Fernandez v. Takata Seat Belts, Inc., 108 P.3d 917, 921 (Ariz. 2005) ("[A]lthough, as a matter of discretion, we can waive the requirement of standing, we do so only in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur."); Sears v. Hull, 961 P.2d 1013, 1019 (Ariz. 1998) ("[W]e are not constitutionally constrained to decline jurisdiction based on lack of standing."); *see also* Roop v. City of Belfast, 915 A.2d 966, 968 (Me. 2007) (stating that in Maine "standing jurisprudence is prudential, rather than constitutional").

57. *See, e.g.*, Chubb Lloyds Ins. Co. v. Miller Cnty. Circuit Ct., 361 S.W.3d 809, 815 (Ark. 2010) ("Arkansas . . . has not followed the federal analysis and definition of 'justiciability' to include standing as a matter of subject-matter jurisdiction."); Bateson v. Weddle, 48 A.3d 652, 656 (Conn. 2012)

standing doctrines that parallel the federal standards,[58] those states may alter their standing doctrine at any time.

(allowing taxpayer standing in *quo warranto* actions); Sierra Club v. Dep't of Transp., 167 P.3d 292, 312 (Haw. 2007) (generally following federal standing requirements, but relaxing those standards when "the needs of justice" so require); Greer v. Ill. Hous. Dev. Auth., 524 N.E.2d 561, 574 (Ill. 1988) ("[T]o the extent that the State law of standing varies from Federal law, it tends to vary in the direction of greater liberality."); Leek v. Civil Serv. Comm'n, 800 N.E.2d 346 n. 4 (Mass. 2003) ("While the Federal and State rules applicable to standing share similar concerns, the rules are not identical.") (citation omitted); Mississippi v. Quitman Cnty., 807 So. 2d 401, 405 (Miss. 2001) (stating that Mississippi "has been 'more permissive in granting standing to parties who seek review of governmental actions'" than federal courts) (quoting Van Slyke v. Bd. of Trs. of State Inst. of Higher Learning, 613 So. 2d 872, 875 (Miss. 1993)); ACLU v. Albuquerque, 188 P.3d 1222, 1226–27 (N.M. 2008) ("[T]his Court has exercised its discretion to confer standing and reach the merits in cases where the traditional standing requirements were not met due to the public importance of the issues involved."); Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 573 N.E.2d 1034, 1040 (N.Y. 1991) (noting that New York standing law differs from federal standing law); Goldston v. North Carolina, 637 S.E.2d 876, 882 (N.C. 2006) ("While federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine."); Kellas v. Dep't of Corr., 145 P.3d 139, 142–43 (Or. 2006) (refusing to "import federal law regarding justiciability into our analysis of the Oregon Constitution and rely on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government"); *In re* Hickson, 821 A.2d 1238, 1243 (Pa. 2003) (stating that Pennsylvania is not bound by federal standing law and recognizing broad potential standing to enforce criminal laws privately); R.I. Ophthalmological Soc'y v. Cannon, 317 A.2d 124, 128 (R.I. 1974) (refusing to tie standing to injury in fact); Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796, 798–800 (Utah 1986) (recognizing standing for plaintiff who has not suffered injury in fact "if no one else has a greater interest in the outcome of the case and the issues are unlikely to be raised at all unless that particular plaintiff has standing to raise the issue" or "if the issues are unique and of such great public importance that they ought to be decided in furtherance of the public interest"); To-Ro Trade Shows v. Collins, 997 P.2d 960, 963 (Wash. Ct. App. 2000) (distinguishing Washington's standing doctrine from federal standing law).

58. *See Ex parte* McKinney, 87 So. 3d 502, 513 (Ala. 2011) ("Much of the precedent in the area of standing comes from federal courts subject to the case-or-controversy requirement of Article III of the United States Constitution. Of course, we do not have a case-or-controversy requirement in the Alabama Constitution of 1901, but our concepts of justiciability are not substantially dissimilar." (quoting Hamm v. Norfolk S. Ry. Co., 52 So. 3d 484, 500 (Ala. 2010)) (internal quotation marks omitted)); Dover Historical Soc'y v. City of Dover Planning Comm'n, 838 A.2d 1103, 1111 (Del. 2003) (stating that although "state courts apply the concept of standing as a matter of self-restraint," Delaware courts have "recognized that the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware"); Feminist Women's Health Ctr. v. Burgess, 651 S.E.2d 36, 37–38 (Ga. 2007) ("In the absence of our own authority, we frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issues of standing to bring a claim in Georgia's courts."); Wasden v. State Bd. of Land Comm'rs, 280 P.3d 693, 697 (Idaho 2012) ("This Court has articulated a standing doctrine analogous to the federal rule."); Godfrey v. State, 752 N.W.2d 413, 418 (Iowa 2008) ("[O]ur doctrine on standing parallels the federal doctrine, even though standing under federal law is fundamentally derived from constitutional strictures not directly found in the Iowa Constitution."); Carter v. Mont. Dep't of Transp., 905 P.2d 1102, 1105 (Mont. 1995) (Nelson, J., concurring) ("This Court has interpreted [Montana's justiciability provision] to embody the same limitations as the Article III 'case or controversy' provision in the United States Constitution."); Cincinnati City Sch. Dist. v. State Bd. of Educ., 680 N.E.2d 1061, 1066 (Ohio 1996) ("[I]n deciding issues of standing in the courts of Ohio, the Ohio Supreme Court relies on federal court decisions."); Toxic Waste Impact Grp., Inc. v. Leavitt, 890 P.2d 906, 910–11 (Okla. 1994) (stating that Oklahoma standing " jurisprudence is similar" to federal law).

In light of the differences between federal and state standing doctrines, following federal standing in a diversity case may prevent a federal court from hearing a suit that the state courts would allow. A plaintiff from one state seeking to sue an individual in another state might have no choice but to proceed to the home forum of the defendant.[59] Likewise, a defendant from one state hailed into the court of another state might not be able to remove the action to federal court.[60] In both situations, a party who might fear prejudice from the state courts because of his out-of-state citizenship has no choice but to proceed to state court.

Consider *Lee v. American National Insurance Co*.[61] There, Lee, a resident of California, sued a Texas insurance company in California state court under California's prohibition on unfair business practices. Although the insurance company's misconduct had not harmed Lee, California's law conferred standing on any person acting in the public interest to sue a business engaged in unfair business practices.[62] The insurance company removed to federal court, but the Ninth Circuit concluded that Lee lacked standing in federal court to proceed against that insurance company.[63] Although acknowledging that Lee had standing to pursue the action in California state court, the court explained that to proceed in federal court, Lee also had to show the "requisite injury" to satisfy Article III and that Lee had not done so.[64] Consequently, the insurance company could not benefit from a federal forum to defend against the claim.

Following state standing rules in cases brought under the diversity jurisdiction diversity would ameliorate this problem. It would provide a

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59. Personal jurisdiction rules might prevent the plaintiff from bringing suit against the defendant in the plaintiff's home state. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) (A state may assert personal jurisdiction over a defendant only if he has "followed a course of conduct directed at the society or economy existing within the jurisdiction" of that state.).

60. *See* Lee v. Am. Nat'l Ins. Co., 260 F.3d 997, 1004 (9th Cir. 2011).

61. *Id.*

62. CAL. BUS. & PROF. CODE § 17204 (West 2012) (authorizing civil action to enforce Unfair Business Practices Act, CAL. BUS. & PROF. CODE § 17200, by "any person acting for the interests of itself, its members or the general public"); *see also* Churchill Vill., L.L.C. v. Gen. Elec. Co., 169 F. Supp. 2d 1119, 1126 n.6 (N.D. Cal. 2000) (quoting Barquis v. Merchs. Collection Ass'n., 496 P.2d 817, 827–28 (Cal. 1972)).

63. *Lee*, 260 F.3d at 1001.

64. *Id*. at 1001–02; *Coyne v. Am. Tobacco Co*., 183 F.3d 488 (6th Cir. 1999), provides another example. There, Ohio taxpayers brought a state law restitution claim against tobacco companies, demanding that the companies return to Ohio money spent to treat victims of disease caused by tobacco use. Federal jurisdiction was based on diversity of citizenship. The Sixth Circuit concluded that the taxpayers lacked standing. *Id*. at 494. It explained that, although Ohio courts had recognized standing in state court based on taxpayer status, standing to sue in federal court "'is a matter of federal law, not state . . . law.'" *Id*. at 495 (quoting City Commc'ns, Inc. v. City of Detroit, 888 F.2d 1081, 1086 (6th Cir. 1989 (alteration in original)). Because federal law generally does not allow taxpayer standing, the court continued, the plaintiffs lacked standing. *Id*.

federal forum for resolving state law claims free from the bias that might be present in the state courts because of the identity of the parties.

Another reason to follow state standing rules in state law diversity cases is that a federal court can serve as a fair substitute forum for a state court only if it recognizes the same rights as the state court[65] and enforces those rights to the same degree.[66] Imposing federal standing requirements in diversity cases impairs reaching that goal.[67] State standing rules functionally define the scope of the state substantive law, just as the federal standing test functionally defines rights in federal court.[68] State causes of action are created with the understanding that the courts of that state will have the primary role in enforcing those actions. That is because a state has sovereign power only over its own institutions; it cannot require the courts of another state or the federal courts to enforce its laws. Thus, the doctrines establishing standing in the state courts set forth the situations under which state rights are expected to be enforced. If state courts lack the power in a particular situation to enforce a right conferred under that state law, the right functionally does not exist in that situation.[69] A person cannot claim protection of that right nor seek its vindication in state court. Put differently, a restriction on standing in state courts signifies a determination by the state legal system to limit the enforceability of the right.[70]

The difference in the scope of right in state and federal court could lead to inequitable administration of the laws and forum shopping, two evils that the federal courts have sought to avoid in determining whether to follow

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65. Hanna v. Plumer, 380 U.S. 460, 467 (1965).

66. Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 108–09 (1945) (A federal court sitting in diversity "cannot afford recovery if the right to recover is made unavailable by the State nor can it substantively affect the enforcement of the right as given by the State.").

67. *See supra* note 70 and accompanying text.

68. *See supra* note 58 and accompanying text.

69. *See* Levinson, *supra* note 38 (arguing that rights are meaningful only to the extent that they are enforced); *cf.* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 698 (2006).

70. Several circuits have acknowledged the importance of state law by stating that, for a plaintiff to have standing, he must satisfy *both* state and federal standing requirements. *See, e.g.*, Comer v. Murphy Oil USA, 585 F.3d 855, 861 (5th Cir. 2009) ("Because this is a diversity case involving state common-law rights of action, plaintiffs must satisfy both state and federal standing requirements."); Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp., 418 F.3d 168, 173 (2d Cir. 2005) ("Where, as here, jurisdiction is predicated on diversity of citizenship, a plaintiff must have standing under both Article III of the Constitution and applicable state law in order to maintain a cause of action."). Although not framed in terms of *Erie*, these circuits' statements rest on the idea that *Erie*'s principles apply to standing. They acknowledge that federal courts hear claims under state law only when the state judiciary also has jurisdiction to hear those claims. Of course, these circuits also require the plaintiff to satisfy federal standing. But that does not change their view about the importance of state law. And the conclusion that federal standing rules also must be satisfied simply begs the question of what federal standing law requires in cases in diversity. If one understands standing to be essentially a determination on the merits, federal law should impose no additional requirements beyond what is required by state law.

state law in diversity cases.[71] Inequitable administration of the laws may result simply because plaintiffs have different abilities to recover remedies in federal and state court because of the differences in standing. Forum shopping may similarly result because recovery may be more difficult, or at least different, in federal court.[72]

III. ADDRESSING OBJECTIONS

Even if one agrees that *Erie*'s logic should extend to state standing laws, one might argue that there are countervailing reasons, such as separation of powers, federalism, and avoiding instability in standing, for federal courts to continue to apply the injury-in-fact test in diversity cases. This part addresses those arguments.

A. Separation of Powers

The Supreme Court has repeatedly insisted that standing turns on one principle: separation of powers.[73] Without injury in fact and the other requirements, the Court has explained, federal courts will infringe on the roles of the coordinate branches of the federal government.[74] But that rationale does not extend to diversity, at least in those cases that do not involve federal or constitutional law but instead turn on state law. Neither Congress nor the President has any involvement in the content or

71. Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). Providing a federal forum free from these biases would not only lead to more just results, but also avoid hostilities between states who perceived that their citizens had not been fairly treated in the courts of other states. *See* Alexander Hamilton, *Federalist No. 80*, *in* THE FEDERALIST 534, 537 (Jacob E. Cooke ed., 1961). Before the adoption of the Constitution, states occasionally resorted to hostilities to resolve disputes. James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 17–18 (1964). Diversity jurisdiction provided a peaceful arbitrator for those disputes. It also helped to forge the various states into a single nation by providing a national forum to resolve regional conflicts. William L. Marbury, *Why Should We Limit Federal Diversity Jurisdiction* 46 A.B.A. J. 379, 380 (1960). Diversity jurisdiction also promoted stability in the law to encourage interstate trade, investment, and communication: Those engaged in interstate commerce could expect to litigate in only a handful of federal courts instead of in a variety of state tribunals. *Id*.

72. Of course, before the Supreme Court's decision in *Erie* there was better reason to impose separate federal limitations on justiciability in diversity cases. At that time, federal courts sitting in diversity did not apply state common law; instead, where a case brought in diversity turned on the application of common law instead of statute, the federal courts applied federal common law. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). Federal courts thus often applied different substantive rules to resolve cases in diversity than the states would have applied. Because federal, not state, law provided the law controlling those cases, federal courts should not have been constrained by any state law, including state standing law.

73. Allen v. Wright, 468 U.S. 737, 752 (1984) ("[S]tanding is built on a single basic idea—the idea of separation of powers.").

74. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341–42 (2006); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Hessick, *supra* note 17, at 317.

enforcement of state law.[75] The federal court decisions in those disputes thus pose no threat to Congress or the President.

To be sure, a federal court's decision in a diversity case raising only state law issues may affect the state's executive or legislative branches. But as discussed above, states may adopt a different allocation of power between their branches of government than the federal model, and the extent of the judicial power in each state depends on that state's standing doctrine.[76] Whether a federal court impermissibly trenches on the state political branches thus depends on state standing law.

B. Federalism

Although federal standing rules are unnecessary to protect the separation of powers in state law cases brought in diversity, one might argue that those federal rules promote federalism by reducing federal court interference with state matters. But federal courts have not developed standing with an eye towards protecting federalism.[77] Federalism is concerned with the distribution of power between federal and state governments;[78] it defines when any branch of the federal government—not just the judiciary—may interfere with state action.[79] By contrast, the purpose of standing is to ensure that courts do not usurp the function of the

75. Printz v. United States, 521 U.S. 898, 923–24 (1997) (holding that Congress cannot direct enactment of state laws); Medellin v. Texas, 552 U.S. 491, 530 (2008) (noting the president's inability to control enforcement of state law when no federal law is implicated).

76. *See supra* notes 57–58 and accompanying text.

77. Although federal courts regularly invoke federalism in resolving questions of prudential and statutory standing, *see, e.g.*, Roberts v. Wamser, 883 F.2d 617, 621–22 (8th Cir. 1989) (citing federalism as a reason to deny statutory standing under the Voting Rights Act to a candidate who sought to challenge an election), they have generally not relied on federalism in determining Article III standing. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION (6th ed. 2012) (listing the various reasons given by courts for standing and not listing federalism among those reasons). Particularly illuminating is the Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). There, Adolph Lyons sought an injunction against the city of Los Angeles forbidding its officers from using a life-threatening chokehold. The Court concluded that Lyons lacked standing to bring the claim, *id.* at 105–06, and that even if Lyons did have standing, it would be an improper exercise of discretion to award the requested injunction, *id.* at 112. Only in discussing the latter conclusion, however, did the Court mention federalism as a reason not to grant the relief requested by Lyons. *See id.* ("[R]ecognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws . . . ."). For a rare case invoking federalism as a reason for Article III standing, see *Taub v. Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988) (denying state taxpayer standing based on federalism concerns).

78. Younger v. Harris, 401 U.S. 37, 44 (1971).

79. Alden v. Maine, 527 U.S. 706, 748 (1999) ("[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.").

other branches of the federal government.[80] It accomplishes that goal by limiting federal court jurisdiction to disputes traditionally amenable to judicial resolution by requiring injury in fact.[81] These standing requirements do not prevent federal courts from hearing cases that involve core state issues. So long as there is a redressable injury in fact, standing poses no impediment to federal jurisdiction. Federal courts have regularly found standing over disputes raising core state issues such as the constitutionality of state statutes defining who may serve in state government.[82]

To be sure, applying standing's requirement in diversity cases does promote federalism by leaving more cases to the state courts. But that is because *any* restriction on federal jurisdiction—including amount-in-controversy requirements,[83] the well-pleaded complaint rule,[84] or a statute barring federal jurisdiction over challenges to flag-burning laws[85]—necessarily results in cases going to state courts. Standing doctrine continues to allow federal courts to interfere with state actions; it just limits the circumstances under which it may occur. Those circumstances are, from a federalism point of view, arbitrary.

Courts have developed other discretionary doctrines to protect federalism interests. The primary example is abstention, under which federal courts will not hear claims if doing so will interfere with state interests.[86] Courts have also protected federalism by considering state interests in applying other discretionary doctrines, such as ripeness and third-party standing. None of these doctrines is commanded by Article III; instead, they are prudential doctrines that the courts have fashioned to limit federal judicial interference with the states. Courts thus may choose not to

80. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Hessick, *supra* note 17, at 317.

81. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102–03 (1998).

82. Quinn v. Millsap, 491 U.S. 95, 103 (1989) (finding Article III standing to raise equal protection clause challenge to state law requiring ownership of real property in state to serve on government board); *accord* Turner v. Fouche, 396 U.S. 346, 361 n.23 (1970).

83. *See, e.g.*, 28 U.S.C. § 1332 (2006) (extending diversity jurisdiction only to suits over $75,000).

84. *See, e.g.*, Vaden v. Discover Bank, 556 U.S. 49, 60 (2009) ("Under the longstanding well-pleaded complaint rule, however, a suit arises under federal law only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law].") (alteration in original) (internal quotation marks omitted).

85. Michael J. Gerhardt, *The Constitutional Limits to Court-Stripping*, 9 LEWIS & CLARK L. REV. 347, 358 (2005) (noting proposals to strip federal courts of jurisdiction over flag burning).

86. *See, e.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (abstention to avoid interference with certain civil state cases); Younger v. Harris, 401 U.S. 37, 44 (1971) (directing federal courts to abstain from enjoining state criminal prosecutions); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (requiring abstention in cases that implicate an important "sovereign prerogative" and in which state law is unclear); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (directing federal courts to abstain to avoid interfering with administration of state regulatory scheme).

apply those rules when prudence councils against it, and Congress may abrogate those doctrines by statute. Federalism has also informed interpretations of statutes conferring jurisdiction. In *Rooker v. Fidelity Trust Co.*[87] and *District of Columbia Court of Appeals v. Feldman*,[88] for example, the Court invoked principles of federalism to conclude that 28 U.S.C. § 1257 does not confer jurisdiction on the lower federal courts to review decisions of the state courts.[89] But these interpretations are also not based on the Constitution and may be altered by Congress.

C. Instability of Standing

Another objection is that defining standing in diversity cases in terms of state law results in giving "controversy" an unstable meaning because standing laws vary from state to state.[90] But nothing prohibits interpreting a constitutional provision in light of state law. For example, courts have looked to state law to determine what constitutes "property" under the Due Process Clause.[91] Likewise, courts look to prevailing local norms to determine whether material is obscene.[92] Looking to state law in interpreting "controversies" in the diversity provisions involves the same process.

Moreover, some variation is already seen under the current doctrine. As noted earlier, the Supreme Court has partially reintroduced a rights-based conception of standing by stating that an injury suffices for standing only if that injury is "judicially cognizable."[93] Whether an injury is cognizable depends on the content of the law; an injury is cognizable if the law recognizes the injury as worthy of redress.[94] Accordingly, courts have denied standing based on the cognizability requirement where a plaintiff has asserted a factual injury that is not recognized by law. For example, in

87. 263 U.S. 413 (1923).

88. 460 U.S. 462 (1983).

89. *Id*.; *Rooker*, 263 U.S. 413.

90. *See supra* notes 57–58 and accompanying text.

91. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law . . . .").

92. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 124–26 (1989).

93. *See, e.g*., Allen v. Wright, 468 U.S. 737, 755–56 (1984) (refusing to find standing for stigmatic injury because "such injury is not judicially cognizable").

94. Vt. Agency of Natural Res. v. U.S. *ex rel*. Stevens, 529 U.S. 765, 772–73 (2000) ("[This] interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right."). As I have argued elsewhere, the cognizability requirement reintroduces the concept, so well articulated in Judge Fletcher's article, that standing should depend on whether the plaintiff has invoked a legal right that the courts can enforce, as opposed to whether the plaintiff has alleged an injury in fact. Unfortunately, the cognizability requirement has not resulted in the abandonment of the injury-in-fact test; instead, now both injury in fact and cognizability must be satisfied. Hessick, *supra* note 17, at 306–09.

Lewis v. Casey, inmates filed an action for injunctive relief against various prisons, claiming that the prisons' failure to provide adequate libraries and access to legal assistance had deprived them of their constitutional right of access to the courts.[95] Although the denial of library access and legal assistance are factual injuries, the Supreme Court denied standing to the majority of the inmates on the ground that their injury was not cognizable because it did not involve the violation of a right.[96] The Court explained that the Constitution does not provide a right to a law library but provides only the narrower right of access to the courts.[97] For these reasons, that standing might vary according to state law is not a sound objection against looking to state law in defining standing in cases brought in diversity.

CONCLUSION

If Judge Fletcher is right that standing is a merits question, current federal standing doctrine should not apply to cases brought in diversity. Instead, standing in federal courts should turn on state law. Accepting this argument does not mean that federal courts would be obliged to discard the injury-in-fact test completely.[98] The argument extends only to cases brought under the diversity jurisdiction. For cases brought under other provisions of Article III, such as when a case "aris[es] under" the Constitution or federal law,[99] the federal courts may still have the power to fashion standing doctrine as they see fit.[100] But for those cases brought in diversity involving just state law, the federal courts should follow state law.

95. 518 U.S. 343 (1996).

96. *Id*. at 356–57.

97. *Id*. at 350–51.

98. Of course, many scholars have made strong arguments for discarding the injury-in-fact test. *See, e.g*., Elliott *supra* note 25, at 510 (suggesting a prudential test); Fletcher, *supra* note 5, at 251–85 (suggesting a rights based approach); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 129–38 (2007) (recommending a variety of discretionary rules of justiciability).

99. U.S. CONST. art. III, § 2, cl. 1 ("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 . . . .").

100. Even if a plaintiff invokes a state law cause of action in a suit arising under federal law, concerns about the separation of powers might support a federal standing doctrine because resolving federal questions requires the courts to determine the meaning and legality of the acts of the other branches of the federal government.