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CASES, CONTROVERSIES, AND DIVERSITY

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ABSTRACT—Article III's diversity jurisdiction provisions extend the federal judicial power to state law controversies between different states or nations and their respective citizens. When exercising diversity jurisdiction, the federal judiciary does not function in its usual role of protecting federal interests or ensuring the uniformity of federal law. Instead, federal courts operate as alternative state courts for resolving disputes between diverse parties. But federal courts often cannot act as alternative state courts because of Article III justiciability doctrines such as standing, ripeness, and mootness. These doctrines define when a federal court may act. But they do not apply to state courts. Rather, states have developed their own justiciability doctrines that substantially diverge from the federal ones. The consequence is that federal courts sitting in diversity cannot hear many claims that can be brought in state court and can hear other claims that state courts lack the power to decide. This Article argues that, instead of applying federal justiciability doctrines, federal courts should apply state justiciability doctrines to state law cases brought under diversity jurisdiction. Following state justiciability doctrines would better achieve the goals of allowing federal courts to function as alternative state courts. Moreover, following state justiciability doctrines in state law cases would not undermine the rationales underlying federal justiciability doctrines because those doctrines were developed to limit the federal judiciary's ability to interfere with the other branches of the federal government—concerns that are inapplicable in state law disputes.

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INTRODUCTION

Every year, tens of thousands of suits are filed in federal court based on diversity jurisdiction.[1] The primary reason for federal diversity jurisdiction is to provide an alternative forum for resolving state law claims free from the bias that state courts might harbor against out-of-state litigants.[2] Thus, when exercising diversity jurisdiction, the federal judiciary

[1] *See U.S. District Courts*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx [http://perma.cc/87ZZ-5NUX] (noting that in 2012, 85,742 suits were filed based on diversity of citizenship). Diversity of citizenship is the most common basis for federal jurisdiction after "Federal Question" jurisdiction. *Id.* This number includes only suits between citizens of different states; it does not include suits presenting other forms of diversity, such as suits between a state and a citizen of another state.

[2] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816) (justifying diversity jurisdiction on the ground that "state attachments . . . might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice"); THE FEDERALIST NO. 80, at 534 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (describing diversity jurisdiction as necessary because the "state tribunals cannot be supposed to be impartial and unbiased" against out-of-state litigants). According to some, the fear of bias was limited not only to state judges, but also included state juries. *See* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 997 (2007).

does not function in its usual capacity as a coequal branch of the federal government. Instead, federal courts operate as an alternative forum to the state courts, resolving disputes between different states or nations and their respective citizens.[3] In that role, as the Supreme Court has explained, the federal court is simply "another court of the State."[4] Its function is to interpret and enforce state law as any other court of that state would.[5]

But federal courts sitting in diversity often cannot act as alternative forums to state courts because of federal justiciability doctrines.[6] Deriving from the "case" or "controversy" language from Article III,[7] these doctrines include standing, mootness, ripeness, the political question doctrine, and the prohibitions on hearing collusive suits and issuing advisory opinions.[8] They define the circumstances under which a federal court has the power under Article III to hear a dispute[9]—including a dispute brought under diversity jurisdiction.[10]

Imposing federal justiciability requirements in diversity cases impairs the federal courts' ability to serve as an alternative state forum. Article III does not apply to state courts, and state courts consequently need not follow federal justiciability doctrines.[11] Instead, states have developed their own justiciability doctrines that substantially differ from the federal ones. The application of federal justiciability doctrines to suits in diversity thus causes a divergence between state courts and federal courts: Although federal courts sitting in diversity are supposed to function as state courts, they cannot hear some claims that a state court can hear, and they can hear other claims that a state court cannot.

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[3] For purposes of this Article, the term "diversity jurisdiction" refers to the federal courts' power under Article III to hear "Controversies . . . between a State and Citizens of another State; . . . between Citizens of different States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1.

[4] Guar. Trust Co. v. York, 326 U.S. 99, 108–09 (1945).

[5] *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law . . . .").

[6] *See infra* note 132 (collecting examples).

[7] *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("The doctrines of [justiciability] originate in Article III's 'case' or 'controversy' language . . . .").

[8] *See* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 76–77 (2007) (cataloguing doctrines).

[9] Franks v. Bowman Transp. Co., 424 U.S. 747, 754 (1976) ("[A]ll concepts of justiciability . . . derive[] from . . . the 'cases or controversies' limitation imposed by Art. III.").

[10] *See, e.g.*, Lee v. Am. Nat'l Ins. Co., 260 F.3d 997, 1000–02 (9th Cir. 2001) (dismissing claim brought under diversity because plaintiff failed to demonstrate federal standing); *see also* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 448 & n.6 (1994) (noting that federal courts apply federal justiciability doctrines to suits brought under diversity jurisdiction).

[11] *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that . . . state courts are not bound by . . . federal rules of justiciability . . . .").

Although scholars have written extensively on federal justiciability doctrines,[12] none have examined whether these justiciability doctrines should apply to suits in diversity.[13] This Article takes up that challenge. It argues that federal justiciability doctrines should not apply to state law disputes brought under diversity jurisdiction. Instead, federal courts sitting in diversity should apply state justiciability doctrines.

Following state justiciability law would better achieve the primary goal of diversity jurisdiction: providing an alternative forum for resolving state law claims free from potential state court bias against out-of-state litigants. It would also increase parity between the state and federal courts.[14] As the Court explained in the context of *Erie v. Tompkins*,[15] for a federal court to serve as an alternative to state court in suits brought under diversity jurisdiction, parties must have the same substantive rights in the federal court as they do in state court.[16] Following federal instead of state justiciability requirements in suits brought under diversity jurisdiction undermines that goal because it results in federal and state courts having different scopes of power to enforce rights. To be clear, my claim is not that *Erie* extends to justiciability. *Erie* is limited to questions of substantive law,[17] and modern justiciability doctrines are not substantive law.[18] But the

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[12] *See, e.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 244–67 (2002) (discussing the evolution of political question doctrine); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (criticizing standing); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992) (criticizing mootness); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–71 (1973) (arguing for more expansive justiciability); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 160 (1987) (criticizing ripeness); Siegel, *supra* note 8, at 122–38 (criticizing federal justiciability doctrines).

[13] Scholars have explored the converse question whether state courts should apply federal justiciability doctrines when hearing federal questions. *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265, 282–304 (1990) (arguing that state courts should be bound by federal justiciability doctrines when hearing issues of federal law); Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1291–96 (2011) (arguing that Supreme Court jurisdiction should extend to all state court determinations of federal law that are adverse to the claimed federal right).

[14] By parity, I mean the equal ability of federal and state courts to enforce state law. *See* Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 593–94 (1991) (defining parity between two courts as including an equal ability to enforce rights).

[15] 304 U.S. 64 (1938).

[16] Guar. Trust Co. v. York, 326 U.S. 99, 108–09 (1945) ("[S]ince a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.").

[17] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law . . . .").

same concerns underlying *Erie* apply to questions of justiciability, and state justiciability doctrine therefore should inform the meaning of the term "controversies" in Article III for state law suits brought under diversity jurisdiction. In other words, although what constitutes a controversy is a question of constitutional law, federal courts should look to state law to give meaning to that constitutional term.

Following state justiciability doctrines in state law suits brought under diversity jurisdiction would also not conflict with the rationales underlying federal justiciability doctrines. The two main reasons for federal justiciability doctrines are to protect the separation of powers and to ensure adverseness sufficient to frame the dispute for the court.[19] But separation of powers concerns generally do not apply to state law cases brought under diversity jurisdiction because the powers of the other branches of the federal government are not implicated in those disputes.[20] Nor do concerns about sufficient adverseness warrant following federal instead of state justiciability doctrines. State law should dictate the degree of adverseness necessary to warrant adjudication of state law claims.

This Article proceeds in four parts. Part I begins by providing an overview of federal justiciability law and contrasting that law with state justiciability doctrines. It then explains how these differences have resulted in federal courts sitting in diversity refusing to hear claims that could be brought in state court. Part II makes the affirmative case for following state justiciability rules in state law diversity cases. It explains that following state justiciability doctrines is consistent with the text of the diversity provisions in Article III and better achieves the principal purpose motivating those provisions—to avoid state court bias against out-of-staters—than the current practice of following federal doctrines. It also explains that, although *Erie* does not apply by its terms to justiciability, many of the same reasons supporting the requirement that federal courts apply state substantive law in diversity cases apply to justiciability as well. Part III explains why the justifications for federal justiciability doctrines do not apply to cases brought under diversity jurisdiction. Part IV addresses various other concerns with applying state justiciability doctrines in

[18] For an argument that, if justiciability is substantive, federal courts should apply state justiciability doctrines when sitting in diversity, see F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417 (2013).

[19] *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 95 (1968) (explaining that justiciability serves the two roles of "limit[ing] the business of federal courts to questions presented in an adversary context and . . . assur[ing] that the federal courts will not intrude into areas committed to the other branches of government").

[20] Of course, state lawsuits may implicate separation of powers if they are brought against particular parties, such as the United States.

diversity cases and explains why none of those concerns justify following federal justiciability doctrines in those cases.

I. JUSTICIABILITY IN FEDERAL AND STATE COURTS

A. Federal Justiciability Doctrines

Article III empowers the federal courts to exercise the "judicial [p]ower"[21] to hear nine categories of cases and controversies.[22] The Constitution does not define cases and controversies, and the Convention provides little insight into their meaning.[23] Instead, the Court has provided meanings to those terms on a case-by-case basis through a common-law-like process that focuses on the appropriate role of the judiciary in the federal system.[24]

Over the years, the Supreme Court has developed a variety of complex justiciability doctrines to determine when a dispute constitutes a case or controversy under Article III.[25] These doctrines include the requirements that plaintiffs have standing,[26] that their claims be ripe[27] and not moot,[28] that

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[21] U.S. CONST. art. III § 1, cl. 1.

[22] The nine categories are:

> [(1)] 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; . . . [(2)] Cases affecting Ambassadors, other public Ministers and Consuls; . . . [(3)] Cases of admiralty and maritime Jurisdiction; . . . [(4)] Controversies to which the United States will be a party; . . . [(5)] Controversies between two or more States;[(6) controversies] between a State and Citizens of another State;[(7) controversies] between Citizens of different States;[(8) controversies] between Citizens of the same State claiming Lands under Grants of different States, and [(9) controversies] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

[23] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911) [hereinafter FARRAND] (recounting James Madison's statement that it was "generally supposed that the jurisdiction given" in Article III "was constructively limited to cases of a Judiciary nature").

[24] Allen v. Wright, 468 U.S. 737, 751 (1984) (acknowledging that Article III "concepts have gained considerable definition from developing case law"); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 401 (1980) ("[J]usticiability doctrine[s] [are] of uncertain and shifting contours." (quoting *Flast*, 392 U.S. at 97)); Poe v. Ullman, 367 U.S. 497, 503–04 (1961) (plurality opinion) (explaining that the Court "evolved" the various justiciability doctrines); Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1327 (2005) (stating that courts "fabricated" justiciability doctrines); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (acknowledging that defining the terms "cases" and "controversies" requires resort to "common understanding of what activities are appropriate to legislatures, to executives, and to courts" (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992))).

[25] *See Ullman*, 367 U.S. at 504 (explaining that the Court "evolved" the various justiciability doctrines); Siegel, *supra* note 8, at 76–77 (cataloguing the various justiciability doctrines).

[26] *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) (dismissing for lack of standing).

[27] *E.g.*, *Ullman*, 367 U.S. at 508 (dismissing for lack of ripeness).

[28] *E.g.*, Already, LLC v. Nike, Inc., 133 S. Ct. 721, 733 (2013) (dismissing for mootness).

plaintiffs are not requesting an advisory opinion[29] or seeking the resolution of a political question,[30] and that their suits are not collusive or otherwise nonadversarial.[31] Although grounded in Article III, these doctrines are only loosely connected to that provision; indeed, many of these doctrines began as rules of judicial self-restraint and were tied to Article III only in the twentieth century.[32] The only apparent exceptions are the prohibition on advisory opinions and the political question doctrine. Early refusals to issue advisory opinions invoked Article III,[33] and early references to the political question doctrine grounded it in the role of the judiciary under Article III.[34]

The theory underlying most of the federal justiciability doctrines is that the function of federal courts is to provide remedies for violations of rights.[35] Under this "dispute resolution" model,[36] the role of the federal courts is not to expound on constitutional or other legal questions or to police the other branches of government.[37] Courts may engage in these functions, but only in the course of resolving a dispute arising from the violation of rights.[38]

Standing provides an example of this view of dispute resolution. For a plaintiff to have standing, he must demonstrate that he has suffered, or imminently will suffer, a concrete and personal injury to a legal interest; that the injury is fairly traceable to the challenged action of the defendant; and that a court can redress the injury through a favorable decision.[39] Under these requirements, an individual has standing to seek a remedy only for harm to herself; she cannot sue to complain about illegal action that did not

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[29] *E.g.*, Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("[A] federal court has [no] power to render advisory opinions . . . .").

[30] *E.g.*, Nixon v. United States, 506 U.S. 224, 228 (1993) (dismissing for political question).

[31] *E.g.*, Muskrat v. United States, 219 U.S. 346, 360–61 (1911) (dismissing suit for lack of adversity).

[32] Hall, *supra* note 13, at 1267 ("[C]ourts dismissed [non-justiciable] cases using language suggesting an exercise of discretion.").

[33] S*ee* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (suggesting that Article III prohibited a scheme under which the Secretary of War reviewed judicial determinations of veterans benefits).

[34] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (stating that, because the Constitution commits them to another branch, political questions "can never be made in this court").

[35] Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) ("Article III of the Constitution restricts [the judiciary] to the traditional role of Anglo-American courts [of] redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by . . . violation of law.").

[36] RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72 (6th ed. 2009).

[37] Monaghan, *supra* note 12, at 1365; Siegel, *supra* note 8, at 77.

[38] *See Summers*, 555 U.S. at 492 ("Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action."); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) ("Federal courts . . . pass on constitutional questions because . . . they must decide a litigated issue that is otherwise within their jurisdiction . . . .").

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

cause her harm.[40] According to the Supreme Court, these requirements ensure that the judiciary stays within its "province of . . . decid[ing] on the rights of individuals."[41]

The other theory underlying federal justiciability is the "special functions" model.[42] This model rejects the notion that the role of federal courts is solely to remedy violations of rights; instead, it posits that the judicial function also includes articulating constitutional values and ensuring government compliance with the law.[43] Thus, unlike the dispute resolution model, the special functions model would extend standing to citizens concerned about illegal government action.[44] The model does not claim that the courts may perform these law-articulating and enforcement functions at any time; federal courts still may act only to resolve a case or controversy by entering a judgment binding parties to the suit.[45] But what constitutes a case or controversy—the occasions for entering those judgments—is broader.[46]

Although the dispute resolution model underlies most federal justiciability doctrines, several doctrines rest on the special functions model.[47] One example is the "capable of repetition, yet evading review" exception to mootness.[48] That exception allows a court to hear a claim that is otherwise moot if there is a reasonable probability that the defendant will again engage in the complained-of conduct.[49] The exception does not exist to vindicate private rights; plaintiffs in such cases receive no relief for the violation of their rights. Instead, the purpose of the exception is to clarify the law and deter future violations.[50]

Despite their differences, both the dispute resolution model and special functions model agree that justiciability involves the question of the federal court's appropriate role with respect to the other branches of government. Both balance considerations of when the federal courts should intervene to enforce federal law against the need to avoid unduly interfering with the elected branches. Consequently, it is unsurprising that federal justiciability

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[40] *Id.* at 571–78.

[41] *Id.* at 576 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

[42] Monaghan, *supra* note 12, at 1368–71. This model is also known as the "law declaration" model. FALLON ET AL., *supra* note 36, at 73.

[43] Monaghan, *supra* note 12, at 1368–71.

[44] *Id.*

[45] *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 284 (1990) (explaining that the special functions model expands the scope of "the parties and issues" subject to adjudication).

[46] Monaghan, *supra* note 12, at 1397.

[47] *Id.* at 1368.

[48] Spencer v. Kemna, 523 U.S. 1, 17 (1998).

[49] *See id.*

[50] *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 327 (2008).

doctrines have developed almost exclusively in the context of determining whether to adjudicate disputes "arising under" federal law or the Constitution.[51]

B. Variance Between State and Federal Justiciability

Article III's limitations apply only to the federal courts; they do not extend to state courts.[52] States have developed their own justiciability rules defining the authority of their judiciaries. These doctrines vary from state to state.[53] Some states have adopted doctrines that roughly resemble the federal justiciability doctrines. Other states allow greater access to their courts than is available under the federal doctrines. Those latter states have more readily embraced a special functions model of adjudication, establishing a broader role for the courts in their governmental system. This section discusses differences between state justiciability doctrines and federal justiciability doctrines.

1. Standing.—Standing defines who may bring suit in federal court, and is "perhaps the most important" of the federal justiciability doctrines.[54] The basic requirements for Article III standing are that a plaintiff must demonstrate that he has suffered a "particularized" "injury in fact" to a "judicially cognizable interest," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will "likely . . . be redressed by a favorable decision."[55] This test rests on a private-rights conception of the federal courts. It limits access to the federal courts to only those litigants

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[51] *See* Pushaw, *supra* note 10 (explaining that the cases developing justiciability doctrines are "invariably . . . federal question case[s]"). These doctrines have not developed in the course of resolving cases based solely on diversity jurisdiction under Article III because the Supreme Court does not exercise its certiorari jurisdiction to clarify issues of state law. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989) (noting that the Supreme Court does not review "question[s] of state law").

[52] ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts . . . .").

[53] The source of these doctrines also varies from state to state. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844–46 (2001) (noting that state doctrines derive from state constitutions, statutes, and judicial decisions).

[54] Allen v. Wright, 468 U.S. 737, 750 (1984).

[55] Bennett v. Spear, 520 U.S. 154, 167 (1997) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). Courts also require the injury to be "actual or imminent." *Lujan*, 504 U.S. at 560. As the Court has acknowledged, the imminence requirement mirrors the hardship inquiry for ripeness. *See* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 & n.8 (2007). For simplicity, this Article discusses the requirement in terms of ripeness.

that seek a remedy for personal injuries.[56] An individual cannot go to federal court simply to ensure compliance with the law.[57]

Further, the Supreme Court has limited the types of injuries that qualify for standing. For instance, aside from a limited class of suits based on the Establishment Clause,[58] a taxpayer cannot base standing on federal or state governmental misuse of tax money.[59] Similarly, a generalized interest an individual shares with other members of the public is not sufficient to establish Article III standing.[60] According to the Court, to allow these common injuries to suffice for standing would unduly expand the power of the judiciary at the expense of the elected branches of government.[61] Instead, to establish Article III standing, a plaintiff must demonstrate that he has suffered a distinct harm beyond the violation of his interest in seeing the law obeyed. Moreover, the Court has held that Congress cannot avoid this Article III limitation on standing by enacting citizen-suit statutes authorizing private individuals to enforce the law.[62]

Standing doctrine varies widely among the states. Some states, like Rhode Island, Wyoming, Indiana, and Arizona, have adopted an injury in fact test similar to the federal one.[63] Others, such as California, Louisiana, and New Hampshire, have rejected that test, concluding that standing

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[56] Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771–72 (2000) ("[T]he Art. III judicial power exists only to redress . . . injury *to the complaining party*." (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975))).

[57] *See Lujan*, 504 U.S. at 576–77.

[58] Flast v. Cohen, 392 U.S. 83, 103 (1968).

[59] Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1445 (2011).

[60] *See, e.g.*, *Lujan*, 504 U.S. at 576 (prohibiting standing based on "generalized interest" (quoting Whitmore v. Arkansas, 495 U.S. 149, 160 (1990))).

[61] *Id.*

[62] *Id.* at 576–77 (rejecting the argument that "the public interest in proper administration of the laws . . . can be converted into an individual right by a statute that denominates it as such"). In earlier cases, the Court said that standing may exist "solely by virtue of statutes creating legal rights, the invasion of which creates standing." Warth v. Seldin, 422 U.S. 490, 500 (1975) (internal quotation marks omitted). *Lujan* distinguished these cases by saying that Congress cannot confer standing on a person who has not suffered a "de facto" injury; instead, Congress may simply identify which factual injuries may form the basis of standing. 504 U.S. at 577–78.

[63] *E.g.*, Trs. for Alaska v. State, 736 P.2d 324, 327 (Alaska 1987) (basing standing on "interest-injury," such as "economic" harm); Fernandez v. Takata Seat Belts, Inc., 108 P.3d 917, 919 (Ariz. 2005) (en banc) (stating that a plaintiff must allege "palpable injury" for standing (quoting Sears v. Hull, 961 P.2d 1013, 1017 (Ariz. 1998))); State *ex rel.* Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978, 979 (Ind. 2003) (stating standing turns on a showing of "injury"); Ritchhart v. Daub, 594 N.W.2d 288, 291–92 (Neb. 1999) (requiring a "personal stake" to show standing); Haviland v. Simmons, 45 A.3d 1246, 1256 (R.I. 2012) (stating that only a "plaintiff who has suffered injury in fact" has standing (quoting Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004) (internal quotation marks omitted))); To-Ro Trade Shows v. Collins, 27 P.3d 1149, 1154–55 (Wash. 2001) (requiring "sufficient factual injury" for standing (quoting Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 82 (Wash. 1978))); Miller v. Wyo. Dep't of Health, 275 P.3d 1257, 1261 (Wyo. 2012) (expressly following federal standard).

depends on whether the plaintiff has alleged the violation of a legal right.[64] Others have concluded that injury in fact is the default requirement for standing but that the legislature may extend standing by statute to plaintiffs who have not experienced a factual injury.[65] And some have adopted still other tests. In Utah, for example, plaintiffs may have standing when there is no other person better situated to bring suit.[66] Moreover, various states have said that standing is a prudential doctrine subject to legislative modification.[67] And some have concluded that standing is not jurisdictional at all,[68] and consequently may be waived and, presumably, modified by the legislature.[69]

States have also not placed the same restrictions on generalized grievances as the Supreme Court. For example, according to a recent survey, at least thirty-six states allow taxpayer standing.[70] Furthermore, many states, including six that otherwise require injury in fact (Arizona,

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[64] *See* Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 943 (Cal. 2003) (looking solely to rights conferred by statute to determine standing); La. Associated Gen. Contractors, Inc. v. State, 669 So. 2d 1185, 1192 (La. 1996) (determining standing by looking only to alleged violation of rights); Libertarian Party of N.H. v. Sec'y of State, 965 A.2d 1078, 1080 (N.H. 2008) ("In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect." (quoting Asmussen v. Comm'r, N.H. Dep't of Safety, 766 A.2d 678 (N.H. 2000))).

[65] *See, e.g.*, Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010) (stating that "a litigant has standing whenever there is a legal cause of action" or "if the litigant has a special injury"); *In re* Custody of D.T.R., 796 N.W.2d 509, 513 (Minn. 2011) ("Standing to appeal may be conferred by a statute or by the appellant's status as an aggrieved party."); Harrison County. v. City of Gulfport, 557 So. 2d 780, 782 (Miss. 1990) (granting standing based on "adverse effect" or as "otherwise authorized by law"); Youngblood v. S.C. Dep't of Soc. Servs., 741 S.E.2d 515, 518 (S.C. 2013) (requiring injury in fact only "[w]hen no statute confers standing"); Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 556 (Tex. 2000) (requiring injury "absent a statutory exception" (quoting Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984))); Goldman v. Landsidle, 552 S.E.2d 67, 72 (Va. 2001) (basing standing on "statutory right" or "direct injury").

[66] *See, e.g.*, Gregory v. Shurtleff, 299 P.3d 1098, 1104 (Utah 2013).

[67] *See, e.g.*, Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1382 (Del. 1991) ("Standing [is] a matter of self-restraint . . . ."); Sierra Club v. Dep't of Transp., 167 P.3d 292, 312 (Haw. 2007) (describing "standing doctrine" as "prudential rules of judicial self-governance"); Lansing Sch. Educ. Ass'n, 792 N.W.2d at 699 (calling standing "prudential"); Kellas v. Dep't of Corr., 145 P.3d 139, 143 (Or. 2006) (describing standing as "prudent" (citation omitted)); *In re* Hickson, 821 A.2d 1238, 1243 (Pa. 2003) (calling "standing" a "prudential, judicially-created tool").

[68] *See, e.g.*, Chubb Lloyds Ins. Co. v. Miller Cnty. Cir. Ct., 361 S.W.3d 809, 816 (Ark. 2010) ("[S]tanding is not a component of subject-matter jurisdiction . . . ."); Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 916 (Ill. 2010) ("[L]ack of standing is an affirmative defense . . . ."); Harrison v. Leach, 323 S.W.3d 702, 707–08 (Ky. 2010) ("[A] trial court's subject-matter jurisdiction is distinct from standing . . . .").

[69] *See, e.g.*, *Lebron*, 930 N.E.2d at 916 (stating that a lack of standing defense can be forfeited).

[70] Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1277 (2012).

Indiana, Nebraska, Rhode Island, Washington, and Wyoming), waive standing requirements in cases raising an important public interest.[71]

2. Ripeness.—Unlike standing, which limits who can bring suit, ripeness defines when a person may bring suit.[72] Ripeness prohibits courts from hearing suits prematurely.[73] It limits jurisdiction only when a plaintiff seeks prospective relief like an injunction to prevent future harms.[74] Ripeness in federal courts depends on two considerations: (1) whether the parties will suffer hardship without prompt judicial consideration and (2) whether the issues are fit for immediate judicial review or would benefit from future developments.[75] According to the Supreme Court, ripeness involves "constitutional" and "prudential" considerations,[76] but the Court has not clarified whether constitutional considerations underlie only one or both prongs of the ripeness inquiry.[77]

Many states follow the federal standard.[78] But some do not. A few states, such as Arkansas, have focused only on the fitness prong,[79] whereas

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[71] *Youngblood*, 741 S.E.2d at 518 (recognizing "public importance exception"); *Gregory*, 299 P.3d at 1104 (waiving standing in suit claiming violation of the Utah constitution's single-subject rule on the ground that the suit was of "significant public importance" (quoting Cedar Mountain Envtl., Inc. v. Tooele County. *ex rel.* Tooele Cnty. Comm'n, 214 P.3d 95, 98 (Utah 2009))); Vill. Rd. Coal. v. Teton Cnty. Hous. Auth., 298 P.3d 163, 168 (Wyo. 2013) (relaxing standing in cases of "great public interest" (quoting Maxfield v. State, 294 P.3d 895, 900 (Wyo. 2013))); *see* Fernandez v. Takata Seat Belts, Inc., 108 P.3d 917, 919 (Ariz. 2005) (en banc) (same); State *ex rel.* Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978, 979 (Ind. 2003) (same); Godfrey v. State, 752 N.W.2d 413, 425 (Iowa 2008) (same); Bd. of Trs. of State Insts. of Higher Learning v. Ray, 809 So. 2d 627, 632 (Miss. 2002) (same); New Energy Econ., Inc. v. Martinez, 247 P.3d 286, 290 (N.M. 2011) (same); *see also Sierra Club*, 167 P.3d at 312 (relaxing standing when "the needs of justice so require"); Nebraskans Against Expanded Gambling, Inc. v. Neb. Horsemen's Benevolent & Protective Ass'n, 605 N.W.2d 803, 807 (Neb. 2000) (noting "great public concern" exception); Salorio v. Glaser, 414 A.2d 943, 947 (N.J. 1980); State *ex rel.* Howard v. Okla. Corp. Comm'n, 614 P.2d 45, 52 (Okla. 1980); Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992) (recognizing "substantial public interest" exception); To-Ro Trade Shows v. Collins, 27 P.3d 1149, 1155 (Wash. 2001) (waiving standing when "the interest of the public . . . is overwhelming" (quoting *In re* Deming, 736 P.2d 639, 660 (Wash. 1987) (en banc), *amended by* 744 P.2d 340 (Wash. 1987))).

[72] Nichol, *supra* note 12, at 160–62.

[73] *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967).

[74] F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 63–64 (2012).

[75] *Abbott Labs.*, 387 U.S. at 149.

[76] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010).

[77] As a logical matter, only the hardship inquiry should be based on Article III. Whether a case is fit for review does not implicate the power of the courts to act; instead, it focuses on whether the court has adequate information to make an informed decision. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.4.1, at 119 (6th ed. 2012) ("[T]he focus on the quality of the record seems prudential.").

[78] *See, e.g.*, La. Fed'n of Teachers v. State, 94 So. 3d 760, 763 (La. 2012) (asking whether "issues are fit" for review and whether "the parties will suffer hardship" if the court does not grant the requested relief); *accord* Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 219 P.3d 1111, 1123 (Haw. 2009); Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373, 384 (Ill. 2008); State *ex rel.*

others, like Oregon and Florida, have focused only on the hardship prong.[80] Some states have explicitly rejected the federal standard. Alaska, for example, has stated that its ripeness doctrines are "more lenient than their federal counterpart."[81] Other states have said that their ripeness doctrine differs from the federal one but have looked to federal decisions for guidance.[82] And some states have not yet developed a robust ripeness doctrine.[83]

States also differ on whether ripeness is mandatory or discretionary. Most states have concluded that ripeness is prudential,[84] but at least six have deemed it mandatory.[85] And some states have concluded that parts of ripeness are mandatory and others are discretionary. For example, Kentucky has deemed the hardship prong mandatory but the fitness prong discretionary,[86] while Nebraska has deemed the fitness prong mandatory but the hardship prong prudential.[87]

Morrison v. Sebelius, 179 P.3d 366, 377–83 (Kan. 2008); Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 713 (R.I. 2000).

[79] Donovan v. Priest, 931 S.W.2d 119, 121 (Ark. 1996) (basing ripeness on whether "additional facts are necessary for decision").

[80] State v. Newman, 405 So. 2d 971, 972 (Fla. 1981) (discussing only the plaintiff's stake to determine ripeness); Yancy v. Shatzer, 97 P.3d 1161, 1163 (Or. 2004) (stating that ripeness involves the "practical effect on or concerning the rights of the parties" (quoting Brumnett v. Psychiatric Sec. Review Bd., 848 P.2d 1194, 1196 (Or. 1993))).

[81] Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937, 942 (Alaska 2004).

[82] *See, e.g.*, State v. Fischer, 876 A.2d 232, 237 (N.H. 2005) (stating that the state has "not adopted a formal test for ripeness," but finding federal test "persuasive"); Perry v. Del Rio, 66 S.W.3d 239, 249 (Tex. 2001) (stating that "ripeness . . . should be determined by state law" but following federal test); State v. M.W., 57 A.3d 696, 699 (Vt. 2012) (declaring federal ripeness law "instructive" but not binding); *see also Ex parte* Riley, 11 So. 3d 801, 806–07 (Ala. 2008) (following the same "basic rationale" as federal ripeness doctrine).

[83] Winkle v. City of Tucson, 949 P.2d 502, 504 (Ariz. 1997) (stating that a court cannot render judgment "on a situation that may never occur" (citing Ariz. Downs v. Turf Paradise, Inc., 682 P.2d 443, 449 (Ariz. Ct. App. 1984))); Ind. Dep't of Envtl. Mgmt. v. Chem. Waste Mgmt., Inc., 643 N.E.2d 331, 336 (Ind. 1994) (ripeness depends on whether the dispute turns on "actual facts rather than on abstract possibilities"); Nordike v. Nordike, 231 S.W.3d 733, 739–40 (Ky. 2007) (stating that questions that "are purely advisory or hypothetical" are not ripe (quoting Doe v. Golden & Walters, PLLC, 173 S.W.3d 260, 270 (Ky. Ct. App. 2005))); Granville Cnty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n, 407 S.E.2d 785, 791 (N.C. 1991) (stating ripeness prevents "premature intervention" (quoting Elmore v. Lanier, 155 S.E.2d 114, 116 (N.C. 1967))).

[84] *See* Patrick W. Maraist, *A Statutory Beacon in the Land Use Ripeness Maze: The Florida Private Property Rights Protection Act*, 47 FLA. L. REV. 411, 419 n.40 (1995) ("[S]tate courts apply ripeness . . . under prudential concerns.").

[85] *See* Developmental Pathways v. Ritter, 178 P.3d 524, 530 (Colo. 2008); Davidson v. Wright, 151 P.3d 812, 817 (Idaho 2006); State *ex rel.* Morrison v. Sebelius, 179 P.3d 366, 382 (Kan. 2008); Am. Waste & Pollution Control Co. v. St. Martin Parish Police Jury, 627 So. 2d 158, 162 (La. 1993); MEA-MFT v. McCulloch, 291 P.3d 1075, 1078 (Mont. 2012); State v. Hammer, 787 N.W.2d 716, 725 (N.D. 2010).

[86] W.B. v. Commonwealth, 388 S.W.3d 108, 114–17 (Ky. 2012).

[87] Omaha v. Elkhorn, 752 N.W.2d 137, 145 (Neb. 2008).

In addition, ripeness does not function the same way in state and federal court. For example, states with liberal standing rules allow litigants to avoid ripeness obstacles.[88] Ripeness limits jurisdiction only when a plaintiff alleges a possible future injury; it does not apply when a plaintiff seeks relief for a present harm. States with broad standing doctrines have expanded the scope of what constitutes a *present* injury. For instance, a concerned citizen invoking a citizen suit provision may base standing on either the present harm of the defendant's illegal conduct *or* the possible future injury that the plaintiff may suffer from the defendant's illegal conduct. The latter type of injury raises ripeness concerns because the injury may not transpire. But the former type of injury is a presently occurring injury that raises no ripeness issues. Thus, ripeness poses less of an obstacle in states that recognize standing under citizen suit provisions. The Michigan Supreme Court's opinion in *Lansing Schools Education Association v. Lansing Board of Education* provides an example.[89] There, schoolteachers sought an injunction ordering the school board to expel students who assaulted teachers.[90] Under federal law, the only interest that would have sufficed for the teachers' standing was the threat that they might face assaults, but that claim of injury would not have been justiciable under federal ripeness doctrine because the teachers did not claim that they faced an imminent threat of assault.[91] The Michigan Supreme Court, however, concluded that the claim was justiciable because the teachers had standing based on their *present* interest in seeing the appropriate enforcement of the law[92]—an interest that does not support standing under federal doctrine.[93]

3. Mootness.—Mootness is the counterpart to ripeness. It bars a federal court from hearing a claim if the plaintiff loses his interest in the case after it has been filed.[94] In that circumstance, the Supreme Court has explained, the court hearing the suit no longer has a case or controversy before it.[95]

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[88] *See* Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937, 942 (Alaska 2004) (noting that liberal standing rules expand ripeness because "[r]ipeness is an aspect of standing").

[89] 792 N.W.2d 686, 699 (Mich. 2010).

[90] *Id.* at 689.

[91] Although the teachers claimed to have been assaulted in the past, past injuries do not support standing to seek prospective relief under federal doctrine. *See id.*; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 210–11 (1995) ("[P]ast injury . . . does nothing to establish a real and immediate threat . . . [of] similar injury in the future." (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983)) (internal quotation marks omitted)).

[92] *Lansing Schs.*, 792 N.W.2d at 701; *see also* Cusack v. Howlett, 254 N.E.2d 506, 508 (Ill. 1969) (rejecting a ripeness challenge on the ground that plaintiff had present taxpayer standing).

[93] Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–77 (1992).

[94] *See* Spencer v. Kemna, 523 U.S. 1, 7 (1998).

[95] *Id.*

Unlike with the other Article III justiciability doctrines, federal courts have largely applied a special functions model to mootness, recognizing a number of exceptions to mootness that allow courts to resolve cases even in the absence of a continuing dispute. For example, federal courts may hear an otherwise moot case when the issue presented is "capable of repetition, yet evading review";[96] when the defendant ceased its conduct voluntarily;[97] when the lead plaintiff in an uncertified class action has had his claim resolved;[98] or when the challenged action has collateral consequences for the plaintiff.[99]

States also prohibit the resolution of moot cases.[100] Although many have recognized exceptions similar to those for federal mootness,[101] the overlap is not complete. Oregon, for example, does not recognize the capable of repetition yet evading review exception,[102] and many states have not had the opportunity to determine whether to recognize the class action exception.[103] Moreover, even in those states that do recognize the federal exceptions, the scope of those exceptions differs from state to state.[104] Furthermore, states have created other exceptions that the federal courts do not recognize. The most common is an exception for cases presenting

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[96] Norman v. Reed, 502 U.S. 279, 287–88 (1992) (quoting Moore v. Ogilvie, 394 U.S. 814, 816 (1969)). That exception allows a court to hear a claim that is otherwise moot if there is a reasonable probability that the defendant will again engage in the complained-of conduct. *Spencer*, 523 U.S. at 17 (citing Lewis v. Cont'l Bank Corp., 494 U.S. 474, 481 (1990)).

[97] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000).

[98] U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980).

[99] Sibron v. New York, 392 U.S. 40, 53 (1968).

[100] *See* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 567 n.14 (2009) (noting that states have adopted mootness restrictions).

[101] For states that apply the capable of repetition yet evading review exception, see *State v. Rochon*, 75 So. 3d 876, 886 n.12 (La. 2011) (gathering state cases). For states applying the voluntary cessation exception, see, for example, *Barber v. Cornerstone Community Outreach, Inc.*, 42 So. 3d 65, 72 (Ala. 2009); *Wolf v. Commissioner of Public Welfare*, 327 N.E.2d 885, 889–90 (Mass. 1975); *Oklahoma Firefighters Pension & Retirement System v. City of Spencer*, 237 P.3d 125, 129 (Okla. 2009); *Allen v. Colautti*, 417 A.2d 1303, 1306 (Pa. 1980); and *All Cycle, Inc. v. Chittenden Solid Waste District*, 670 A.2d 800, 803 (Vt. 1995). For states applying the class action exception, see *Kagan v. Gibraltar Savings & Loan Ass'n*, 676 P.2d 1060, 1065 (Cal. 1984); *Wolf*, 327 N.E.2d at 890; and *Heckman v. Williamson County*, 369 S.W.3d 137, 163 (Tex. 2012). For states applying the collateral consequences doctrine, see Zachary C. Howenstine, *Conforming Doctrine to Practice: Making Room for Collateral Consequences in the Missouri Mootness Analysis*, 73 MO. L. REV. 859, 869 nn.67–69 (2008) (gathering cases).

[102] Yancy v. Shatzer, 97 P.3d 1161, 1171 (Or. 2004) ("The judicial power under the Oregon Constitution does not extend to moot cases that are 'capable of repetition, yet evading review.'").

[103] Searches on Westlaw reveal fewer than thirty state cases even discussing such an exception. WESTLAWNEXT, http://next.westlaw.com [http://perma.cc/N5DS-QX49] (search "moot! /20 class /3 action /10 except!").

[104] *See, e.g.*, Arnold v. Lebel, 941 A.2d 813, 819 (R.I. 2007) (limiting capable of repetition yet evading review exception to cases involving public importance); Howenstine, *supra* note 101, at 870–72 (noting a more narrow collateral order exception in Connecticut and Missouri).

questions of public importance.[105] Others include the power to hear a moot case if the issue occurs frequently[106] and an exception if the issue becomes moot only after argument.[107] Finally, many states have deemed mootness prudential,[108] and consequently modifiable by the legislature and waivable.

4. Nonadversarial Suits.—Federal courts cannot hear suits in which the parties are not adverse. For example, in *Moore v. Charlotte-Mecklenburg Board of Education*, the Supreme Court held that there was "no case or controversy" when both the plaintiff and the defendant sought the same outcome in the case.[109]

Most state courts that have addressed the issue also forbid nonadversarial suits[110] although a few courts maintain that their jurisdiction includes nonadversarial suits. For example, courts in Louisiana have held

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[105] *See, e.g.*, Underwood v. Ala. State Bd. of Educ., 39 So. 3d 120, 130 (Ala. 2009) ("There is a well established exception to the mootness doctrine allowing courts to reach the ultimate issue even if it has become moot where a broad public interest is involved." (internal quotation marks omitted)); Hamilton *ex rel.* Lethem v. Lethem, 193 P.3d 839, 843 (Haw. 2008) (recognizing "the public interest exception"); Operation Save Am. v. City of Jackson, 275 P.3d 438, 448 (Wyo. 2012) ("If a case presents an issue of great public importance or interest, we may rule on the issue even if the dispute is technically moot."); *accord* Gray v. Mitchell, 285 S.W.3d 222, 233 (Ark. 2008); State v. Rogers, 91 P.3d 1127, 1130–31 (Idaho 2004); *In re* Commitment of Schulpius, 707 N.W.2d 495, 500 (Wis. 2006).

[106] *Schulpius*, 707 N.W.2d at 500.

[107] *In re* Dunn, 181 S.W.3d 601, 604 (Mo. Ct. App. 2006).

[108] Hall, *supra* note 100, at 567 n.14 ("State courts . . . generally treat their mootness doctrines as prudential . . . ."). For states treating mootness as a mandatory doctrine, see *Chapman v. Gooden*, 974 So. 2d 972, 983–84 (Ala. 2007); *State v. T.D.*, 944 A.2d 288, 294 (Conn. 2008); *National Education Ass'n-Topeka, Inc. v. U.S.D. 501*, 608 P.2d 920, 923 (Kan. 1980); *Kentucky High School Athletics Ass'n v. Runyon*, 920 S.W.2d 525, 526 (Ky. 1996); *St. Charles Parish School Board v. GAF Corp.*, 512 So. 2d 1165, 1166 (La. 1987); *In re B.S. v. State*, 966 S.W.2d 343, 344 (Mo. Ct. App. 1998); *Progressive Direct Insurance Co. v. Stuivenga*, 276 P.3d 867, 872 (Mont. 2012); *Hearst Corp. v. Clyne*, 409 N.E.2d 876, 877 (N.Y. 1980); *National Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 88 (Tex. 1999); and *State v. Rooney*, 965 A.2d 481, 484 (Vt. 2008).

[109] 402 U.S. 47 (1971) (per curiam); *see also, e.g.*, Muskrat v. United States, 219 U.S. 346, 360–61 (1911) (dismissing as nonjusticiable a suit in which the United States had "no interest adverse to the claimants"). Although usually framed in terms of Article III, at least some modern authority describes the limitation as prudential. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 171 n.3 (1970) (Brennan, J., concurring) (noting the "policy against friendly or collusive suits" and distinguishing that policy from "justiciability" doctrines).

[110] *See* City of Birmingham v. Bouldin, 190 So. 2d 271, 274 (Ala. 1966); City & Cnty. of S.F. v. Boyd, 140 P.2d 666, 670 (Cal. 1943); Commonwealth United Corp. v. Rothberg, 143 S.E.2d 741, 742 (Ga. 1965); Cnty. of Kaua'i v. Baptiste, 165 P.3d 916, 931 (Haw. 2007); Schneider v. Howe, 133 P.3d 1232, 1237 (Idaho 2006); Neu v. Neu, 298 N.W. 318, 320 (Mich. 1941); Clinton Co-op. Farmers Elevator Ass'n v. Farmers Union Grain Terminal Ass'n, 26 N.W.2d 117, 121 (Minn. 1947); Meeker v. Straat, 38 Mo. App. 239, 243 (Mo. Ct. App. 1889); Haley v. Eureka Cnty. Bank, 26 P. 64, 66–67 (Nev. 1891).

that they may hear nonadversarial suits,[111] and Maryland courts have held that they may hear such suits so long as they present important issues.[112]

5. Political Questions.—Unlike the other doctrines of justiciability, which ask only whether a dispute has taken the appropriate form for judicial resolution, the political question doctrine limits the power of the courts to decide issues in particular subject areas. Although ill-defined,[113] the doctrine applies to essentially two situations.[114] First, it prohibits courts from resolving disputes that the Constitution commits to another branch of the federal government.[115] This limitation does not derive from Article III. Instead, it flows from other provisions of the Constitution that assign particular subjects to other branches,[116] and it applies equally to federal and state courts. No court—state or federal—can decide an issue that the Constitution commits to another institution.[117]

Second, a dispute presents a political question when there is "a lack of judicially discoverable and manageable standards for resolving it."[118] Although a doctrine of justiciability, this limitation depends on the content of substantive law: a dispute presents a political question if a court cannot identify a manageable standard to implement substantive law.[119] Almost all

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[111] Blaize v. Hayes, 15 So. 2d 217, 224 (La. 1943) ("[A] lawsuit is not objectionable to the courts merely because the parties to the suit believe that it should and desire that it shall be decided in a given way.").

[112] Columbia Park & Recreation Ass'n, Inc. v. Olander, 410 A.2d 592, 596 (Md. 1980) (stating that suits that involve "the validity of a statute or . . . regulation . . . , or an urgently needed determination affecting future governmental conduct, and in which the public's concern is both imperative and manifest, need not hereafter necessarily be dismissed as collusive." (quoting Reyes v. Prince George's Cnty., 380 A.2d 12, 24 (Md. 1977))).

[113] Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1031 (1985) (noting disagreement over scope and importance of doctrine).

[114] *Baker v. Carr*, 369 U.S. 186, 217 (1962), lists six considerations for finding a political question:

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

But the Court has indicated that only the first two considerations are important. *See* Vieth v. Jubelirer, 541 U.S. 267, 277–78 (2004) (stating that the other tests are of less importance).

[115] Nixon v. United States, 506 U.S. 224, 228 (1993).

[116] *See* Pushaw, *supra* note 24, at 1294 (citing Allen v. Wright, 468 U.S. 737, 750 (1984)).

[117] *See* Brown v. Owen, 206 P.3d 310, 317 (Wash. 2009) (recognizing that state courts cannot resolve issues "conferred upon Congress").

[118] *Nixon*, 506 U.S. at 228.

[119] *See Vieth*, 541 U.S. at 279 (dismissing political gerrymandering claim as nonjusticiable because of lack of judicially manageable standard); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1285–96 (2006) (identifying criteria to assess manageability of substantive law).

states that have addressed the issue have adopted this standard.[120] The one exception is Wyoming, which has stated that it is not bound by the judicially manageable standard, though it has not provided a different standard for determining political questions.[121]

6. Advisory Opinions.—Federal courts cannot issue advisory opinions. Although courts have used the term "advisory opinion" broadly—essentially as a catchall to refer to cases that are not justiciable because of defects in standing, ripeness, mootness, or adversity—the doctrine in its pure form prohibits a federal court from providing advice on legal questions posed by Congress or the President.[122] A corollary of that prohibition is that courts cannot issue a decision that is subject to review by another branch of government;[123] such a decision merely provides advice to the reviewing entity, which may decide the matter differently from the courts.

States agree that requests for advisory opinions are not justiciable.[124] Although eleven states authorize their supreme courts to issue advisory opinions to their legislatures or governors,[125] all but one have stated that advisory opinions are not the product of the exercise of the judicial power.[126] In these states, when courts render advisory opinions, they are not

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[120] *See, e.g.*, State v. Tongass Conservation Soc'y, 931 P.2d 1016, 1019 (Alaska 1997); Kromko v. Ariz. Bd. of Regents, 165 P.3d 168, 171 (Ariz. 2007) (en banc); Lobato v. State, 218 P.3d 358, 378 (Colo. 2009) (en banc); Nielsen v. State, 670 A.2d 1288, 1291–92 (Conn. 1996); Trs. of Office of Hawaiian Affairs v. Yamasaki, 737 P.2d 446, 458 (Haw. 1987); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 178–79 (Neb. 2007); *In re* Veto by Governor Chris Christie, 58 A.3d 735, 744 (N.J. Super. Ct. App. Div. 2012); Bay Ridge Cmty. Council v. Carey, 454 N.Y.S.2d 186, 191 (Sup. Ct. 1982); Thornburgh v. Lewis, 470 A.2d 952, 955 (Pa. 1983); Bredesen v. Tenn. Judicial Selection Comm., 214 S.W.3d 419, 435 (Tenn. 2007).

[121] State v. Campbell Cnty. Sch. Dist., 32 P.3d 325, 334–35 (Wyo. 2001).

[122] Lee, *supra* note 12, at 643–47.

[123] Hayburn's Case, 2 U.S. (2 Dall.) 409, 409 (1792).

[124] Jonathan D. Persky, Comment, *"Ghosts That Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1180–81 (2005) (cataloging states).

[125] Eight states do so by constitution, *see* COLO. CONST. art. VI, § 3; FLA. CONST. art. V, § 3(b)(10); ME. CONST. art. VI, § 3; MASS. CONST. pt. II, ch. III, art. II; MICH. CONST. art. III, § 8; N.H. CONST. pt. II, art. LXXIV; R.I. CONST. art. X, § 3; S.D. CONST. art. V, § 5, and three by statute, *see* ALA. CODE § 12-2-10 (1975); DEL. CODE ANN. tit. 10, § 141 (2014); OKLA. STAT. ANN. tit. 22, § 1003 (West 2003). The scope of the power varies from state to state. Rhode Island, for example, permits advisory opinions on "any question of law" at the request of the governor or legislature. R.I. CONST. art. X, § 3. By contrast, Alabama limits the power to addressing only "important constitutional questions," ALA. CODE § 12-2-10, and Oklahoma permits advisory opinions only on whether a death sentence was properly imposed, OKLA. STAT. ANN. tit. 22, § 1003.

[126] *See* Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. REV. MICH. ST. U. DET. C.L. 101, 107 n.28 (collecting authority from each state that issues advisory opinions, except Colorado, stating that those opinions are not the product of the judicial power).

adjudicating; rather, they are exercising a separate power, much as they do when they promulgate rules of civil procedure.[127] The one possible exception is Colorado. Its supreme court has said that its advisory opinions have the "force and effect of judicial precedents."[128] Still, that those opinions are binding does not mean that they must be the product of the judicial power (after all, rules of civil procedure are binding yet not the product of the judicial power), and the Colorado court has not addressed the issue.

C. Justiciability in Diversity

Although federal courts developed justiciability doctrines primarily in the context of determining whether to adjudicate disputes presenting federal questions, they have applied those federal justiciability requirements equally to all nine categories of cases and controversies, including suits brought under the diversity jurisdiction provisions.[129]

Under these diversity provisions, the jurisdiction of the court depends on the identity of the parties rather than the substance of the claim. As long as the parties are diverse, federal courts may hear and resolve cases involving only questions of state law. Indeed, the Supreme Court has stressed that when a federal court sits in diversity to hear state law claims, it operates simply as "another court of the State" in which it sits[130] and accordingly must apply the state's substantive law.[131]

Although federal courts must apply state substantive law in suits brought under diversity jurisdiction, they do not follow state justiciability doctrine. Instead, federal courts have applied federal justiciability rules.[132]

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[127] *See id.*

[128] *In re* Senate Resolution Relating to Senate Bill No. 65, 21 P. 478, 479 (Colo. 1889).

[129] *See* Pushaw, *supra* note 51, at 450–60. Those provisions extend the federal judicial power to suits between a state and citizens of another state; citizens of different states; and a state, or its citizens, and a foreign country or its citizens. U.S. CONST. art. III, § 2. Article III also extends jurisdiction to suits "between two or more States." *Id.* Although that provision sounds in diversity, those suits may raise unique concerns because they involve disputes between two sovereigns, as evidenced by the exclusive jurisdiction in the Supreme Court over those suits and the application of only federal law to resolve those disputes. *See generally* 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4045, at 151 (3d ed. 1998) (describing the procedures to account for the unique interests in suits between states). It therefore is not included within the argument in this Article.

[130] Guar. Trust Co. v. York, 326 U.S. 99, 108–09 (1945).

[131] King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 161 (1948).

[132] For cases applying the federal mootness doctrine, see *McNair v. Synapse Group Inc.*, 672 F.3d 213, 227 (3d Cir. 2012); *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002); *National Iranian Oil Co. v. Mapco International, Inc.*, 983 F.2d 485, 489–90 (3d Cir. 1992); and *Fairview Park Excavating Co. v. Al Monzo Construction Co.*, 560 F.2d 1122, 1126–27 (3d Cir. 1977). For cases applying the federal ripeness doctrine, see *Kennedy v. Ferguson*, 679 F.3d 998, 1002 (8th Cir. 2012); *Dealer Computer Services, Inc. v. Dub Herring Ford*, 623 F.3d 348, 355 (6th Cir. 2010); and *Camasta v. Omaha Steaks International, Inc.*, No. 12-cv-08285, 2013 WL 4495661, at *6 (N.D. Ill. Aug. 21,

The one exception is standing: many federal courts have concluded that a dispute must satisfy both the federal *and* state standing requirements.[133] But even then, when a plaintiff has standing under state law but not under federal law, federal courts cannot hear the suit.

Levy v. Dial Corp. provides an illustration.[134] There, Carol Levy, a resident of California, sued the Dial Corporation in California state court for violating California's Fair Packaging and Label Act. Although Dial's misconduct had not harmed Levy, Levy brought suit as a private attorney general, as authorized by California law.[135] Dial, which was incorporated in Delaware and has its principal place of business in Arizona, removed the case to federal court based on diversity jurisdiction.[136] The federal court concluded that removal was improper because Levy did not have standing under federal law.[137] Although acknowledging that Levy had standing to proceed in California's courts, the court explained that Levy did not have standing to proceed in federal court because she had not suffered a "distinct and palpable injury to [her]self."[138] The court accordingly remanded, forcing Dial to litigate in California state court and to face potential (or at least potentially perceived) state court bias.[139]

Levy is but one example of this phenomenon. There are many other reported examples of federal courts refusing to hear suits brought under diversity jurisdiction based on federal justiciability doctrines even though those suits would be permitted in state court.[140] Moreover, these reported

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2013). For cases applying the federal doctrine against collusive suits, see *In re Asbestos Litigation*, 90 F.3d 963, 988 (5th Cir. 1996), *vacated on other grounds*, *Flanagan v. Ahearn*, 521 U.S. 1114 (1997). Finally, for cases applying the federal advisory opinion doctrine, see *McCurry ex rel. Turner v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 597 (6th Cir. 2002).

[133] *See, e.g.*, Morell v. Star Taxi, 343 F.App'x 54, 57 (6th Cir. 2009) ("When jurisdiction is premised on diversity of citizenship, a plaintiff must have standing under both Article III and state law in order to maintain a cause of action."); Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp. 418 F.3d 168, 173 (2d Cir. 2005) ("Where . . . jurisdiction is predicated on diversity of citizenship, a plaintiff must have standing under both Article III of the Constitution and applicable state law . . . ."); Metro. Express Servs., Inc. v. Kansas City, 23 F.3d 1367, 1369 (8th Cir. 1994) (requiring standing under state law and Article III for diversity cases); *see also* 13B WRIGHT ET AL., *supra* note 129, § 3531.14, at 296–98 ("Federal courts have stated that state law of standing should be applied as to state rights in . . . diversity jurisdiction . . . . Of course state rules that recognize standing need not be honored if Article III requirements are not met.").

[134] No. C-97-0537 MHP, 1997 WL 588925 (N.D. Cal. Sept. 10, 1997).

[135] *See id.* at *1 (citing CAL. BUS. & PROF. CODE § 17204 (West 2008)); *see also* Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 943 (Cal. 2003) ("Standing to sue" under section 17204 extends to "any person acting for the interests of itself, its members or the general public").

[136] *Levy*, 1997 WL 588925, at *1.

[137] *Id.* at *4.

[138] *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

[139] *Id.* at *5.

[140] *See, e.g.*, Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 935–36 (8th Cir. 2012) (dismissing suit brought in diversity because plaintiff failed to demonstrate federal standing, but

decisions almost certainly do not capture the full impact of applying federal justiciability doctrines in diversity cases.[141] There are doubtless many unreported federal decisions concluding that a dispute that could be brought in state court is not justiciable under Article III.[142] Following federal justiciability rules in diversity cases also likely results in fewer cases being pursued in federal court by litigants who worry that they fail the federal justiciability requirements.[143]

II. FOLLOWING STATE JUSTICIABILITY DOCTRINES IN DIVERSITY

Federal courts should not apply federal justiciability requirements to state law cases brought in federal court under diversity jurisdiction. Instead, federal courts should follow the state justiciability requirements of the state in which the federal court sits.[144] Doing so is consistent with the text of

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recognizing standing in state court); Lee v. Am. Nat'l Ins. Co., 260 F.3d 997, 1000–02 (9th Cir. 2001) (dismissing claim brought under diversity because plaintiff failed to demonstrate federal standing, but recognizing standing in state court); Coyne v. Am. Tobacco Co., 183 F.3d 488, 495 (6th Cir. 1999) (dismissing Ohio taxpayer standing against out-of-stater for lack of standing, but recognizing standing in Ohio court); Jenkins v. Apple, Inc., No. 11-CV-01828-LHK, 2011 WL 2619094, at *2 (N.D. Cal. July 1, 2011) (remanding to state court on the ground that plaintiffs lacked federal standing); *see also* Kennedy v. Ferguson, 679 F.3d 998, 1002 (8th Cir. 2012) (dismissing as unripe under federal doctrines, without evaluating case under state ripeness doctrine); McNair v. Synapse Grp. Inc., 672 F.3d 213, 227 (3d Cir. 2012) (dismissing as moot under federal doctrines, without evaluating case under state mootness doctrine); Dealer Computer Servs., Inc. v. Dub Herring Ford, 623 F.3d 348, 355 (6th Cir. 2010) (dismissing as unripe under federal doctrines, without evaluating case under state ripeness doctrine); Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010) (refusing to certify class because some members of putative class lacked federal standing, but recognizing standing in state court); Friedman's, Inc. v. Dunlap, 290 F.3d 191, 197 (4th Cir. 2002) (dismissing as moot under federal doctrines, without evaluating case under state mootness doctrine).

[141] One might think that abandoning federal standing would have little consequence because of the $75,000 amount in controversy requirement of 28 U.S.C. § 1332 (2012). If a plaintiff lacks a sufficient stake to satisfy federal standing, he also must not satisfy the amount in controversy. Not so. Standing problems usually arise when plaintiffs seek an injunction that is costly for the defendant, and many courts have held that the defendant's cost is an appropriate measure for the amount in controversy. *See* 14A WRIGHT ET AL., *supra* note 129, § 3703. In any event, the amount-in-controversy requirement does not affect other justiciability doctrines.

[142] *See* Theodore W. Ruger, *Chief Justice Rehnquist's Appointments to the FISA Court: An Empirical Perspective*, 101 NW. U. L. REV. 239, 247 (2007) ("[O]nly a small fraction of district judges' rulings . . . are available electronically."). Although circuit decisions are more widely available, circuit courts do not have jurisdiction to hear appeals from remands for lack of jurisdiction. § 1447(d). Removed cases likely constitute a substantial portion of cases in which the federal courts determine that state but not federal justiciability requirements have been satisfied because removal reflects the defendant's effort to avoid state court.

[143] *See* Hessick, *supra* note 74, at 90 (explaining that rigorous standing rules inevitably reduce the number of suits raising standing issues because most plaintiffs who lack standing will not spend resources to bring suit that will be dismissed).

[144] Applying the law of the state in which the federal courts sits is not the only possible test. What is important is that the federal court acts as an alternative state court. One might be able to devise a different test—a test that depends on something other than the location of the federal court—to

Article III and would better achieve diversity jurisdiction's goal of providing an alternative federal forum for the resolution of state law claims.

A. History and Text of the Diversity Provisions

The history and text of the diversity provisions in Article III support the notion that federal courts sitting in diversity should be able to hear any state law case that can be brought in state court.[145] To start, the diversity provisions of Article III do not exclude federal jurisdiction over particular categories of claims depending on what is at stake or the rights involved. Nor do they list justiciability requirements. Rather, they extend the federal judicial power to any controversy in which the parties are diverse.[146] So long as the parties are diverse, the text of Article III allows a federal forum for any controversy that could proceed in state court.

The term controversy itself also does not provide a basis for following federal instead of state justiciability requirements. At the time of ratification, "controversies" were understood to comprise disputes amenable to judicial resolution.[147] But until the nineteenth century, state and federal courts shared a common view about what constituted a dispute subject to judicial resolution.[148] So long as a dispute was civil, the term

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determine which state law applies. This Article proposes following the law of the state in which the federal court sits because it is consistent with *Erie*, *see* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (following substantive law of the state in which federal court sits), and is easily administered. Other proposals may produce seemingly strange results. For example, say Congress redesigned the district court system so that diversity claims could be brought only in district court in Maryland. In this example, Maryland's justiciability rules would apply. Although that result may seem odd, it is no stranger than what already occurs for standing because federal courts already require satisfaction of state (as well as federal) standing rules in diversity cases. *See supra* note 133. Nor is the quirk unique to justiciability rules. Federal courts would likewise apply Maryland's *substantive* law to all claims brought in diversity. *See Klaxon*, 313 U.S. at 496.

[145] One might argue that Article III should be read to allow only those actions that could be brought at the time of ratification. But limiting jurisdiction in that way is unwarranted because the scope of jurisdiction at the Founding was generally flexible. *See, e.g.*, Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 184 (1992) (stating that standing depended on the availability of a cause of action). Moreover, reading Article III to limit jurisdiction to what existed at the founding would undermine diversity's goal of providing an alternative forum to state courts because of the ability of state law to change.

[146] *See* U.S. CONST. art. III, § 2.

[147] *See* 2 FARRAND, *supra* note 23, at 430 (James Madison) (explaining that it was "generally supposed" that "the jurisdiction given" in Article III "was constructively limited to cases of a Judiciary nature").

[148] Fletcher, *supra* note 13, at 269 ("Until the end of the nineteenth century, both state and federal courts appear to have had a common understanding of the limits of judicial power in litigated cases."). That view was that the "judicial power" was the power "to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and . . . apply the remedy." 3 WILLIAM BLACKSTONE, COMMENTARIES *25.

controversy had no bearing on the distribution of power between the federal and state judicial systems.[149] To be sure, there is evidence that controversies did not include criminal cases,[150] but nothing suggests that the Framers used the term "controversies" to prevent the federal courts from hearing categories of civil suits that could be brought in state court.[151]

The Judiciary Act of 1789 also suggests that the term "controversy" was not meant to impose separate federal justiciability requirements. That Act conferred jurisdiction over "all suits of a civil nature" with amounts in controversy exceeding $500 between a citizen of one state and a citizen of another or an alien.[152] The use of the word "suits" instead of "controversies" suggests that the members of the First Congress, many of whom participated in the drafting of the Constitution,[153] did not understand

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[149] Fletcher, *supra* note 13, at 266 ("[T]he words 'case' and 'controversy' in article III were terms of art that were not intended to have significance for the relation between the federal and state judicial systems.").

[150] 1 WILLIAM BLACKSTONE, COMMENTARIES app. note E at 420–21 (St. George Tucker, ed., Philadelphia, William Young Birch & Abraham Small 1803) (explaining that while the term "case" referred to all disputes, "whether civil or criminal," the term "controversy" referred only to disputes "of a civil nature" and therefore excluded criminal cases). Modern commentators generally agree with this position. *See* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 607 n.207 (1994) (collecting scholarly articles agreeing that "controversies," unlike "cases," excludes criminal cases). Professors Amar and Pushaw have offered different theories. Amar has argued that the reason for the different terms "cases" and "controversies" was to highlight the distinction between disputes over which Congress did have the power to limit federal jurisdiction ("controversies") and disputes over which it did not ("cases"). *See* Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1656–57 (1990). Professor Pushaw has argued that "controversy" referred to a dispute requiring resolution by a neutral judge. Pushaw, *supra* note 51, at 450. None of these theories suggests that the federal courts have less power than state courts in adjudicating civil cases in which the parties are diverse.

[151] Further supporting this understanding is that, unlike the "arising under" provision, the diversity provisions do not limit the judicial power to controversies "in law or equity." They allow any type of suit—be it in law, equity, domestic relations, probate, or something else—to be heard in federal court. *See* Spindel v. Spindel, 283 F. Supp. 797, 801 (E.D.N.Y. 1968). Against this, one might argue that Article III confers jurisdiction over "all cases" but omits the word "all" from controversies—a difference that suggests a greater ability to preclude controversies from federal court. That may be so, but that suggests only that *Congress* may limit jurisdiction, not that the Constitution does so. *See* Amar, *supra* note 150, at 1657.

[152] Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. The text of the Act actually conferred jurisdiction over all suits to which an alien was a party, *id.*, but the Supreme Court interpreted the provision to apply only when an alien was a party against a state citizen, *see* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

[153] Bowsher v. Synar, 478 U.S. 714, 723–24 (1986) ("This 'Decision of 1789' provides 'contemporaneous and weighty' evidence of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983))).

the term "controversy" to carry a special meaning prohibiting the federal courts from hearing some suits that could be brought in state court.[154]

Further support for this conclusion can be found in the federal and state courts' shared common understandings about when a dispute was not amenable to judicial resolution. For example, although three state courts—Massachusetts,[155] Pennsylvania,[156] and New Hampshire[157]—had the power to issue advisory opinions in response to questions posed by other government officials near the time of the Founding, none categorized those advisory opinions as the product of the exercise of the judicial power.[158] Instead, they perceived their power to render advisory opinions only as a power to give advice.[159] As the Massachusetts Supreme Judicial Court later explained, "In giving such opinions, the Justices do not act as a court, but as the constitutional advisers."[160] Early federal judges shared this understanding. For instance, in 1793 the Justices refused to answer President Washington's questions about France's rights under various treaties, explaining that providing answers would require them to act "extrajudicially."[161]

The debates surrounding the adoption of the diversity provisions further suggest that those provisions were understood to extend federal jurisdiction over all types of state civil actions when the parties were diverse.[162] For example, John Marshall, a proponent of the diversity provisions, explained that under the diversity provisions, federal

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[154] Further supporting this conclusion is that the Act also conferred original jurisdiction in the Supreme Court over "controversies" between a state and citizens of another state. *See* § 13, 1 Stat. at 80–81. Nothing in the Act suggests that, by using the term controversy instead of suit, Congress meant to confer different jurisdiction over diversity disputes depending on whether a state was a party.

[155] *See* MASS. CONST. pt. II, ch. III, art. II (1780).

[156] The Report of the Judges of the Supreme Court of the Commonwealth of Pennsylvania, 3 Binn. app. at 595 (1808) [hereinafter Report of the Judges].

[157] N.H. CONST. pt. II, art. 74 (1784).

[158] Fletcher, *supra* note 13, at 268–69.

[159] *Id.*

[160] Opinion of the Justices to the Senate and House of Representatives, 126 Mass. 557, 566 (1878); *see also* Report of the Judges, 3 Binn. app. at 595, n* (describing an advisory opinion as "not perhaps . . . as authoritative as judicial precedent").

[161] Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782–1793, at 488 (Henry P. Johnston ed., New York, G. P. Putnam's Sons 1891). English courts also shared this view. *See* 1 JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW 175 (1895).

[162] Although the diversity provisions received little attention at the Constitutional Convention, they saw substantial debate in the state ratifying conventions. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 486–87 (1928). However, the debate did not extend to alienage jurisdiction. *See* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 10 (1996) ("Debate over the merits of alienage jurisdiction was not highly controversial at either the Constitutional Convention or the various state ratification conventions.").

jurisdiction would be "concurrent" over the "causes [that state courts] now decide."[163] Opponents of the diversity provisions similarly understood the diversity provisions to confer broad jurisdiction. Illustrative is the argument of George Mason, who claimed that, by the grant of diversity jurisdiction, the federal courts would "absorb and destroy the judiciaries of the several States."[164] Mason's fear rested on the understanding that all state claims could potentially be encompassed in diversity.[165] Other opponents indicated a similar belief that diversity jurisdiction extended to all suits that could be brought in state courts when the parties were diverse.[166] In response, supporters did not claim that diversity jurisdiction extended to only some disputes. Rather, they pointed out that state courts would have exclusive jurisdiction over state matters when the parties were not diverse[167] and would continue to have concurrent jurisdiction over cases when the parties were diverse.[168]

B. Promoting the Purpose for Diversity Jurisdiction

Applying state justiciability doctrines to state law cases brought under diversity jurisdiction better achieves the goal of diversity jurisdiction. Unlike with the grants of federal jurisdiction over particular subject areas, the motivation behind diversity jurisdiction was not to protect federal interests articulated in the Constitution or federal law.[169] Instead, the

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[163] John Marshall, Virginia Ratifying Convention (June 20, 1788), *reprinted in* IV THE FOUNDERS' CONSTITUTION 247 (Philip B. Kurland & Ralph Lerner eds., 1987).

[164] *See* 2 FARRAND, *supra* note 23, at 638 (George Mason).

[165] Fear that the federal courts would displace the state courts was not the only objection to diversity jurisdiction. Others included that requiring litigation in federal court would be expensive and inconvenient and that diversity jurisdiction could result in expansive federal law displacing state law. *See* Friendly, *supra* note 162, at 490–91.

[166] PENNSYLVANIA PACKET AND DAILY ADVERTISER (Dec. 18, 1787), *reprinted in* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 469 (John Bach McMaster & Frederick D. Stone, eds., Philadelphia, Historical Soc'y of Pa. 1888) ("The judicial powers . . . may be extended to every case, and thus absorb the State judiciaries . . . ."); *see also* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 542–43 (Jonathan Elliot ed., 2d ed. 1901) [hereinafter ELLIOT] (reporting Patrick Henry's claim that the grant of diversity jurisdiction would result in the "destruction of the state judiciaries").

[167] James Iredell, Answers to Mr. Mason's Objections to the New Constitution (1788), *reprinted in* IV FOUNDERS' CONSTITUTION, *supra* note 163, at 233 (responding that the state judiciaries will be "left uncontrolled as to the affairs of the *State* only"); Letter from James Madison to George Washington (Oct. 18, 1787), *reprinted in* IV FOUNDERS' CONSTITUTION at 228 (stating Mason's objections left him "at some loss" because the "great mass of suits in every State lie between Citizen & Citizen, and relate to matters not of federal cognizance").

[168] Marshall, *supra* note 163, at 247 ("State courts will not lose jurisdiction of the causes they now decide. They have a concurrence of jurisdiction with the Federal Courts . . . .").

[169] Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 650 (1949) (Frankfurter, J., dissenting) ("Power to adjudicate between citizens of different states, merely because they are citizens of different states, has no relation to any substantive rights created by Congress.").

primary goal of diversity jurisdiction was to prevent bias, or even the perception of bias, that state courts might harbor against out-of-state litigants.[170] Diversity jurisdiction empowered federal courts to serve as neutral fora for the resolution of claims involving those litigants.[171] That neutrality would result in more just decisions; placate, to some degree, dissatisfied litigants who might otherwise resort to extra-legal measures were they to lose at the hands of a biased state court;[172] and facilitate business among the several states.[173]

Consider a suit between State *A* and a citizen of State *B*. If a judge from State *A* were to hear that claim, the judge might be inclined to rule in favor of State *A* because the ruling would benefit the judge's home state.[174] Moreover, judges who rule in favor of their home states might personally benefit from making such decisions because politicians in the judges' home states may reward judges for doing so.[175] Indeed, judges might imperil their careers by ruling against their states, especially in those states that do not guarantee life tenure or salary for state judges.[176] Likewise, if State *A*

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[170] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816) (justifying diversity jurisdiction on the ground that "state attachments . . . might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice"); THE FEDERALIST NO. 80, *supra* note 2, at 534 (Alexander Hamilton) (describing diversity jurisdiction as necessary because the "state tribunals cannot be supposed to be impartial and unbiased" against out-of-staters); 3 ELLIOT, *supra* note 166, at 391 (James Madison) (justifying diversity jurisdiction on the ground that "[i]t may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them").

[171] THE FEDERALIST NO. 80, *supra* note 2, at 537–38 (Alexander Hamilton) (stating that, to protect legal rights in cases in diversity, "[I]t is necessary that [those rights] should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded"); *accord* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1681, at 557–60 (Boston, Hilliard, Gray & Co. 1833).

[172] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 467–68 (1793) (opinion of Cushing, J.) (stating that an impartial federal court could prevent appeal to "sword" and "bloodshed"); James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 17–18 (1964) (stating that before the adoption of the Constitution, states occasionally resorted to hostilities to resolve disputes).

[173] FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 9–10 (1928).

[174] THE FEDERALIST NO. 80, *supra* note 2, at 538 (Alexander Hamilton) (justifying diversity jurisdiction in part on the ground that "it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government"). Although a judge could implement this bias through interpretations of law adverse to the out-of-state litigant, the precedential effect of that interpretation could have consequences for in-state litigants in the future. More likely, a judge would favor his state by making factual findings adverse to the out-of-state litigant.

[175] 3 STORY, *supra* note 171, § 1685, at 562–64 (relating that state judges might favor their states for professional reasons); *see also* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 118 (2012) (noting that judges continue to be elected in about half the states).

[176] Of course, this concern could apply in a case between a state and a citizen of that same state. A state judge might seek to bolster his career by unjustifiably ruling in favor of the state against the

brought suit against a citizen of State *B* in a court of State *B*, the judge hearing that case might be inclined to rule against State *A* for similar reasons.[177]

These considerations would have less effect on a federal judge. A federal judge would likely feel less allegiance to a particular state because that judge is a federal employee rather than a state employee. Additionally, federal judges are likely to feel less pressure to rule for the state because of Article III's salary and tenure guarantees.[178] Providing a federal forum could also combat against bias held by state jurors against out-of-staters.[179] Unlike with criminal juries,[180] the Constitution does not require that civil juries be pulled from the state in which the tort was committed. Moreover, federal judges could remove biased jurors and instruct the jurors in a way that avoids bias[181]—actions unlikely to be taken by a biased state judge.

Similar concerns underlay the grant of jurisdiction over suits between citizens of a state and foreigners. State judges and juries might favor parochial interests over foreign ones,[182] which could not only lead to unjust results but also potentially jeopardize foreign relations and trade[183] and possibly lead the nation into war.[184] Providing a federal forum would

citizen. But in-state litigants have recourse to the state political process—by petitioning the legislature to remedy an unfavorable decision or even to punish the judge. By contrast, state judges have little to fear from out-of-state litigants because those litigants cannot participate in the state political process.

[177] *Chisholm*, 2 U.S. at 475–76 (opinion of Jay, C.J.) ("[If] a State . . . has demands against some citizens of another State, it is better that she should prosecute their demands in a national Court, than in a Court of the State to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of partiality, being thereby obviated.").

[178] U.S. CONST. art. III, § 1.

[179] *See* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 997 (2007).

[180] U.S. CONST. art. III, § 2 ("The trial of all crimes . . . shall be by jury; and . . . held in the State where the said crimes shall have been committed . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy . . . [a] trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

[181] *Cf.* Jones, *supra* note 179, at 1021 & n.98.

[182] *See* Johnson, *supra* note 162, at 14–15 (recounting debates about the bias of state courts against aliens).

[183] JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94–95 (2002) ("This penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution.").

[184] *See* THE FEDERALIST NO. 80, *supra* note 2, at 535 (Alexander Hamilton) ("As the denial or perversion of justice by the sentences of courts is with reason classed among the just causes of war, it will follow, that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.").

reduce these risks because it would likely be more neutral and bring a national perspective to disputes implicating foreign relations.[185]

Providing a neutral forum for resolving state law claims was also the reason behind extending federal jurisdiction to controversies between citizens of different states, though there is disagreement over the precise type of bias that state courts would harbor. The traditional theory is that state courts would discriminate, or at least be perceived to discriminate, against out-of-state litigants in favor of in-state litigants for the same reason that those judges might discriminate against out-of-staters in suits against the state itself—a sense of allegiance to the state and an effort to advance their careers.[186] A different theory, most famously articulated by Henry Friendly, argues that the inclusion of diversity jurisdiction was to protect, not out-of-state litigants, but creditors.[187] According to this view, diversity jurisdiction was a response to the economic crisis of the late 1780s that led the legislatures and courts of poorer states to favor in-state debtors over creditors, who generally were from out of state.[188] The belief was that the federal courts would be more inclined to protect creditors[189]—a belief that generally proved to be true in practice.[190] In any event, despite the disagreement over the precise nature of the feared bias, all agree that the purpose behind federal diversity jurisdiction was to combat bias by providing an alternative federal forum for claims where the parties were diverse.

Protecting against potential state court bias in disputes between diverse parties depends on the ability to extend federal jurisdiction to all cases that could be brought in state court and in which the parties are diverse.[191] Overlaying Article III justiciability doctrines in diversity cases

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[185] *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1622–23 (2008) ("These provisions provided an unbiased forum with a national perspective to resolve disputes that could affect the United States' relationship with foreign nations.").

[186] 3 STORY, *supra* note 171, § 1690, at 567 (stating that state judges would be naturally inclined to favor interests of citizens from their state over citizens from other states); *id.* § 1685, at 562–64 (stating that state judges have professional interest in ruling for citizens of their state).

[187] Friendly, *supra* note 162, at 498–99. According to Friendly, there was virtually no evidence of state bias against out-of-state litigants or that diversity was conferred to combat such bias. *See id.* at 493. Other commentators, however, have stressed that it was the potential for bias, as opposed to actual bias, against out-of-staters that led to the grant of diversity. *See* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 24 (1948).

[188] Jones, *supra* note 179, at 1012–13 (claiming that state legislatures set aside verdicts favorable to creditors, discharged debts, and undertook other actions adverse to creditors).

[189] Friendly, *supra* note 162, at 496–97.

[190] Jones, *supra* note 179, at 1015 ("The empirical evidence suggests that the federal courts were indeed more conducive to creditor interests than the state courts, and that British creditors frequently utilized the federal courts during the early decades of the nation's existence.").

[191] Some cases in which the parties are diverse may also fall within another jurisdictional provision of Article III. For example, a case in which the parties are diverse may also "aris[e] under" federal law.

undermines that goal.[192] It may prevent federal courts from hearing those claims because of the difference between federal and state justiciability doctrines. Diverse parties therefore may be forced into state court to litigate their claims, despite the threat of bias against the out-of-state party.[193]

Coyne v. American Tobacco Co. provides an example.[194] There, Ohio taxpayers filed a state law restitution claim in Ohio state court against out-of-state tobacco companies, demanding that the companies return to Ohio money that the state had spent on treating victims of disease caused by tobacco use. The tobacco companies removed to federal court based on diversity of citizenship.[195] It seems highly likely that the decision to remove was motivated by fear that an Ohio state court judge would be predisposed to supporting efforts to help Ohio and its victims of illness from smoking.[196] The Sixth Circuit concluded that removal was improper.[197] It reasoned that, although Ohio courts recognize standing in state court based on taxpayer status, it is not a basis for standing in federal court.[198] The tobacco companies accordingly were compelled to litigate in Ohio state court, just as Dial was forced to litigate in California state court in the suit brought by California citizens.[199]

U.S. CONST. art. III, § 2. The reason for those other bases for jurisdiction was not to prevent possible discrimination against certain litigants, but to protect federal interests and secure uniformity in federal law. THE FEDERALIST NO. 80, *supra* note 2, at 448 (Alexander Hamilton). Still, when another jurisdictional basis applies, the fear of bias against out-of-staters provides an independent reason for federal jurisdiction.

[192] To be sure, the Framers recognized that in some cases the threat of bias may be so small as not to warrant the cost of conferring federal jurisdiction by empowering Congress to confer less than the entirety of diversity jurisdiction authorized by Article III. Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies."); *see also* The "Francis Wright," 105 U.S. 381, 386 (1882) (stating that Congress may likewise limit the Supreme Court's appellate jurisdiction). But to fulfill the purpose of the diversity provisions, Congress must have the ability to extend federal jurisdiction to all cases in which the parties are diverse, if it deems the threat of bias too great.

[193] A state could conceivably seek to bias out-of-staters by limiting certain causes of action to taxpayers or concerned citizens to force out-of-state suits into state court. But that arrangement is unlikely because, to avoid constitutional problems, those limitations would apply to in-state litigants as well, and would likely be unpopular. Moreover, limiting causes of action in this way would not prevent federal actions in a predictable way because whether federal justiciability is satisfied depends not on the cause of action invoked, but instead on whether there is actual or imminent injury and adversity.

[194] 183 F.3d 488 (6th Cir. 1999).

[195] *Id.* at 491.

[196] Further evidence of the belief that the Ohio courts would favor the taxpayers is that the taxpayers vigorously sought remand to state court. *Id.* at 491–92.

[197] *Id.* at 494.

[198] *Id.* at 495.

[199] *See supra* notes 140–43 and accompanying text.

C. Parity Between Federal and State Courts

Applying state justiciability doctrines would also promote parity between the state and federal courts. As the Supreme Court explained in the context of *Erie Railroad v. Tompkins*,[200] one of the assumptions underlying diversity jurisdiction is that the enforceability of state rights should not depend on whether a suit is brought in state or federal court.[201] Because federal courts sitting in diversity are acting as alternative state courts, parties should have the same rights whether their cases proceed in state or federal court.[202] To provide different rights in state and federal court would lead to unacceptably different results depending on where the suit is filed and would encourage forum shopping.[203]

Of course, *Erie* requires only that federal courts apply state substantive law.[204] Although scholars have challenged the idea that justiciability is separate from substance,[205] federal courts have consistently treated justiciability as separate from substantive law, based on the theory that it does not set forth rights but instead defines whether a court may decide a dispute.[206] But the same concerns motivating *Erie* extend to justiciability.[207] *Erie*'s premise is that the scope of state rights cannot vary depending on whether suit is brought in state or federal court because the same state substantive law empowers both the federal and state court to provide

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[200] 304 U.S. 64 (1938).

[201] Guar. Trust Co. v. York, 326 U.S. 99, 108–09 (1945). ("[S]ince a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot . . . substantially affect the enforcement of the right as given by the State.").

[202] *Id.*

[203] Hanna v. Plumer, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court."); Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865, 1893–1900 (2013) (rules that lead to forum shopping or inequitable administration of justice are inconsistent with the goal of providing an unbiased federal forum).

[204] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law . . . .").

[205] *See, e.g.*, Fletcher, *supra* note 12, at 234 (arguing that standing should be considered a merits determination); Lee, *supra* note 12, at 669 (making a similar argument for mootness).

[206] *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2362 (2011) (distinguishing the merits from justiciability).

[207] This is not to say that federal courts *must* have the same jurisdiction as state courts. Congress may confer less than the full scope of diversity jurisdiction on federal courts. The point is that federal courts should be available, if Congress deems it wise, to operate as alternative state courts for enforcing state rights to the same extent as state courts.

relief.[208] Federal courts need not follow state procedures, but they must enforce the same rights.

Although justiciability rules may seem procedural in the sense that they regulate courts instead of individuals, categorizing them solely as procedural is wrong. Justiciability rules do not simply prescribe "the manner and the means" by which rights are enforced.[209] Instead, they define the "rules of decision" for adjudicating rights by imposing various requirements on litigants, such as that they have a sufficient stake in the dispute and that their interests be adverse.[210] Those requirements do not simply determine the means by which a court decides a dispute; rather, they relate to conduct outside the courtroom by defining when an individual has a cognizable grievance for which he can obtain judicial redress.

Thus, by following federal instead of state justiciability doctrines in diversity cases, federal courts functionally enforce different rights than state courts.[211] This difference in the scope of rights may result in different outcomes in state and federal court and lead litigants to forum shop to avoid particular outcomes—the two evils that the *Erie* doctrine seeks to prevent.[212] Indeed, the understanding that justiciability should be treated similarly to substantive law for *Erie* purposes underlies the practice of the lower federal courts to require plaintiffs to satisfy state (as well as federal) standing rules for state law claims brought under diversity jurisdiction.[213]

Even so, one might argue that state law should have no bearing on justiciability in federal court, because federal justiciability turns on the meaning of cases and controversies in Article III.[214] But the fact that federal

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[208] *Hanna*, 380 U.S. at 467 (stating the goal of *Erie* was to avoid having "rights . . . vary according to whether enforcement was sought in the state or in the federal court" (quoting Erie R.R. v. Tompkins, 304 U.S. 64, 74–75 (1938))).

[209] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 406 (2010) (plurality opinion) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)) (noting that procedural rules can only govern "the manner and the means" by which rights are enforced).

[210] *Id.* (quoting *Miss. Publ'g Corp.*, 326 U.S. at 446) (stating that procedural rules may not alter the "rules of decision" for adjudicating rights).

[211] *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 650 (2006) (arguing that limitations on jurisdiction affect enforceability of rights); *see also* Angel v. Bullington, 330 U.S. 183, 209 (1947) (Rutledge, J., dissenting) ("[A] right without a remedy is no right at all for purposes of enforcement by a diversity suit in a federal court sitting in the state." (citing Guar. Trust Co. v. York, 326 U.S. 99, 108–09 (1945))).

[212] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428 (1996) (citing *Hanna*, 380 U.S. at 468). In this sense, justiciability is not procedural. Unlike procedural rules, justiciability does not simply regulate "the manner and the means" by which rights are enforced; it defines the "rules of decision" for adjudicating rights by requiring litigants to have adequate interests. *Shady Grove*, 559 U.S. at 407.

[213] *See supra* note 133.

[214] *Cf. Gasperini*, 518 U.S. at 427 (explaining that under the *Erie* doctrine, state substantive law does not apply if the matter is governed by the Constitution).

justiciability is a question of constitutional law does not preclude following state justiciability rules in diversity cases. The Constitution often incorporates aspects of state law. For example, state law often determines what constitutes "property" under the Due Process and Takings Clauses,[215] and it is central to determining whether punishment is cruel and unusual under the Eighth Amendment.[216] The rationale for following state law in those situations is that doing so is necessary to implement those constitutional provisions sensibly.[217] That same rationale applies to the justiciability of claims brought under diversity. The motivation for diversity jurisdiction was to provide an alternative federal forum for state law disputes between diverse parties, and following state justiciability rules ensures that federal courts can hear any civil suit meeting that description.[218] In that light, state justiciability doctrines should inform the meaning of "controversies" in diversity cases. This is not to say that federal justiciability should be a question of state law—it should not be. Whether disputes in federal court constitute "controversies" is a constitutional question. Rather, the point is that state law should give content to the meaning of the term "controversies."

The argument for following state justiciability doctrines is all the stronger when viewing the rules of federal justiciability as judicially created rather than compelled by the text of Article III.[219] When courts create doctrine implementing vague constitutional text, they should seek to accomplish the goals underlying the text being implemented so as to avoid accusations of unbridled judicial lawmaking.[220] Following state justiciability doctrines in diversity cases best accomplishes the goal of allowing federal courts to function as alternative state courts.[221]

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[215] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("[Property interests] are created . . . by existing rules or understandings that stem from an independent source such as state law . . . ."); *see also* Phillips v. Wash. Legal Found., 524 U.S. 156, 163–64 (1998) (applying same analysis to takings).

[216] Graham v. Florida, 560 U.S. 48, 62–63 (2010) (looking to state law to determine the national consensus).

[217] *See id.*; *Roth*, 408 U.S. at 577.

[218] *See supra* Part II.B.

[219] *See supra* note 24 and accompanying text; *cf.* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) (stating that, when creating federal common law, federal courts should "incorporat[e] [state law] as the federal rule of decision" (alterations in original) (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979))).

[220] *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 56 (1997) (describing doctrine as effort to implement constitutional values).

[221] Applying state justiciability doctrines would also have the potential to improve justiciability doctrine overall. The process of applying a variety of different state justiciability doctrines would provide federal judges with insights on ways to improve federal justiciability doctrines, an area of law known for its complexity and incoherence. *See* Lawrence Friedman, *The Constitutional Value of*

Following state justiciability rules would undermine uniformity in justiciability rules in federal court because different states have different justiciability rules. But there is no federal interest in establishing a uniform rule of justiciability for state law suits brought under diversity jurisdiction. To the contrary, the diversity provisions implement the federal interest in protecting out-of-state interests from the real or perceived biases of state courts, and following state justiciability doctrines better achieves that goal.[222] Although doing so may lead to differences among federal courts in different states,[223] it creates greater uniformity between federal courts and the courts of the states in which they sit—a preferable outcome given that federal courts function as state courts under diversity jurisdiction.[224]

Nor would following state justiciability doctrines imperil some other important federal interest. The current federal justiciability doctrines are not an essential characteristic of the federal judiciary.[225] They are neither dictated by the text of Article III nor have they always been understood to be critical to defining federal jurisdiction. To the contrary, with the possible exceptions of the political question doctrine and the advisory opinion doctrine,[226] these doctrines are relatively recent judicial creations, and they continue to evolve even today.[227] Moreover, unlike cases presenting federal or constitutional questions or suits involving the United States, suits involving only issues of state law brought under diversity jurisdiction do not inherently implicate national interests. They involve questions of

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Dialogue and the New Judicial Federalism, 28 HASTINGS CONST. L.Q. 93, 123 (2000) (noting the value of dialogue between state and federal courts in developing individual rights); 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, 1773 (1992) (discussing the value of "cross-pollination" between state and federal courts in developing doctrine). Likewise, federal judges would have opportunities to suggest ways to improve state justiciability doctrines in the course of applying those doctrines.

[222] *See supra* Parts II.A–B.

[223] Federal justiciability determinations already vary because of state law. For example, federal courts require satisfaction of both state and federal standing requirements. *See supra* note 133. Further, state law may affect the existence of *federal* standing. To establish standing, a plaintiff must show that his alleged injury in fact is judicially cognizable—that is, the injury must involve the "violation of a legally protected right." Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 772–73 (2000). State law may provide the legal right that renders an injury cognizable. *See, e.g.*, Booker-El v. Superintendent, Ind. State Prison, 668 F.3d 896, 899–900 (7th Cir. 2012) (explaining that state law creates cognizable interests for standing).

[224] *Cf.* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941) (explaining that although *Erie* leads to lack of uniformity in substantive law, that "lack of uniformity . . . is attributable to our federal system").

[225] *Cf.* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537–38 (1958) (holding that right to a jury is an essential characteristic of federal courts under the Seventh Amendment and therefore that federal courts must empanel juries for state law claims even when state law permits a bench trial).

[226] *See supra* notes 33–34 and accompanying text.

[227] *See supra* note 24 and accompanying text.

importance only to the state.[228] One might argue that federal courts should follow state justiciability rules but only as long as they do not conflict with the case or controversy requirement of Article III. But that simply begs the question, because justiciability provides the basis for defining what constitutes a case or controversy in the first place. Article III does not define those terms, and courts must develop these doctrines through reference to another source.

To be sure, it may seem that the rationale behind some state justiciability doctrines does not extend to federal courts. For example, one reason behind the exceptions to the usual justiciability requirements for cases presenting issues of public importance is to allow the state court to resolve recurrent issues by writing precedential opinions.[229] That reason applies less to federal courts because their determinations of state law have limited precedential value.[230] But fashioning binding precedent is not the only reason for this exception; otherwise, the exception would not be available to state trial courts that cannot issue opinions that bind in future cases. Another reason for the exception is to allow a court to issue a binding judgment on the parties in a particular dispute to resolve the dispute with respect to those parties, and federal courts can equally fill this function. Although some of the reasons underlying some state justiciability might not support federal jurisdiction, most of those doctrines have multiple goals, and many of those goals do support federal jurisdiction.

III. THE REASONS FOR FEDERAL JUSTICIABILITY

The prior Part explained that applying separate federal justiciability doctrines in state law diversity actions conflicts with the purposes of diversity jurisdiction. One might argue, however, that the reasons for federal justiciability doctrines nevertheless warrant the application of those doctrines to diversity cases. But that is not so. The rationales underlying federal justiciability doctrines do not extend to diversity cases that turn solely on state law. The main rationale for federal justiciability—separation of powers—does not apply to cases brought under diversity jurisdiction because the other branches of the federal government have no role in the creation or enforcement of state law. The other major rationale offered by courts—institutional competence—likewise does not justify following federal justiciability doctrines because state law should determine when a

[228] 13B WRIGHT ET AL., *supra* note 129, § 3531.14, at 298 ("Federal concepts of standing developed to regulate enforcement of federal rights do not represent any independent interest of the federal courts that justifies disregarding state law in [diversity cases].").

[229] *See, e.g.*, *In re* Commitment of Schulpius, 707 N.W.2d 495, 500 (Wis. 2006) (recognizing exception to mootness for recurrent issues).

[230] *See, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499 (1941) (describing a federal court determination of state law as merely a "forecast rather than a determination").

court is competent to resolve a state law dispute. Nor do other reasons sometimes given for the federal justiciability doctrines—fairness and conservation of judicial resources—justify the use of those doctrines in state law diversity cases.

A. Separation of Powers

Separation of powers is the central idea underlying the justiciability doctrines implementing Article III.[231] According to the Supreme Court, the case or controversy provisions of Article III "define the role assigned to the judiciary in a tripartite allocation of power" among the judiciary, the President, and Congress.[232] Federal justiciability doctrines implement those provisions by ensuring that the federal courts stay within their sphere of power and do not "usurp the powers of the political branches."[233]

As noted in Part I, the appropriate role of the federal judiciary is a matter of dispute. Some argue that the federal courts should be limited to enforcing private rights, whereas others contend that the federal courts should take a more active role in articulating and policing legal norms.[234] Both models recognize, however, that constraints must be placed on the judiciary to avoid undue interference with Congress and the President.[235] The difference between the models lies only in where to define the boundaries between the judicial power and the legislative and executive powers.

But that debate has no place in diversity cases that depend solely on state law. Federal courts exercising diversity jurisdiction over state law disputes pose no threat to the powers of President or Congress. Neither does Congress have any say over the content of state law,[236] nor does the President have any involvement in the enforcement of state law.[237] The role of federal courts in those cases is not to vindicate national interests.[238]

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[231] Allen v. Wright, 468 U.S. 737, 752 (1984) (stating that justiciability is "built on a single basic idea—the idea of separation of powers"); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–47 (2013) ("The law of Article III standing . . . is built on separation-of-powers principles . . . .").

[232] Flast v. Cohen, 392 U.S. 83, 95 (1968).

[233] *Clapper*, 133 S. Ct. at 1146.

[234] *See supra* Part I.A.

[235] Siegel, *supra* note 8, at 123, 125 (arguing that even under a "special functions" model, "courts would still play only a 'proper—and properly limited—role . . . in a democratic society'" (quoting Allen v. Wright, 468 U.S. 737, 750 (1984))).

[236] *See, e.g.*, Printz v. United States, 521 U.S. 898, 924 (1997) (holding that Congress cannot direct enactment of state laws).

[237] Medellin v. Texas, 552 U.S. 491, 525 (2008) (noting the President's inability to control enforcement of state law when no federal law is implicated).

[238] To be sure, one of the fears motivating diversity was that forcing out-of-staters or foreigners into state court could lead dissatisfied litigants to violence. But there is no generalized national interest in preventing violence; otherwise, all cases could be brought in federal court.

Instead, the federal courts operate as alternative state courts, resolving issues of state law.[239] Thus, for those state law disputes, the separation of powers concerns underlying federal justiciability doctrines do not apply.

To be sure, concerns about separation of powers may be greater in suits between diverse parties that do not turn solely on state law, but instead also raise questions of federal or constitutional law. Article III extends the judicial power to such suits both because the parties are diverse and because the cases arise under federal law[240]—how the court resolves a federal or constitutional question may affect the federal government's interests. Accordingly, there may be reason to apply federal justiciability principles in those cases, even when the parties are diverse.[241] But when a dispute does not present a federal or constitutional question, as is the case for many disputes brought under diversity jurisdiction, those separation-of-powers concerns do not apply.[242]

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[239] England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 426–27 (1964) (Douglas, J., concurring) ("The diversity jurisdiction . . . was generally to afford to suitors an opportunity . . . to assert their rights in the federal rather than in the state courts." (quoting Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943))). Diversity jurisdiction, therefore, is an exception to the general rule that the powers of the branches of the federal government are commensurate. *See* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 394–95 (1964). It allows courts to hear cases involving matters beyond the jurisdiction of the President and Congress when the parties are diverse. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435–36 (1793) (opinion of Iredell, J.) ("Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general Government, . . . the general Government has a Judicial Authority in regard to such subjects of controversy . . . .").

[240] Although *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), holds that Article III's arising under provision extends to those cases in which federal law forms an unlitigated ingredient of the case, the Court has questioned whether that interpretation of Article III is too broad. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 492–93 (1983) (noting the question but declining to resolve it). In any event, separation of powers concerns are minimal when a federal issue is merely an underlying ingredient instead of a disputed matter in a case, because such cases do not present an occasion for the courts to rule on the federal issue. The argument in this Article accordingly extends to that circumstance.

[241] Under 28 U.S.C. § 1331 (2012), Congress has limited "arising under" jurisdiction to cases in which the cause of action presents a federal question. *See* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 807–08 (1986). That statute does not confer federal jurisdiction over cases that present only a federal defense, even though those cases "arise under" federal law for Article III purposes. *See id.* In those cases, diverse parties seeking to litigate in federal court must invoke diversity jurisdiction. Still, there may be separation of powers concerns warranting the application of the federal justiciability doctrines if those cases turn on federal law.

[242] One might argue that, when a plaintiff brings a state law claim under diversity jurisdiction and a federal claim arising from the same transaction, those claims form the same case and, therefore, that the federal justiciability requirements should apply to the state law claim. But the Court has consistently refused to treat multiple claims as a single case in evaluating justiciability. Instead, it has evaluated justiciability independently for each claim. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352–53 (2006) (refusing to apply supplemental jurisdiction to justiciability); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109 (1998) (arguing that standing for past harm does not establish standing to seek prospective relief). *See generally* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law*

Although following state justiciability doctrines in state law diversity cases would not lead federal courts to infringe on the other branches of the federal government, one might argue that applying state doctrines nevertheless violates the separation of powers by expanding the power of the judiciary. The Supreme Court has espoused this view. It has explained that Article III confers on the federal courts the power to decide only those disputes "traditionally amenable to, and resolved by, the judicial process,"[243] and for a federal court to exercise power beyond these historical limitations violates the separation of powers.[244] According to the Court, the federal justiciability doctrines ensure that the federal courts are limited to that historical role.[245]

It may be that limiting the federal judiciary to its historical role was the origin of some federal justiciability doctrines. But federal justiciability doctrines have evolved over time, and they no longer limit the federal judiciary to its historical role. For example, historically, whether a plaintiff had standing did not depend on whether he had suffered injury in fact; rather, standing depended on whether the plaintiff had invoked the proper form of action.[246] The Supreme Court first created the injury in fact test in 1970.[247] Mootness doctrine has changed as well. It was only in 1911, for example, that the Court first recognized the capable of repetition yet evading review exception,[248] and the scope of that exception has changed over time.[249] Ripeness has undergone a similar evolution: courts now hear some cases that historically would not have been ripe.[250] So, too, for the

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Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U. L. REV. 1, 30 (1984) (summarizing and criticizing doctrine). By that rationale, a single justiciability doctrine need not apply to state and federal claims in one case. Instead, state claims may be evaluated under state justiciability doctrines, whereas federal claims may be evaluated under federal doctrines.

[243] *Steel Co.*, 523 U.S. at 102.

[244] *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) (limiting federal justiciability to disputes "'historically viewed as capable of resolution through the judicial process' . . . ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives" (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968))). *But see Flast*, 392 U.S. at 95 (suggesting that limiting courts to their historical function is independent from separation of powers).

[245] *Hollingsworth*, 133 S. Ct. at 2659.

[246] *See* Sunstein, *supra* note 145, at 184.

[247] Fletcher, *supra* note 12, at 224.

[248] *See* S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515–16 (1911); *see also* David H. Donaldson, Jr., Comment, *A Search for Principles of Mootness in the Federal Courts: Part One—The Continuing Impact Doctrines*, 54 TEX. L. REV. 1289, 1306 (1976) (discussing development of the exception).

[249] *See* Honig v. Doe, 484 U.S. 305, 335–36 (1988) (Scalia, J., dissenting) (noting that, under original exception, plaintiff had to demonstrate that he faced a reasonable probability of suffering the harm again, but that exception was expanded to include instances where someone else faced a threat of facing the harm).

[250] *Compare* Massachusetts v. EPA, 549 U.S. 497, 519 (2007) (finding ripe a claim that global warming might cause coastal damage in several decades), *with* Attorney Gen. v. Kingston-on-Thames,

prohibition on nonadversarial suits: In 1804, the Supreme Court resolved a case while acknowledging that it involved only "a feigned issue."[251]

Following state justiciability doctrines in diversity cases may actually better align with history. Historically, justiciability was not clearly separate from substantive law. Courts could hear a claim when a party "assert[ed] his rights in the form prescribed by law"[252]—a requirement that sounds in the merits. Because federal courts sitting in diversity must apply state substantive law,[253] applying that historical test today would lead federal courts sitting in diversity to follow state justiciability rules as well—because it would require federal courts to reconceptualize justiciability as substantive law.[254] Further, many state justiciability doctrines actually hew more closely to the historical line than the federal doctrines. For example, in some states, standing turns on whether the plaintiff properly states a claim[255]—a requirement that closely mirrors the historical rule that justiciability depended on plaintiffs asserting their rights "in the form prescribed by law."[256]

There may be situations where the state defines its judicial power to extend far beyond the traditional notion of the judicial power. For example, a state may redefine its "judicial power" to include the power to issue nonbinding opinions.[257] Although the Supreme Court has stated that the

(1865) 34 H.L. 481 at 487 (Eng.) (deeming unripe a claim against dumping sewage into the Thames because any harm from dumping might not arise for "a hundred years hence").

[251] Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 33–34 (1804).

[252] 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."); *see also* Tutun v. United States, 270 U.S. 568, 577 (1926) (stating that Article III is satisfied "[w]henever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued"). Professors Woolhandler and Nelson have argued that historically merely stating a cause of action was insufficient to create standing. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 721 (2004). But the earliest example they provide is from 1911, *id.* (citing Muskrat v. United States, 219 U.S. 346 (1911)), by which time justiciability doctrines had already departed from their roots.

[253] *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

[254] *See* Hessick, *supra* note 18, at 425.

[255] *See supra* note 57 and accompanying text.

[256] *Osborn*, 22 U.S. at 819.

[257] The hypothetical is farfetched because it would be a poor use of resources and depart from the common understanding of the judicial power among the states. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 224 (1995) (recounting the shared historical view of states that the judicial power is the power to render binding judgments). One can imagine even more outlandish hypotheticals, such as redefining the judicial power to include the power to legislate. Assuming such arrangements are constitutional, *but see* U.S. CONST. art. IV, § 4 (guaranteeing to each state a republican form of government), and that the diversity requirement could be satisfied, federal courts should have the Article III power to hear cases brought under this scheme but also the power to abstain or deny the remedy if appropriate, *see infra* note 305.

federal judicial power is the power to render dispositive judgments,[258] federal courts sitting in diversity should still follow the state laws of justiciability in those situations.[259]

By authorizing an individual to bring suit that has the remedy of obtaining a judicial opinion on the law, the state law has conferred on that individual a right to know the law, and it has prescribed a remedy for a violation of that right—a nonbinding opinion from the courts. For justiciability purposes, the suit is no different from any other suit in which the individual seeks to vindicate a right—the traditional basis for justiciability in federal courts and still a common ground for justiciability in state courts.[260] The objection to empowering a court to issue a nonbinding opinion is one of remedy. But as the Court recognized long ago, Article III does not "crystallize" the remedies available.[261] Legislatures may create new remedies, and if a state determines that its courts should have the power to vindicate rights through the remedy of a nonbinding opinion, federal courts sitting as alternative state courts in diversity should have that same power. To the extent that the remedy is a poor use of judicial resources, Congress may limit diversity jurisdiction through legislation, and courts may develop doctrines of abstention.[262] But the deficiency of the remedy should not categorically prohibit a federal court from hearing the dispute.

B. Institutional Competence

The Supreme Court has said "the business of federal courts" is to resolve "questions presented in an adversary context."[263] For a dispute to be sufficiently adverse, it must have at least two opposing parties, each of which is asserting conflicting rights and each of which has a stake in winning the dispute.[264] According to the Court, this adverseness is necessary to "sharpen[] the presentation of issues upon which the court so largely depends."[265] In other words, adverseness promotes better litigation,

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[258] *See Plaut*, 514 U.S. at 219.

[259] The diversity requirement would not be obviously satisfied because a request for an opinion need not be brought against another party. But one can imagine a statute authorizing suit against another simply to obtain a judicial pronouncement. *Cf.* 28 U.S.C. § 2201 (2012) (authorizing declaratory judgments).

[260] *See* Fletcher, *supra* note 12, at 233.

[261] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937) (holding declaratory judgments justiciable).

[262] *See* United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (identifying various forms of abstention). *See generally* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 580–85 (1985) (summarizing this area of law).

[263] Flast v. Cohen, 392 U.S. 83, 95 (1968).

[264] Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 469 (2008).

[265] Baker v. Carr, 369 U.S. 186, 204 (1962).

which leads to better judicial decisions[266]—and the federal justiciability doctrines ensure this adverseness.[267]

This rationale does not support applying federal justiciability doctrines to state law cases in diversity. State law dictates when state courts are competent to act.[268] Because federal courts act as state courts when hearing state law suits in diversity, that same state law should determine when federal courts are competent to hear those claims. States may adopt a different understanding of when a dispute is sufficiently adverse for judicial resolution, and many have done so through their differing justiciability doctrines.[269]

One might argue that adverseness is more beneficial to federal than state judges because federal judges know less about state law than state courts. That argument does not account for those states that demand more adverseness than is required under federal doctrines.[270] More important, whether federal judges know less state law than state judges is an empirical question. Some federal judges may actually know state law better than some judges of that state because federal judges are often picked from among leaders of the state bars.[271] Moreover, not all state judges know state law equally. There is always a risk that a state judge, especially a newly appointed one, is unfamiliar with a particular area of law in a dispute. State laws permitting judicial resolution of disputes in the absence of substantial adverseness operates on the premise that, irrespective of a particular judge's knowledge and experience, that judge is capable of resolving that dispute without the adverseness required by federal justiciability doctrine. Thus, even if federal courts would benefit from greater adverseness, that adverseness is not necessary to adjudicate the state claim.[272] In any event, the federal justiciability doctrines are not particularly effective at ensuring high-quality advocacy. An interest group that does not have a sufficient

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[266] Hessick, *supra* note 50, at 322.

[267] *E.g.*, Camreta v. Greene, 131 S. Ct. 2020, 2035 (2011) (invoking adversity to justify mootness); *Flast*, 392 U.S. at 95 (invoking adversity to justify standing).

[268] Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9662) (opinion of Story, J.) ("The states . . . have a right to limit, control, and restrict their judicial functions, and jurisdiction, according to their own mere pleasure.").

[269] *See supra* Part I.B.

[270] *See, e.g.*, Yancy v. Shatzer, 97 P.3d 1161, 1171 (Or. 2004) (rejecting the capable of repetition yet evading review exception to mootness).

[271] Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 812 (1981) ("[M]any appointments to the federal bench are from state court benches.").

[272] Indeed, federal courts may be better equipped to resolve cases in the absence of strong advocacy because of their access to greater resources. *See* William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1744 (1992). Moreover, if an issue proves particularly difficult to resolve, the federal court may certify the question to the state supreme court. *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 74 (1997).

stake to satisfy the justiciability requirements may nevertheless litigate more vigorously than an individual who actually has a sufficient stake.[273]

A second argument supporting greater adverseness for federal courts is that resolving legal questions in a non-adverse context resembles lawmaking more than adjudication, and state judiciaries may more appropriately engage in lawmaking because their members may be subject to elections.[274] This argument does not extend to those states in which judges are not elected, which amounts to about half the states.[275]

More importantly, this argument rests on the false assumption that federal justiciability doctrines actually guarantee adverseness. Various federal doctrines allow federal courts to resolve disputes even when the parties are not adverse. For example, under the capable of repetition yet evading review exception to mootness, a court will not dismiss a claim that is otherwise moot if there is a reasonable probability that the defendant will again engage in the complained-of conduct. In that situation, the plaintiff no longer has a real stake in the case—an order favorable to the plaintiff will not provide the plaintiff with tangible relief—yet the courts have deemed themselves competent to resolve the dispute. Similarly, the interests required to satisfy federal justiciability doctrines need not be tied to the merits of the case. For example, the injuries giving rise to federal standing often have no bearing on the legal issue before the court,[276] and once a court finds standing, it may discuss any legal issue in its decision.[277] The adverseness ensured by standing, therefore, has no bearing on the issue on which the court may make new law. Indeed, in its most recent decision on standing, the Court itself said that the adverseness basis for justiciability is merely a prudential consideration.[278]

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[273] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983).

[274] Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1185 (1999). Finally, that state judges may be subject to elections is a reason why federalism should not limit justiciability in cases brought under diversity jurisdiction. Judges facing elections are more likely to be biased in favor of their state and its citizens against out-of-state litigants. *See* Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1313–14 (1997) (arguing that, under public choice theory, elected judges will aim to please the electorate).

[275] Issacharoff, *supra* note 175, at 118.

[276] David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 823–24 (2004) (arguing that justiciability requirements usually do not affect a court's analysis of the merits).

[277] *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1269 (2006) (noting the widespread acceptance of dicta).

[278] *See* United States v. Windsor, 133 S. Ct. 2675, 2687 (2013).

C. Fairness

Another reason given for federal justiciability doctrines is that they serve the interest of fairness.[279] According to this theory, rightsholders should have the prerogative to determine whether to enforce their rights; third parties should not be permitted to raise the rights of others who do not want to enforce their own rights or have not yet had an opportunity to do so.[280] Federal justiciability doctrines protect this structure by allowing only those with a substantial stake in a dispute to pursue litigation.[281]

But what constitutes a substantial enough stake to warrant litigation is a question of law. Under federal doctrine, any amount of money constitutes a sufficient interest to invoke the judicial process,[282] but emotional distress, even when severe, resulting from observing the government's or some other person's illegal conduct, is not.[283] State doctrines often draw a different line. For example, some states have decreed that ensuring government compliance with the law is an adequate interest to invoke the judiciary.[284]

The law that creates a right also establishes who has an adequate basis to enforce that right. For example, a law authorizing all people to bring suit to enforce a permitting requirement for property improvements *creates* in all people an interest in the enforcement of the requirement.[285] Because a federal court faced with a state law suit brought under diversity jurisdiction must enforce that right to the same degree as state courts,[286] that same state law should dictate which individuals have a sufficient interest to seek to enforce that law.

D. Judicial Resources

Another reason for federal justiciability doctrines is to deploy effectively finite judicial resources.[287] Federal courts have limited time and

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[279] *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306–15 (1979).

[280] *Id.* at 310.

[281] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982) ("[S]tanding also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.").

[282] United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973) (allowing suit based on any "identifiable trifle").

[283] *Valley Forge*, 454 U.S. at 486.

[284] *See, e.g.*, New Energy Econ., Inc. v. Martinez, 247 P.3d 286, 290–91 (N.M. 2011) (granting standing when "the Governor and the Secretary have exceeded the limits of their constitutional powers"); Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1082 (Ohio 1999) (basing standing on interest in preventing unconstitutional legislation).

[285] *See* Sunstein, *supra* note 145, at 234–35.

[286] Guar. Trust Co. v. York, 326 U.S. 99, 108–09 (1945).

[287] CHEMERINSKY, *supra* note 77, at § 2.1, 43–44.

money. They also have limited political capital: Federal courts depend on other institutions to enforce their orders, and if a court enters too many disfavored decisions, those other institutions may refuse to enforce the federal orders.[288] Federal justiciability doctrines let the federal courts expend these resources effectively by screening out those disputes ill-suited for judicial resolution.

Following state justiciability doctrines is unlikely to result in a substantial increase in the expenditure of federal judicial resources. State judiciaries also have finite resources, and states have an interest in expending those resources wisely. Presumably, one way that states accomplish that goal is through their justiciability doctrines. Although some states may have more permissive justiciability doctrines than the federal ones, their need to conserve resources supports the idea that the greater scope of justiciability does not overly tax the state court system. Requiring federal courts to follow state justiciability doctrines in diversity thus would not likely result in a substantial increase in the expenditure of federal resources.

Of course, the differences in state and federal justiciability doctrines may result in federal courts expending their resources differently under state justiciability doctrines than they would under federal justiciability doctrines. But state law should control which state claims warrant judicial attention. To allocate federal resources according to federal doctrines is to prioritize federal over state interests in cases that present no federal interest.

To the extent state justiciability doctrines do result in a poor use of federal judicial resources, Congress may redirect the use of those federal judicial resources by limiting diversity jurisdiction through statute, as it has done with the amount in controversy requirement,[289] which prevents federal courts from expending resources under diversity jurisdiction on small disputes.[290]

IV. FEDERALISM AND DISPARITY OBJECTIONS

Although the rationales underlying federal justiciability doctrines do not justify applying those doctrines to diversity cases, there may be other reasons to apply federal justiciability in those cases. One might argue that federal justiciability doctrines protect federalism or that following state

[288] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 116 (2d ed. 1986); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 55–59 (1980).

[289] 28 U.S.C. § 1332(a) (2012).

[290] Indeed, Congress could mandate through legislation the current federal justiciability requirements in diversity cases.

justiciability doctrines in diversity cases leads to unwarranted disparities in justiciability between cases presenting federal questions and cases brought under diversity. But neither objection warrants applying federal instead of state justiciability doctrines in state law diversity cases.

A. Federalism

Federalism defines the distribution of power between the federal and state governments.[291] Under our political system, states have general regulatory power.[292] By contrast, the federal government is one of limited powers.[293] It may exercise only those powers enumerated in the Constitution and cannot exercise those powers left to the states. One might argue that the federal justiciability doctrines protect this division of power by limiting the federal judiciary's ability to meddle in state affairs.

But federalism should not limit the power of federal courts to exercise diversity jurisdiction. The very point of diversity jurisdiction is to enable federal courts to hear issues of state law that might not involve federal interests.[294] Diversity thus is a departure from the ordinary balance of power between the state and federal governments.[295] Although allowing federal courts to hear state issues may imperil state sovereignty to some degree,[296] the Founders thought this jurisdiction was necessary to maintain order and the rule of law among the states.

Even if federalism does prohibit federal courts from hearing certain state matters, federal justiciability doctrines are not targeted at that goal. Federal courts have not developed justiciability doctrines with an eye towards protecting state sovereignty.[297] Instead, their focus in fashioning

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[291] *See* Alden v. Maine, 527 U.S. 706, 748 (1999).

[292] *See* United States v. Morrison, 529 U.S. 598, 618 (2000).

[293] *See id.*

[294] *See supra* Part II.B.

[295] *Cf.* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1873 (2013) (stating federalism is irrelevant to situations where the federal government is empowered to act). The one limitation on diversity jurisdiction based on federalism is the Eleventh Amendment, which courts have interpreted to prohibit federal courts generally from hearing suits by individuals against a state without its consent. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc. 506 U.S. 139, 146 (1993).

[296] Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1675 (1992).

[297] Particularly illuminating is *Steffel v. Thompson*, 415 U.S. 452 (1974). There, the Court considered whether a request for a judgment declaring a threatened prosecution for a state crime unconstitutional presented a justiciable controversy and, if so, whether a district court appropriately denied the declaratory judgment. If federalism underlay the justiciability doctrines, one would expect federalism to appear prominently in the justiciability analysis because the requested judgment would interfere with the state's prosecutorial function. Yet the Court did not mention federalism in that portion of its analysis. *Id.* at 459–60. By contrast, the Court discussed federalism extensively in determining whether the district court appropriately exercised its discretion in denying declaratory relief. *Id*. at 460–62.

those doctrines has been on defining which disputes the federal courts may resolve and which disputes should be left to the federal political branches.[298] Consequently, those doctrines do not sort cases based on whether they involve national issues or local issues more appropriately handled by the states. Instead, they ask whether the dispute has characteristics that render it susceptible to judicial resolution.[299] As long as a dispute has those characteristics, a federal court may hear the suit, even if it involves an important state issue such as the processes employed by state administrative agencies or the scope of state common laws.[300]

Nor do the federal justiciability doctrines protect federalism by ensuring that federal courts do not unduly interfere with the state executive or legislative branches. Federal justiciability doctrines enforce the *federal* allocation of power among the courts, executive, and legislature. Many states have rejected the federal arrangement of power in favor of different allocations of power among their governmental departments. For instance, some states do not place all executive power in a single office but instead disperse it among several elected officials; some allow direct participation of their citizens through popular referenda; and some confer more power on their judges because those judges are subject to elections.[301] These

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To be sure, in *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 573–74 (1947), the Court arguably suggested in dicta that one consideration in determining whether a dispute is justiciable is whether the dispute comes "from state courts involving state legislation . . . [that] remain[s] unresolved or highly ambiguous." But the Court's opinion is ambiguous and can be equally read as saying that the clarity of state law is relevant only to determining whether a court should abstain from hearing a challenge to the constitutionality of state law, not whether there exists a case or controversy. This latter reading seems more sensible given that the existence of a dispute capable of judicial resolution should not turn on the clarity of the law, and is more consistent with the Court's subsequent abstention decisions.

Highly respected treatises also do not discuss federalism as a basis for justiciability. *See* CHEMERINSKY, *supra* note 77, at § 2.1, 42–46; FALLON ET AL., *supra* note 36, at 80–153, 183–248; 13 WRIGHT ET AL., *supra* note 129, § 3529, at 611–39. The one notable exception is Professor Tribe's treatise, which states that federalism informs justiciability doctrines, *see* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3.28, at 567–68 (3d ed. 2000), but the citation he provides does not support the claim, *see id.* § 3.28 at 568 ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997))). The cited quotation discusses how abstention and certification promote federalism; it does not pertain to cases or controversies.

[298] Flast v. Cohen, 392 U.S. 83, 95 (1968) (justiciability "defin[es] the role assigned to the judiciary in a tripartite allocation of power" among the judiciary, the President, and Congress).

[299] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[300] *See* City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 168–71 (1997) (concluding that a challenge to conclusions of state administrative determination was justiciable); Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co., 621 F.3d 554, 560 (6th Cir. 2010) (finding standing to challenge state nuisance laws).

[301] Hershkoff, *supra* note 53, at 1886–96 (giving examples of states with these characteristics).

differences and others affect how the states structure their justiciability doctrines.[302] Applying federal justiciability in diversity cases therefore does not faithfully enforce the state's scheme for directing who should decide a particular dispute.

Instead of relying on justiciability to promote federalism,[303] federal courts have developed discretionary doctrines to protect federalism.[304] For example, under various abstention doctrines, federal courts may decline to hear claims if doing so will interfere with important state interests.[305] Likewise, courts have cited federalism in developing prudential jurisdictional rules, such as third-party standing.[306] Federalism has also guided federal courts in deciding whether to award equitable relief[307] and in fashioning the scope of those remedies.[308] Federalism has also informed interpretations of jurisdictional statutes.[309] But Article III commands none of these doctrines. Instead, they are prudential doctrines and doctrines of statutory interpretation.

Federalism might provide a stronger case for imposing tighter federal limitations on justiciability in diversity cases if federal courts were not bound to follow state law as interpreted by the state courts, as was the case

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[302] *See id.*

[303] Although justiciability doctrines do not seek to promote federalism, courts may *use* justiciability doctrines to protect state interests. *See* Taub v. Kentucky, 842 F.2d 912, 919 (6th Cir. 1988) (recognizing that justiciability doctrines were not created with federalism in mind, but explaining that justiciability could nevertheless be used to further federalism). For example, courts may be quicker to dismiss for lack of justiciability a suit seeking particularly intrusive remedies against a state or its officers. *See* Fallon, *supra* note 211, at 650 (arguing that fear of entering intrusive remedies against a state may explain otherwise inconsistent standing rulings). But that argument does not establish that the justiciability doctrines are designed to protect federalism. Rather, it shows only that the federal courts may *employ* justiciability doctrines to protect federalism.

[304] *See, e.g.*, CHEMERINSKY, *supra* note 77, §§ 11.1–14.4, at 763–919 (listing discretionary doctrines protecting federalism); Shapiro, *supra* note 262, at 580–85 (explaining how federalism informs discretionary doctrines whether to exercise jurisdiction).

[305] *See, e.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (abstaining to avoid interference with certain civil state cases); Younger v. Harris, 401 U.S. 37, 44 (1971) (directing federal courts to abstain from issuing injunctions barring state criminal prosecutions); La. Power & Light Co. v. 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 the state regulatory scheme).

[306] *E.g.*, Roberts v. Wamser, 883 F.2d 617, 622 (8th Cir. 1989) (citing federalism as a reason to deny statutory standing).

[307] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) ("[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 . . . .").

[308] *See* Milliken v. Bradley, 433 U.S. 267, 280–81 (1977) (explaining federal courts should narrowly tailor injunctive relief against local government officers to avoid interfering with that government's operations).

[309] *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313–14 (2005) (invoking federalism to limit interpretation of 28 U.S.C. § 1331).

for suits involving "general" common law before the Supreme Court's decision in *Erie*.[310] In that situation, federal courts would pose a greater threat to state sovereignty because they could control state law to some degree through their interpretations.[311] But federal courts are bound to follow state law as interpreted by the state courts. They must follow state supreme court decisions on the content of all substantive state law,[312] or do their best to ascertain how the state supreme court would rule when it has not passed on the issue.[313] Because of these constraints, federal courts do not pose a threat warranting federal justiciability doctrines.

Far from enforcing federalism, imposing federal justiciability requirements may undermine federalism. In those situations where a federal justiciability doctrine is more liberal than a state justiciability doctrine, a federal court's decision to follow federal justiciability doctrine may result in the federal court ruling where the state would not permit it. For example, if a state chooses not to recognize any exceptions to the mootness doctrine, a federal court following federal doctrine might still hear a state law case that is otherwise moot under the capable of repetition yet evading review exception. Yet doing so would disturb the state allocation of powers by allowing a court to decide an issue that the state has determined is inappropriate for judicial resolution. Likewise, when a federal court refuses to hear a claim justiciable under state law, that court undermines state sovereignty by refusing to apply state law.[314] Through that determination, the federal court impairs the ability of litigants to pursue their claims under state law even when they are entitled to do so.[315]

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[310] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[311] Moreover, if they did not follow state interpretations, federal courts sitting in diversity would not function as alternative forums for the state courts, because they would be applying different substantive law than state courts. Federal courts would be applying federal interpretations of state law, while state courts would follow state interpretations of state law. Because federal courts would not be acting as state courts, there would be less reason to follow state justiciability doctrines.

[312] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) (describing scope of *Erie*). This is not to say that *Erie* completely eliminated the federal court's effect on state law. When a state supreme court has not decided an issue, the federal court must predict how the state court would decide the issue. That speculation may influence the development of state law. *See* Sloviter, *supra* note 296, at 1676–79. But the states have the ultimate say on the content of their law, and they may reject the federal court's determination.

[313] In some ways, *Erie* reduced the ability of the federal courts to combat state bias against out-of-state litigants. States may exhibit bias against out-of-state litigants by developing doctrines that disfavor those litigants, and under *Erie*, federal courts must apply those biased state court doctrines. *See* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 86–87 (1993).

[314] *Cf.* Haywood v. Drown, 556 U.S. 729, 734–35, 739–41 (2009) (holding that, because they must apply federal law, states usually cannot refuse to hear federal claims).

[315] Of course, litigants could file in state court instead of federal court, but that does not cure the federal judiciary's interference with state sovereignty.

Following state justiciability doctrines in state law diversity cases would avoid these problems.

B. Inconsistent Justiciability Doctrines

One might object that applying state justiciability doctrines in diversity cases would lead to unwarranted inconsistencies in determining justiciability in federal court. There would no longer be a single set of justiciability doctrines in federal court. Instead, federal justiciability doctrines would apply to cases arising under federal law and other disputes raising federal interests, but state justiciability doctrines would control state law controversies brought under diversity jurisdiction.

But a single justiciability doctrine need not apply to all types of dispute. As mentioned earlier, justiciability doctrines are not commanded by the text of Article III. Those doctrines largely originated as self-imposed limitations on the judicial power and were tied to Article III only later.[316] And even since being tied to Article III, the federal justiciability doctrines have continued to develop in a common-law-like process.[317] Because justiciability is a judicially created concept, courts should develop justiciability doctrines in a way that reflects the reasons and concerns underlying particular grants of federal judicial power.[318]

Applying a single justiciability test to all the various types of disputes in Article III does not accomplish this goal. Different values and concerns are at stake in each of the various categories of dispute in Article III. For example, the principal reasons for federal jurisdiction over cases arising under federal law are to promote uniform interpretation of federal law and to protect federal interests,[319] but pursuing these goals presents a risk that the judiciary might interfere with the other branches of the federal government.[320] By contrast, the primary reason for diversity jurisdiction is to prevent discrimination against certain litigants, and hearing those claims does not raise separation of powers concerns.[321] These different considerations suggest that the same justiciability doctrines should not apply to these two divergent categories of dispute. Instead, justiciability doctrines should be tailored to allow federal courts to accomplish the goals underlying the respective jurisdictional grants to the extent they can without raising other concerns.

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[316] *See supra* note 32 and accompanying text.

[317] *See supra* note 24 and accompanying text.

[318] *Cf.* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 72 (1921) (explaining that the common law should evolve to reflect society's changing sense of morality, justice, and fairness).

[319] *See* CHEMERINSKY, *supra* note 77, § 5.2.1, at 284.

[320] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473–74 (1982).

[321] *See supra* text accompanying notes 170 and 236–39.

Moreover, although this Article's argument is not based on the text of Article III because that text does not provide the foundation for the content of the justiciability doctrines,[322] the text does support the notion that federal courts may not play precisely the same role in each of the nine types of disputes delineated in Article III. In defining the scope of the judicial power, Article III does not describe the nine types of disputes identically. Instead, for six categories of disputes, including diversity jurisdiction, Article III empowers the federal courts to hear "controversies."[323] For the other three types of disputes, Article III empowers the federal courts to hear "cases."[324] Although there is disagreement on the significance of the different terms,[325] Professor Pushaw has cogently argued that the difference in terminology may reflect a different scope of federal judicial power for those types of disputes.[326] Article III itself thus may contemplate that the doctrines implementing "controversies" brought in diversity may differ from the doctrines implementing "cases."[327]

Of course, by the same logic, the repeated use of the term "controversy" may signify a decision to impose the same justiciability requirements to all those disputes referred to as "controversies."[328] Although thoroughly assessing that argument is beyond the scope of this Article, on first glance that conclusion seems reasonable. Five of the six categories of "controversies" are forms of diversity jurisdiction. The same reason for extending federal jurisdiction—potential bias in state court—underlies each grant, which suggests that the same justiciability rules should apply.

The final category of "controversies" comprises disputes to which the United States is a party.[329] Suits against the United States may raise separation of powers concerns, because they may result in federal judicial orders entered against the other branches of the federal government. But

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[322] *See supra* note 24 and accompanying text.

[323] U.S. CONST. art. III § 2.

[324] *Id.*

[325] *See supra* note 150.

[326] Pushaw, *supra* note 51, at 512–17. Professor Pushaw suggested from this difference that federal justiciability doctrines should apply to controversies but not cases. *Id.* at 519–20. But he did so only casually because resolving that question was not the focus of his paper; his goal was to show only that cases should be treated differently from controversies, not to determine the precise content of the justiciability doctrines to apply to those categories.

[327] Further support for differing scope of jurisdiction for the different grants of jurisdiction comes from an early draft of Article III that extended jurisdiction only to cases arising under federal law but to all "*disputes*" in which the parties were diverse. 2 FARRAND, *supra* note 23, at 146–47 (emphasis added).

[328] *See* Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) (noting a presumption that the same words in the same provision have the same meaning).

[329] U.S. CONST. art. III, § 2, cl. 1.

there is still reason to align this grant of jurisdiction with state justiciability rules. The grant of jurisdiction covers claims against the United States that do not involve the Constitution or federal laws—if the claim involved those laws, the suit would be covered by the arising under provision of Article III. The reason for this grant of jurisdiction was that the state courts might seek to promote their local interests over those of the national government.[330] Because the purpose of the grant of this jurisdiction was to allow any suits that could be brought in state court to be brought in federal court so as not to expose the United States to state bias, federal jurisdiction over claims against the United States should be at least as broad as state jurisdiction.

CONCLUSION

Federal justiciability doctrines should not apply to state law suits brought in federal court under diversity jurisdiction. Instead, federal courts should apply state justiciability doctrines in those cases. Applying state justiciability doctrines would better achieve diversity jurisdiction's goal of providing an alternative forum for resolving state claims involving out-of-state litigants, and it would not conflict with the reasons underlying federal justiciability doctrines.

Of course, moving away from federal justiciability doctrines—which tend to be more restrictive than state ones—to state justiciability could increase federal interference with state affairs. But all diversity cases involving state law present a threat to state sovereignty; whenever a federal court hears such a case, it injects itself into state affairs. The decision to include diversity jurisdiction in Article III reflects a determination that this infringement on state sovereignty was not so troublesome as to preclude federal intervention to prevent bias against out-of-state litigants.

One might think that tinkering with justiciability in diversity cases is unnecessary because state courts do not exhibit the bias that motivated diversity jurisdiction.[331] State courts today are not known for discriminating

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[330] THE FEDERALIST NO. 80, *supra* note 2, at 444 (Alexander Hamilton); *see* Pushaw *supra* note 51, at 522 n. 353.

[331] The absence of bias has led to criticism of diversity as an unwarranted burden on the federal judiciary. *See, e.g.*, Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499, 523–27 (1928) (arguing for the curtailment of diversity jurisdiction). This criticism, however, has generally pressed for limits by statute, not by interpretation of Article III. *Id.* at 523 ("[T]he obvious abuses of diversity jurisdiction should be promptly removed by legislation . . . ."). *See generally* MICHAEL L. WELLS ET AL., CASES AND MATERIALS ON FEDERAL COURTS 219 (2d. ed. 2011) ("While judicial attitudes toward diversity jurisdiction may influence the way judges resolve a close case regarding its scope, most of the debate is directed at Congress . . . .").

against out-of-state litigants.[332] But that sense of the state courts may be wrong.[333] The perception of fairness may be attributable to our inability to detect when local prejudice affects judgments. Or the lack of bias exhibited by state courts may be due in part to the existence of diversity jurisdiction; states might act more fairly to avoid losing cases to federal court. Moreover, that the states are fair today is no guarantee that they will be so tomorrow. That possibility counsels against reading the Constitution to restrict justiciability in diversity cases. If there is insufficient risk of bias to warrant federal jurisdiction, Congress has the power to limit federal jurisdiction. But the Constitution should not be read to preclude federal courts from hearing those claims in the event that Congress concludes that federal intervention is necessary.

[332] *See* FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/repfcsc.pdf/$file/repfcsc.pdf [http://perma.cc/GM85-8VBP] (concluding that bias against out-of-state litigants is not a significant problem).

[333] *See, e.g.*, Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 384 (1992) (arguing that bias is perceived in more rural states).