

## Notes

# **State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs**

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### I. INTRODUCTION

Environmentalists habitually bring their federal claims to federal court. Only a handful of citizen suits under national environmental statutes have surfaced in the state courts. This pattern may reflect environmental lawyers' greater familiarity with federal procedure, their fear of state court bias, or their greater confidence in the quality of federal adjudication. Perhaps it reflects a mistaken belief that state courts generally lack concurrent jurisdiction over federal environmental claims. The task I shoulder here is not to plumb the origins of this pattern, but to predict and defend a change—a new role for state courts in adjudicating claims under federal environmental law. It is my contention that state courts can, will, and should adjudicate the federal environmental claims of parties who lack Article III standing (non-Article III plaintiffs).

My prediction emerges from no insider knowledge of environmentalists' litigation strategy. Rather, it takes root in the principle that, in law as in markets and ecosystems, unexploited niches come to be filled. This Note reveals an open niche.<sup>1</sup> Three jurisprudential developments that came to a head in the last decade make state courts increasingly attractive fora for the private enforcement of federal

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1. Thus, my "prediction" more resembles self-fulfilling prophecy than inference from scientifically tested hypotheses.

environmental law. First, under the intellectual leadership of Justice Scalia, the Supreme Court elaborated constitutional doctrines of standing that curtail environmentalists' access to the federal courts. Second, in the underappreciated case of *ASARCO v. Kadish*,<sup>2</sup> the Supreme Court decisively affirmed the right of state courts to adjudicate federal claims that do not present federally justiciable "cases or controversies." New doctrinal architecture unveiled in *ASARCO* reverses the longstanding principle that state court decisions on claims brought by non-Article III plaintiffs lack collateral effect in federal courts. Third, the Court continued to strengthen the presumption of concurrent jurisdiction. One can argue reasonably that seven of the nine major environmental statutes now accommodate state court jurisdiction, notwithstanding several lower court decisions to the contrary.

It is no accident that the milestone cases in the modern development of Article III standing pertain to environmental matters.<sup>3</sup> Laws usually aim to improve the condition of a class of people. To violate the law is to hurt a member of this class, creating the central predicate of Article III standing: "injury in fact."<sup>4</sup> Most environmental laws aim to improve the condition of the natural world. Sometimes conditions in the natural world bear on the well-being of people, and harms to the environment translate into injuries in fact to human beings. Yet, immediate connections between environmental damage and human welfare are not inevitable. Within the ambit of environmental law are remote and rarely visited lands;<sup>5</sup> uncommon and inconspicuous species;<sup>6</sup> and the depths of the seas.<sup>7</sup> Even when concern for human health or welfare motivates a statute, and environmental protection is only penultimate, the connection between regulated activities and human well-being can be roundabout or probabilistic. A doctrine of standing bottomed on causation and redressability could impede citizen-suit enforcement, much as the complexities of proving causation ensnarl common-law environmental claims.<sup>8</sup> All "ideological" plaintiffs would benefit from liberal state court standing to enforce federal law, but environmentalists have the most to gain.

The argument of this Note unfolds in four segments. In Part II, I provide a brief overview of the law of standing in state courts. My goal in

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2. 490 U.S. 605 (1989).

3. These cases are surveyed *infra* Section III.A.

4. The other predicates are "causation" and "redressability." *Infra* Section III.A.

5. *E.g.*, Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1994).

6. *E.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994).

7. *E.g.*, Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401-1473 (1994).

8. *Cf.* Robert L. Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27, 29 (1987) (describing the scientific complexity of proving causation in toxic tort cases). The Supreme Court's recent holding in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), does reduce the causation burden on environmental standing, but it is too early to assess *Laidlaw*'s ramifications. *See infra* notes 41-44 and accompanying text.

Part II is simply to convey a sense of the various ways in which state standing law advantages public-interest plaintiffs. An in-depth, state-by-state examination of standing doctrine would be far beyond the scope of this Note.

Part III lays out recent developments in Supreme Court jurisprudence and shows how they presage the growth of federal environmental claims in state courts. This Part discusses constitutional standing, *ASARCO* and its antecedents, and the important concurrent jurisdiction decisions. I evaluate concurrent jurisdiction under the major environmental statutes, and argue that all but the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA)<sup>9</sup> and the Toxic Substances Control Act (TSCA)<sup>10</sup> should be read to authorize state court jurisdiction. Finally, Part III asks whether the Supreme Court's nondiscrimination doctrine affirmatively requires state courts to apply their own, more liberal rules of justiciability to federal claims. I conclude that it does not.

In Part IV, the tenor of the Note changes. Moving from the positive to the normative, I defend *ASARCO* and the logic of lenient state court standing for federal claims. In so doing, I rebut academic attacks issued a generation apart by Professor Freund and Judge Fletcher, respectively, who propose that state courts hearing federal claims be required to treat Article III standing as a federal question. One cannot defend *ASARCO* without an interpretive theory of the Supremacy Clause, one of the structural keystones of the Constitution. I use the Supreme Court's recent federalism and separation-of-powers decisions to frame my account of the Supremacy Clause. My jurisprudential argument runs as follows: When interpreting a structural provision of the Constitution, the Supreme Court should begin with an inquiry into dangers. If the provision guards against "tyranny" or other remote but horrific eventualities, the Court should interpret it with formal rules that keep one branch from assuming control over the settled practices of another. Otherwise, the Court should build doctrine—rules, where feasible—from the fairest reading of the text the Court can muster.

Working within this framework, I consider and rebut the thesis that state court adjudication of federal claims brought by non-Article III plaintiffs transgresses the separation of powers and, as such, should be warded off prophylactically. This question settled, I evaluate the *ASARCO* rule in terms of the twin meanings of supremacy: power and quality. *ASARCO*'s framework for state court adjudication of non-Article III plaintiffs' federal claims does more for the power and quality of federal law than would the Freund-Fletcher alternative.

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9. 42 U.S.C. §§ 9601-9675 (1994).

10. 15 U.S.C. §§ 2601-2629 (1994).

In Part V, the Note assesses consequences. I use the Emergency Planning and Community Right-To-Know Act,<sup>11</sup> whose citizen-suit provision was gutted by the Supreme Court's standing decision in *Steel Co. v. Citizens for a Better Environment*,<sup>12</sup> to illustrate the practical implications of liberal state court standing.<sup>13</sup>

## II. PRELUDE: STANDING IN STATE COURTS

State courts do not run "public interest" and other ideological plaintiffs through the obstacle course erected by the U.S. Supreme Court under the guise of Article III. Most state courts are courts of general jurisdiction, unfettered by constitutional provisions analogous to Article III. True, out of respect for the legislature, or out of a sense of their own limitations, these courts customarily decline to rule on questions of law absent something like a case or controversy.<sup>14</sup> But state courts need not follow the Supreme Court's jurisprudence in this regard, and, in practice, their default rules of justiciability tend to be more liberal.<sup>15</sup>

Unencumbered by constitutional constraints, state courts and legislatures often relax the background rules of standing in ways

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11. 42 U.S.C. §§ 11001-11050.

12. 523 U.S. 83 (1998); *see infra* notes 193-199 and accompanying text.

13. This Note is the second to explore the implications of *ASARCO* for the enforcement of federal environmental law. Another commentator took note of *ASARCO* and suggested that Congress use the threat of federal preemption to induce state legislatures to authorize their courts to hear the federal claims of non-Article III plaintiffs. William Grantham, Note, *Restoring Citizen Suits After Lujan v. Defenders of Wildlife: The Use of Cooperative Federalism To Induce Non-Article III Standing in State Courts*, 21 VT. L. REV. 977 (1997). My contribution differs from Grantham's in three respects. First, I show that many states already apply liberal standing to environmental claims; Congress need not pressure these states to relax their laws of standing. Second, I analyze concurrent jurisdiction under the present constellation of federal environmental laws and show that state courts can enforce most of them. When juxtaposed against the recent concurrent jurisdiction decisions, *ASARCO* has immediate implications for the enforcement of federal environmental law. Public-interest litigators do not need Congress to enact the implausible affront to norms of federalism that Grantham proposes. Third, I make a foray into constitutional theory and develop a new rationale for the *ASARCO* holding. Incidentally, my jurisprudential analysis of the structural provisions of the Constitution indicates that Grantham's proposal might run afoul of separation-of-powers principles. *See infra* note 155 and accompanying text.

14. *See, e.g.*, *Brown Mech. Contractors v. Centennial Ins. Co.*, 431 So. 2d 932 (Ala. 1983); *Estes v. Walters*, 601 S.W.2d 252 (Ark. Ct. App. 1980); *Washakie County Sch. Dist. Number One v. Herschler*, 606 P.2d 310 (Wyo. 1980).

15. *See, e.g.*, *Me. Ass'n of Interdependent Neighborhoods v. Comm'r, Me. Dep't of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989) (acknowledging that Maine's law of standing is more liberal than its federal counterpart); *Langford v. Superior Court*, 729 P.2d 822, 833 n.6 (Cal. 1987) ("California's [standing] requirements are less stringent than those imposed by federal law."); *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1257 (Haw. 1992) (showing that Hawaii has adopted a broader view than the federal courts have of what constitutes a personal stake in cases involving public rights); *State v. Alston*, 440 A.2d 1311, 1314-18 (N.J. 1981) (granting vehicle passengers standing to challenge a search and seizure, despite contrary holdings from the U.S. Supreme Court); *Suffolk Hous. Serv. v. Town of Brookhaven*, 397 N.Y.S.2d 302, 308-11 (Sup. Ct. 1977) (contrasting trends in New York and Article III standing law as regards challenges to exclusionary zoning).

advantageous to environmental plaintiffs.<sup>16</sup> Prominent examples include judge-made exceptions for cases of “great public import,” taxpayer-standing laws, and environmental rights acts. Not every green gripe rises to the level of “great public import,”<sup>17</sup> but taxpayer standing and environmental rights acts present manifold opportunities for public-interest plaintiffs.

Taxpayer standing empowers citizens, in their capacity as taxpayers, to counter the illegal expenditure of tax revenues and other threats to the public fisc.<sup>18</sup> Taxpayer standing could be used to challenge state construction and development projects—highways, irrigation systems, river channelization, and the like—that would violate federal environmental laws. Every state except New Mexico recognizes taxpayer standing;<sup>19</sup> some even authorize taxpayer challenges to nonfiscal matters,<sup>20</sup> which opens up further opportunities to contest state agencies’ implementation of federal environmental law.<sup>21</sup> Environmental rights acts or constitutional provisions in fifteen states confer broad citizen standing to challenge ecologically deleterious activities.<sup>22</sup> Fourteen provide for lawsuits against virtually any entity; the exception, Maryland, focuses more narrowly on claims against governmental entities.<sup>23</sup> Only three of the environmental rights acts

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16. Even though state courts are not cabined by a state constitutional analogue to Article III, it is conceivable that state courts would derive a constitutional law of standing from the constitutional structure of state government. I have managed to unearth only two examples of this kind of thinking: *Life of the Land v. Land Use Commission*, 623 P.2d 431 (Haw. 1981), and *Texas Ass’n of Business v. Texas Air Control Board*, 852 S.W. 440 (Tex. 1993).

17. For examples of “great public import” disputes, see *Shapiro v. Columbia Union National Bank & Trust Co.*, 576 S.W.2d 310 (Mo. 1978); *Blaikie v. Lindsay*, 321 N.Y.S.2d 388 (Sup. Ct. 1971); *Jenkins v. State*, 585 P.2d 442 (Utah 1978); *DeFunis v. Odegaard*, 529 P.2d 438 (Wash. 1974); and *Milwaukee Professional Firefighters, Local 215 v. City of Milwaukee*, 253 N.W.2d 481 (Wis. 1977).

18. Susan L. Parsons, Comment, *Taxpayers’ Suits: Standing Barriers and Pecuniary Restraints*, 59 TEMP. L.Q. 951, 967-68 (1986) (citing cases).

19. *Id.* at 962-63.

20. See, e.g., *Blair v. Pitchess*, 486 P.2d 1242 (Cal. 1971) (holding that California law authorized taxpayer actions for any illegal expenditure of public funds). See generally 74 AM. JUR. 2D *Taxpayers’ Actions* § 27 (1999) (citing cases upholding taxpayer standing for nonfiscal matters in Colorado, Kansas, Kentucky, Maryland, New Jersey, New York, and West Virginia).

21. Many federal environmental laws are implemented via “cooperative federalism,” with state agencies in the lead. For a concise overview of the role of cooperative federalism in federal law, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Federalism” Doesn’t*, 96 MICH. L. REV. 813, 858-71 (1998).

22. HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; CONN. GEN. STAT. §§ 22a-14 to -20 (1999); FLA. STAT. ANN. § 403.412 (West 2000); IND. CODE §§ 13-30-1-1 to 13-30-1-12 (2000); IOWA CODE § 455B.111 (1999); LA. REV. STAT. ANN. § 30:2026 (West 2000); MD. CODE ANN., NAT. RES. §§ 1-501 to -508 (2000); MASS. GEN. LAWS ch. 214, § 7A (2000); MICH. COMP. LAWS §§ 324.1701-.1706 (2000); MINN. STAT. §§ 116B.01-.13 (2000); NEV. REV. STAT. ANN. §§ 41.540-.570 (Michie 2000); N.J. STAT. ANN. §§ 2A:35A-1 to :35A-14 (West 1999); N.D. CENT. CODE §§ 32-40-01 to 32-40-11 (2000); S.D. CODIFIED LAWS §§ 34A-10-1 to 34A-10-17 (Michie 2000).

23. MD. CODE ANN., NAT. RES. § 1-503(b).

condition standing on personal injury or harm.<sup>24</sup> Viewed from the advocate's perspective, environmental rights acts and taxpayer standing laws mesh together beautifully. Many environmental rights acts enable non-Article III plaintiffs to bring lawsuits against industries and landowners,<sup>25</sup> whereas taxpayer standing facilitates claims against state agencies.

Surely some states follow Article III standing, or invent even more restrictive doctrines.<sup>26</sup> I do not mean to deny state-to-state variation in standing law. But when considered together, the generous background principles of state court standing, the great-public-import exceptions, the taxpayer standing doctrines, and the environmental rights acts define a climate of state court openness toward public-interest litigants.

### III. SUPREME COURT JURISPRUDENCE

I now turn to developments in U.S. Supreme Court jurisprudence that should motivate environmental advocates to pause before rushing off to the federal courthouse. I begin with the recent and familiar history of Article III standing. Then I recount the Court's affirmation of the right of state courts to hear federal claims absent a federally justiciable case or controversy, and explain how, in *ASARCO*, state court judgments in favor of non-Article III plaintiffs garnered collateral effect in federal court. Third, I review the Court's increasingly emphatic defense of the presumption of concurrent jurisdiction, and tease out the implications for state court enforcement of the federal environmental statutes.

#### A. *Article III Standing*

My purpose in this Section is not to evaluate the coherence or desirability of the Court's standing decisions; rather, I want to convey in broad strokes the evolution of doctrine as seen through the lens of the

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24. These three exceptions are Iowa, IOWA CODE § 455B.111, Louisiana, LA. REV. STAT. ANN. § 30:2026, and North Dakota, N.D. CENT. CODE § 32-40-06.

25. Note, however, that two of the environmental rights acts only liberalize standing to challenge violations of *state* law. IOWA CODE § 455B.111; LA. REV. STAT. ANN. § 30:2026. Two more restrict claims against defendants who are in compliance with state regulations. IND. CODE § 13-30-1-8(1) (stating that showing compliance with "applicable rule[s] adopted by a state agency" is a *prima facie* defense); MINN. STAT. § 116B.03(1) (disallowing actions for conduct taken pursuant to any standard, limitation, rule, order, license, stipulation agreement, or permit issued by a relevant state agency).

26. The Virginia legislature, for instance, has imposed standing requirements more restrictive than Article III on persons challenging air pollution permits. See Maria Farinella, Comment, *The Clean Air Act of 1990: Title V's Operating Permit Provision for Citizen Access to State Court Judicial Review*, 8 ADMIN. L.J. AM. U. 67, 83-87 (1994) (recounting the passage of amendments to the state Air Pollution Control Law).

environmental standing cases. Readers familiar with this body of case law can skip forward to Section III.B.

The seminal decision of the modern era is *Sierra Club v. Morton*,<sup>27</sup> in which the Supreme Court acknowledged that “aesthetic and recreational” injuries to people who use an area proposed for development can amount to an “injury in fact” sufficient for standing to challenge the development. Environmental standing seemed wide-open in the 1970s,<sup>28</sup> but in the 1980s and 1990s, the Court tightened the screws on green plaintiffs. *Lujan v. National Wildlife Federation (Lujan I)*<sup>29</sup> reworked the conceptualization of “injury in fact.” The National Wildlife Federation had challenged the Department of Interior’s reclassification of some 1250 tracts of federal land, opening these properties to mining. Wildlife Federation affiants stated that they used lands “in the vicinity” of areas affected by two of the 1250 reclassifications.<sup>30</sup> But the Supreme Court denied standing, on the grounds that the affiants did not utilize the particular portion of the tract of land (some 4500 acres out of two million) newly opened to mining.<sup>31</sup>

On the heels of *Lujan I* came *Lujan v. Defenders of Wildlife (Lujan II)*,<sup>32</sup> in which the high court specified that an “injury in fact” must be “actual or imminent,” not “conjectural or hypothetical.”<sup>33</sup> Defenders of Wildlife had challenged the failure of the U.S. Agency for International Development to consult with the U.S. Fish and Wildlife Service, pursuant to the Endangered Species Act, prior to funding projects alleged to threaten the Nile crocodile and the Asian elephant and leopard. To secure standing, Defenders produced affidavits from two members who had visited the habitat of these animals in the past, and planned to do so again. The Supreme Court ruled, however, that such “‘some day’ intentions [to return]” flunk the test of imminence.<sup>34</sup> Drawing upon nonenvironmental cases from the 1970s and 1980s, the Court went on to explain that Article III standing also requires a showing of causation and redressability as complements to injury in fact.<sup>35</sup> And in categorically rejecting standing for

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27. 405 U.S. 727 (1972).

28. *E.g.*, *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (holding that law students had standing to challenge an Interstate Commerce Commission order authorizing higher charges for rail freight, on the grounds that higher shipping costs would stymie recycling and thus pollute the environment in which the law students lived and recreated).

29. 497 U.S. 871 (1990).

30. *Id.* at 886 (citations omitted).

31. *Id.* at 885-89.

32. 504 U.S. 555 (1992).

33. *Id.* at 560 (citations omitted).

34. *Id.* at 564.

35. *Id.* at 571-78.

purely “procedural” injuries, the four-Justice plurality denied Congress the power to define new forms of injury.<sup>36</sup>

The question of redressability came to the fore in *Steel Co. v. Citizens for a Better Environment*,<sup>37</sup> which addresses citizen suits for wholly past violations under the Emergency Planning and Community Right To Know Act (EPCRA).<sup>38</sup> EPCRA instructs users of specified toxic and hazardous chemicals to file annual reports explaining their use and emissions of the listed chemicals. In 1995, Citizens for a Better Environment sent a “notice of intent to sue” letter to Steel Company, the EPA, and state officials, alleging a pattern of reporting violations dating back to 1988. During the mandatory sixty-day waiting period between the notice letter and the date of suit, Steel Company filed all of the missing reports. The citizens’ group brought suit anyway, seeking a declaratory judgment, civil penalties, attorneys’ fees, and authorization to inspect Steel Company’s facility and records. None of these, ruled the Court, would eliminate the effects of late reporting or compensate the plaintiffs for losses they had suffered.<sup>39</sup> Unlike an award of damages, civil penalties would accrue to the U.S. Treasury, not to the plaintiffs, and so could not redress the plaintiffs’ injuries.<sup>40</sup>

Most recently, in one of its first opinions of the new millennium, the Supreme Court clarified two points of confusion about injury and redressability. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*<sup>41</sup> establishes, first, that environmental standing does not turn on actual or imminent damage to the environment; rather, a reasonable fear of economic and aesthetic harm suffices.<sup>42</sup> *Laidlaw* allowed citizen plaintiffs to challenge “continuous and pervasive illegal discharges of pollutants into a river,”<sup>43</sup> notwithstanding the district court’s finding that no environmental harm had resulted. On a second front, *Laidlaw* stipulates that civil damages can redress the risk of future violations. It follows that standing doctrine does not bar private enforcement of civil penalties if further violations are in the offing.<sup>44</sup>

In time, scholars may come to see *Laidlaw* as a turning point in the Supreme Court’s standing jurisprudence, but nowhere in that decision does the Court question the propriety of *Steel Co.* or the *Lujan* dyad. The barriers

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36. *Id.* at 571-78. The Court of Appeals had ruled that the Endangered Species Act creates certain “procedural rights” that any person may enforce, irrespective of distinct, concrete injury. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 121 (8th Cir. 1990).

37. 523 U.S. 83 (1998).

38. 42 U.S.C. § 11001 (1994).

39. *Steel Co.*, 523 U.S. at 105-10.

40. *Id.* at 106-07.

41. 528 U.S. 167 (2000).

42. *Id.* at 184-85.

43. *Id.* at 184.

44. *Id.* at 184-88.



to “private attorney general” enforcement of federal environmental law erected in those opinions still endure.

B. *State Courts, Federal Claims, and Article III*

The Supreme Court continues to affirm the right of state courts to apply their own, more lenient rules of justiciability to federal claims. This practice dates back to 1952,<sup>45</sup> when, in *Doremus v. Board of Education*,<sup>46</sup> Justice Jackson somewhat tentatively suggested that state courts need not hew to the emerging principles of Article III standing. Justice Jackson’s cautious endorsement of state court discretion subsequently hardened into black-letter law. There were a couple of bumps along the way,<sup>47</sup> but three Supreme Court decisions in the mid-1980s matter-of-factly affirm, in dicta, the *Doremus* standard.<sup>48</sup> Finally, in the 1989 case of *ASARCO v. Kadish*,<sup>49</sup> the Supreme Court made it definitive: State courts’ application of home-grown rules of justiciability to federal claims “properly follows from the allocation of authority in the federal system.”<sup>50</sup> This proposition about federalism won the assent of all eight sitting Justices.<sup>51</sup>

Prior to *ASARCO*, state court rulings on the claims of non-Article III plaintiffs were not reviewable by the U.S. Supreme Court, and as such, had no collateral effect in federal court.<sup>52</sup> *ASARCO* resolves this nagging difficulty. Conjuring a novel legal fiction, Justice Kennedy characterized the Arizona Supreme Court’s ruling for the plaintiff Kadish as an injury in fact to the defendant-intervenor ASARCO, thereby giving ASARCO standing to appeal to the U.S. Supreme Court.<sup>53</sup> This right is asymmetric; had ASARCO prevailed in the state supreme court, Kadish, the non-Article III plaintiff, would have had no recourse to the U.S. Supreme Court.<sup>54</sup> It

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45. There were earlier inklings of this philosophy, but not until *Doremus* did a majority of the Court provide an exposition. For the antecedents, see William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 272-78 (1990).

46. 342 U.S. 429 (1952).

47. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 316-20 (1974) (vacating and remanding a state supreme court ruling that the Court deemed nonjusticiable by the terms of Article III). *DeFunis* and another perplexing decision, *New Jersey v. Portash*, 440 U.S. 450 (1979), are discussed in William P. Murphy, *Supreme Court Review of Abstract State Court Decisions on Federal Law: A Justiciability Analysis*, 25 ST. LOUIS U. L.J. 473, 478-83 (1981).

48. See *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988); *Sec’y of State v. J.H. Munson Co.*, 467 U.S. 947, 971 (1984) (Stevens, J., concurring); *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983).

49. 490 U.S. 605 (1989).

50. *Id.* at 617.

51. The dissenting Justices, Rehnquist and Scalia, embrace this proposition with at least as much fervor as the majority. See *id.* at 636 (Rehnquist, C.J., dissenting).

52. *Id.* at 621-22 (discussing a line of cases dating back to 1927).

53. *Id.* at 618.

54. *Id.*

follows from the defendant's newfound course of appeal that state court judgments in favor of non-Article III plaintiffs have collateral effect in federal court. This important development greatly reduces the ex ante cost of state-court/federal-law citizen suits. No longer need environmentalists worry about relitigating state court victories before federal judges.

On occasion, too-clever defendants have tried to dodge the state court claims of non-Article III plaintiffs by removing federal questions to federal court pursuant to 28 U.S.C. § 1441, and then moving for dismissal for want of standing.<sup>55</sup> They have been stymied every time: When federal courts lack subject matter jurisdiction over a case removed under this section, they must remand the matter to state court.<sup>56</sup>

### C. *The Presumption of Concurrent Jurisdiction*

#### 1. *Doctrine*

The presumption that state courts have jurisdiction over federal claims is well-established.<sup>57</sup> The key question, then, is what Congress must specify to overcome the presumption. *Yellow Freight System, Inc. v. Donnelly*,<sup>58</sup> unanimously decided in 1990, moves forcefully toward a textual, clear-statement requirement for exclusive federal jurisdiction. Preceding decisions followed a three-part test that held the presumption rebuttable

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55. See, e.g., *Langford v. Gates*, 610 F. Supp. 120 (C.D. Cal. 1985).

56. This follows from the mandatory language of 28 U.S.C. § 1447(c) (2000) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." (emphasis added)). See *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 87-89 (1991) (deeming the district court's invocation of a "futility exception" to justify dismissal rather than remand to contravene the plain language of § 1447(c)); cf. *Smith v. Wis. Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1142 (7th Cir. 1994) (noting that § 1447(c) requires remand, not dismissal, when a claim fails to pass Article III tests of ripeness or standing); *Me. Ass'n of Interdependent Neighborhoods v. Comm'r, Me. Dep't of Human Servs.*, 876 F.2d 1051, 1053-55 (1st Cir. 1989) (same). Other cases remanded for lack of standing include *Wheeler v. Travelers Insurance Co.*, 22 F.3d 534 (3d Cir. 1994); *Bradgate Associates, Inc. v. Fellows, Read & Associates, Inc.*, 999 F.2d 745 (3d Cir. 1993); *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809 (N.D. Cal. 1991); and *Martin v. General Motors*, 753 F. Supp. 1347 (E.D. Mich. 1991). But see *Cromwell v. Equicor-Equitable Corp.*, 944 F.2d 1272 (6th Cir. 1991) (stating that a district court may evaluate preemption before standing, and dismiss rather than remand state-law claims found to be preempted). The *Cromwell* concurrence and the dissent both reject this dubious proposition. *Id.* at 1279 (Suhreheinrich, J., concurring); *id.* (Jones, J., dissenting). If it is defensible at all (and I think it is not), *Cromwell* would turn on a distinction between constitutional Article III standing and statutory standing (which may be more restrictive). The *Cromwell* court evaluated standing on statutory grounds (ERISA) more restrictive than Article III, so perhaps the court did not reach beyond its constitutional powers in evaluating preemption before standing. Still, the ultimate decision to dismiss rather than remand the plaintiffs' claims violates the plain language of § 1447(c).

57. E.g., *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990) (Title VII); *Tafflin v. Levitt*, 493 U.S. 455 (1990) (RICO); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) (Outer Continental Shelf Lands Act).

58. 494 U.S. 820.

“by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests.”<sup>59</sup>

*Yellow Freight* acknowledges compelling evidence of a congressional “expectation” of exclusive federal jurisdiction over the law at issue, Title VII,<sup>60</sup> but holds that such an expectation, “even if universally shared, is not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction.”<sup>61</sup> The omission of “language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction . . . is strong, and arguably sufficient, evidence that Congress had no such intent.”<sup>62</sup> Showing the weight of these words, the Court refused to infer a dispositive congressional intent for exclusive federal jurisdiction from statutory references to federal court procedures.<sup>63</sup> *Yellow Freight* never mentions the three-part test for rebutting concurrent jurisdiction, and while the decision includes a perfunctory incompatibility analysis, it does not describe incompatibility as sufficient to deprive state courts of jurisdiction.<sup>64</sup> Indeed, *Yellow Freight* largely follows Justice Scalia’s concurrence in *Tafflin v. Levitt*,<sup>65</sup> decided only months earlier. Concurring in *Tafflin*, Justice Scalia wrote that legislative history never suffices to break the presumption of concurrent jurisdiction.<sup>66</sup> He further proposed that “clear incompatibility” may not be adequate either, observing that the cases usually cited to illustrate clear-incompatibility analysis were decided on other grounds.<sup>67</sup>

## 2. Concurrent Jurisdiction in the Major Environmental Statutes

*Yellow Freight* would be immaterial for environmental plaintiffs if federal environmental laws addressed state court jurisdiction expressly, but it turns out that most of these statutes are mum on concurrent jurisdiction. Generally they convey an impression of exclusive federal jurisdiction, however, which has led to a number of faulty jurisdictional rulings in the lower courts. In the pages that follow I show that a close reading of these

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59. *Gulf Offshore*, 453 U.S. at 478 (citing cases dating back to 1876). Defining the federal interest in exclusive jurisdiction for purposes of the third prong (incompatibility between state court jurisdiction and federal interests), the *Gulf Offshore* Court points to “the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to federal claims.” *Id.* at 483-84.

60. 42 U.S.C. § 2000e (1982).

61. *Yellow Freight*, 494 U.S. at 824-25.

62. *Id.* at 823.

63. *Id.* at 825-26.

64. *Id.* at 826. (rejecting out of hand the experience and expertise arguments for exclusive federal jurisdiction).

65. 493 U.S. 455 (1990).

66. *Id.* at 472 (Scalia, J., concurring).

67. *Id.* at 472-73.

statutes in light of *Yellow Freight* suggests that all but CERCLA,<sup>68</sup> and probably TSCA,<sup>69</sup> accommodate state court jurisdiction.

Post-*Yellow Freight*, a statutory pronouncement that “each United States district court . . . shall have jurisdiction” does not deprive state courts of concurrent jurisdiction.<sup>70</sup> But many of the federal environmental statutes treat jurisdiction and venue separately, and their venue clauses may be thought to signify exclusive federal jurisdiction. Thus, for purposes of jurisdictional analysis, I group the statutes according to their venue clauses. The citizen-suit provisions of the Resources Conservation and Recovery Act (RCRA),<sup>71</sup> EPCRA,<sup>72</sup> and TSCA<sup>73</sup> present the hardest cases. These commence with venue statements suggestive of exclusive federal jurisdiction. Illumined by *Yellow Freight*, however, the RCRA and EPCRA venue clauses seem not to deny concurrent jurisdiction.

The easiest cases are the Endangered Species Act (ESA),<sup>74</sup> the Marine Mammal Protection Act (MMPA),<sup>75</sup> and the Safe Drinking Water Act (SDWA).<sup>76</sup> These statutes have permissive venue clauses, or no venue clause at all.

For a third group of statutes—the Clean Water Act (CWA),<sup>77</sup> the Clean Air Act (CAA),<sup>78</sup> and the Surface Mining Control and Reclamation Act (SMCRA)<sup>79</sup>—the case for concurrent jurisdiction is strong, if not airtight. Like the first group, these statutes have venue clauses that could be read to signify exclusive federal jurisdiction. But here the placement and phrasing of the venue clauses make the argument for exclusive federal jurisdiction comparatively awkward.

I begin with RCRA, for here one finds the richest vein of case law. I then present the other statutes in terms of the questions raised by RCRA. I note the rare occasions on which state courts have issued opinions on federal environmental laws,<sup>80</sup> and also the federal decisions that address

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68. 42 U.S.C. §§ 9601-9675 (1994).

69. 15 U.S.C. §§ 2601-2692 (1994).

70. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).

71. 42 U.S.C. §§ 6901-6992.

72. *Id.* §§ 11001-11050.

73. 15 U.S.C. §§ 2601-2692.

74. 16 U.S.C. §§ 1531-1544 (1994).

75. *Id.* §§ 1361-1407.

76. 42 U.S.C. §§ 300f-j.

77. 33 U.S.C. §§ 1251-1387 (1994).

78. 42 U.S.C. §§ 7401-7642.

79. 30 U.S.C. §§ 1201-1328 (1994).

80. The Appendix tabulates these cases. My census may be slightly underinclusive. For the more commonly cited statutes (e.g., the CAA and the CWA), I ran Westlaw searches for state court citations to the federal statute’s citizen-suit provisions and for the term “citizen suit” in conjunction with the name of the federal statute, rather than reviewing all of the many hundred state court decisions that simply mention the federal statute by name. To confirm the validity of this screen, I reviewed approximately 100 opinions from the more encompassing search (citation to the statute by name), which confirmed that virtually all such cases do not involve citizen suits

concurrent jurisdiction. In most of the state cases, the judge accepted jurisdiction without discussion, or rejected jurisdiction on perfunctory grounds. The painstaking doctrinal analysis offered here will, I hope, help state judges better to understand their jurisdiction over federal environmental claims.

- a. *Resources Conservation and Recovery Act (RCRA), Emergency Planning and Community Right-To-Know Act (EPCRA), and Toxic Substances Control Act (TSCA)*

Under the caption “In general” at the head of its citizen-suit clause, RCRA specifies that suits “*shall* be brought in *the* district court for *the* district in which the alleged violation occurred.”<sup>81</sup> A sentence later the statute explains that “[t]he district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties” to enforce the dictates of the law and to assess civil penalties.<sup>82</sup> The venue proposition suggests that Congress expects all RCRA claims to be brought in a single system of trial courts, and the sentence that follows intimates that that single system is the federal system.

Had Congress intended otherwise, it could have written that claims under RCRA “*shall* be brought in the district [or trial] court of *a* district in which the alleged violation occurred,” or “*may* be brought in the district court of *the* district in which the alleged violation occurred.” Yet Congress is not reliably precise in its use of the articles “the” and “a.” Consider, for instance, these paragraphs from the citizen-suit provision of the Outer Continental Shelf Lands Act, the statute at issue in another concurrent jurisdiction case, *Gulf Offshore Co. v. Mobil Oil Corp.*:<sup>83</sup>

(1) [T]he district courts of the United States shall have jurisdiction . . . Proceedings . . . may be instituted in *the* judicial district in which any defendant resides or may be found, *or* in *the* judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured . . . may bring an action for damages . . . only in *the* judicial district having jurisdiction under [the above clause].<sup>84</sup>

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pursuant to the federal statute (most involve disputes under analogous state laws). Still, practitioners are advised not to assume that the cases tabulated in the Appendix fully exhaust the universe of state-court citizen suits under federal environmental statutes.

81. 42 U.S.C. § 6972(a) (emphasis added).

82. *Id.*

83. 453 U.S. 473 (1981).

84. 43 U.S.C. § 1349(b)(1)-(b)(2) (1994) (emphasis added).

The second paragraph is not semantically correct—Congress mistakenly used the definite article “the” where it meant “a”—for it follows from the first paragraph that multiple federal district courts can have jurisdiction.

Judges should be wary of inferring substance from stray articles, especially when the inference would contravene a legal norm (here, concurrent jurisdiction) protected by clear-statement rules. In the aftermath of *Yellow Freight*, inferences about congressional expectations do not suffice to divest state courts of concurrent jurisdiction, even if those inferences follow from the language of the statute itself.<sup>85</sup> RCRA’s phrase, “the district court for the judicial district in which the violation occurred,” and the ensuing allusion to jurisdiction “without regard to the amount in controversy,” arguably show that Congress had the federal courts in mind, but so do the prescriptions for federal appellate jurisdiction and the references to the Federal Rules of Civil Procedure in Title VII and RICO, which *Yellow Freight* and *Tafflin* respectively deem insufficient for exclusive federal jurisdiction.<sup>86</sup>

A quick glance at Title VII shows how far the Supreme Court will bend plain meanings in the interest of concurrent jurisdiction. The statute declares that “[a]ny temporary restraining order or other order granting preliminary or temporary relief *shall* be issued in accordance with rule 65 of the Federal Rules of Civil Procedure.”<sup>87</sup> It makes no sense for Congress to use the imperative “shall” unless Congress thinks that Title VII creates exclusive federal jurisdiction. With regard to appellate jurisdiction, § 2000e-5(j) of Title VII specifies, “Any civil action brought under this section . . . *shall* be subject to appeal as provided in sections 1291 and 1292, Title 28.”<sup>88</sup> Sections 1291 and 1292 of Title 28 establish the jurisdiction of the federal circuit courts. If Title VII were read to reserve exclusive jurisdiction to the federal courts, then § 2000e-5(j) would be a correct statement. But if Title VII is read to confer concurrent jurisdiction on the state courts—the Supreme Court’s position in *Yellow Freight*—then the word “shall” must be read as “may,” or the words “in federal court” must be inserted after “brought,” for § 2000e-5(j) to be logically correct. The *Yellow Freight* Court concluded that § 2000e-5(j) and § 2000e-5(f)(2) come into play subsequent to a claim being brought in federal court.<sup>89</sup> In effect, then, the Court did read “brought” to mean “brought in federal court.” This seems a bigger interpretive leap than simply reading the “the”

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85. *See supra* note 63 and accompanying text.

86. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 825-26 (1990); *Tafflin v. Levitt*, 493 U.S. 455, 466-67 (1990).

87. 42 U.S.C. § 2000e-5(f)(2) (1994) (emphasis added).

88. *Id.* § 2000e-5(j) (emphasis added).

89. *Yellow Freight*, 494 U.S. at 825-26.

in RCRA's venue language to mean "a," which is all that is required for concurrent jurisdiction under that statute.

Note too that the "temporal" interpretive gloss that *Yellow Freight* uses to avoid exclusive federal jurisdiction also would solve the venue problem in RCRA. One could read RCRA's mandate that citizen suits "shall be brought in the district court for the district in which the alleged violation occurred"<sup>90</sup> as operating subsequent to the decision to bring a claim in state or federal court. Once you have chosen a judicial system, *then* you must bring your claims in *the* district court for *the* judicial district in which the alleged violation occurred. This gloss on RCRA's venue language is considerably less heroic than *Yellow Freight's* analogous interpretation of the federal court procedure clauses of Title VII.<sup>91</sup> *Yellow Freight* renders nugatory two clauses of Title VII as regards state court claims, whereas my reading of RCRA's venue provision allows it to operate vis-à-vis state and federal courts.

Only one court has wrestled with concurrent jurisdiction under RCRA in light of the Supreme Court's decision in *Yellow Freight*. In *Davis v. Sun Oil Co.*,<sup>92</sup> the Sixth Circuit held RCRA not to preempt state court jurisdiction. The court observed that *Yellow Freight* rejects an argument for exclusive federal jurisdiction premised on this language from Title VII: "Each United States district court . . . shall have jurisdiction under this subchapter."<sup>93</sup> It follows that RCRA's "shall be brought" phrase does not divest state courts of jurisdiction. Though the end result seems correct, the reasoning is doubtful. No implications about state court jurisdiction follow as a matter of logical necessity from the above-quoted Title VII clause,<sup>94</sup> whereas the RCRA citizen-suit provision, if read literally, affirmatively requires citizens to bring their claim in one particular and presumably federal court (*the* district court for *the* judicial district in which the alleged violation occurred). *Sun Oil* fails to canvass any of the rationales for concurrent jurisdiction under RCRA set forth in this Note.

*Davis v. Sun Oil* represents a minority viewpoint among judicial opinions that consider state court jurisdiction under RCRA. In *Middlesex*

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90. 42 U.S.C. § 6972(a) (emphasis added).

91. One can imagine a contrary though ultimately unconvincing view. The contrarian's argument runs thus: The references to federal procedure and federal appellate jurisdiction in Title VII, and that statute's jurisdictional provisions, are found in different clauses. By contrast, RCRA wraps venue and jurisdiction into the same paragraph, and both the venue and the jurisdiction statements use "district court" to refer to the same, particular entity (which, by the jurisdiction statement, seems to be a federal court). This position is not nonsense, but when there exist two plausible statutory interpretations, one admitting and the other denying state court jurisdiction, the norms of *Yellow Freight* militate in favor of the one compatible with concurrent jurisdiction.

92. 148 F.3d 606 (6th Cir. 1998).

93. *Id.* at 612 (quoting *Yellow Freight*, 494 U.S. at 823).

94. From "If *X* is a federal court, then *X* shall have jurisdiction," it does not necessarily follow that, "If *X* is not a federal court, then *X* shall not have jurisdiction."

*County Board of Chosen Freeholders v. New Jersey*,<sup>95</sup> which predates *Yellow Freight*, the federal district court relied on the “shall be brought” phrase, scant legislative history, and a statutory reference to the Federal Rules of Civil Procedure to establish exclusive federal jurisdiction over RCRA claims. (The second and third arguments are no longer good in light of *Yellow Freight*.) The argument of *Middlesex County* is rehashed approvingly by the Eighth Circuit in *Blue Legs v. Bureau of Indian Affairs*<sup>96</sup> (which predates *Yellow Freight*), and by Colorado’s intermediate appellate court in *Jilot v. State*<sup>97</sup> (which postdates but does not cite *Yellow Freight*). Three post-*Yellow Freight* decisions from trial courts also treat the “shall” phrase as sufficient to establish exclusive federal jurisdiction.<sup>98</sup> But these perfunctory rulings carry no precedential value—none of the parties argued for concurrent jurisdiction, and the rulings are bereft of any authority or explanation beyond the bare terms of the RCRA citizen-suit clause.

In sum, neither the text of RCRA nor the emerging body of case law provides a secure basis for predicting future decisions on concurrent jurisdiction. Yet the force of the concurrent jurisdiction presumption calls for state court jurisdiction under RCRA, a point lost on the few judges who have considered this issue since the Supreme Court’s decision in *Yellow Freight*.

The citizen-suit clause of RCRA has close cousins in EPCRA<sup>99</sup> and TSCA.<sup>100</sup> EPCRA’s phrasing of venue precisely mimics RCRA’s,<sup>101</sup> and thus raises the same host of questions. Still, the case for concurrent jurisdiction under EPCRA may be marginally stronger than the equivalent claim for RCRA. Right after its perplexing venue requirement, RCRA indicates that “the district court shall have jurisdiction, *without regard to the amount in controversy or the citizenship of the parties*,”<sup>102</sup> suggesting, perhaps, that RCRA’s venue clause refers only to federal courts. By contrast, EPCRA’s jurisdiction clause makes no allusion to federal question

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95. 645 F. Supp. 715, 719-20 (D.N.J. 1986).

96. 867 F.2d 1094, 1098 (8th Cir. 1989).

97. 944 P.2d 566, 568-69 (Colo. Ct. App. 1996).

98. *White & Brewer Trucking, Inc. v. Donley*, 952 F. Supp. 1306 (C.D. Ill. 1997); *Grand E. Props. v. Phillips*, No. CV 940364608, 1996 WL 151229 (Conn. Super. Ct. Mar. 4, 1996); *Andrews v. Caron Bros.*, No. 45136, 1992 WL 67396 (Conn. Super. Ct. Mar. 26, 1992).

99. 42 U.S.C. § 11046(b)(1) (1994) (“Any action . . . against an owner or operator of a facility *shall* be brought in *the* district court for the district in which the alleged violation occurred.” (emphasis added)).

100. 15 U.S.C. § 2619(a) (1994) (stating that citizen suits “*shall* be brought in the United States district court for the district in which the alleged violation occurred.” (emphasis added)).

101. Both statutes specify that citizen suits against private violators “shall be brought in the district court for the district in which the alleged violation occurred.” RCRA, 42 U.S.C. § 6972(a); EPCRA, *id.* § 11046(b)(1) (1994).

102. 42 U.S.C. § 6972(a) (emphasis added).



jurisdiction, and thus does not intimate that “district court” as used in the venue/jurisdiction section means U.S. district court.<sup>103</sup>

TSCA, by contrast, expressly attaches the modifier “United States” to “district court.”<sup>104</sup> In stating that citizen suits “shall be brought in the United States district court for the district in which the alleged violation occurred,”<sup>105</sup> TSCA resolves the ambiguity in RCRA and comes as close as a statute can to reserving jurisdiction expressly to the federal courts without use of the phrase “exclusive jurisdiction.” To find that TSCA confers state court jurisdiction, one would have to abandon plain meanings altogether, massaging the word “shall” until it acquires the shape of “may.”

No court has addressed the question of concurrent jurisdiction under EPCRA; only once has the issue come up under TSCA.<sup>106</sup> As one would expect, that court endorsed exclusive federal jurisdiction. But the ruling is precedentially inconsequential, for the question of concurrent jurisdiction was not argued before the court, and the decision is justified with only a passing reference to the statute.

b. *Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), and Safe Drinking Water Act (SDWA)*

No defensible reading of these statutes could strip the state courts of concurrent jurisdiction. The citizen-suit provision of the ESA indicates that “[d]istrict courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.”<sup>107</sup> The statute also specifies that “any suit under this subsection *may* be brought in the judicial district in which the violation occurs.”<sup>108</sup> It follows from Congress’s use of the permissive “may,” rather than the mandatory “shall,” that the ESA venue clause does not dislodge state court jurisdiction. This reasoning won the Supreme Court’s approval in *Tafflin v. Levitt*.<sup>109</sup>

The SDWA specifies that the “United States district courts shall have jurisdiction”;<sup>110</sup> this is precisely the jurisdictional formulation of Title VII, which the Supreme Court in *Yellow Freight* deemed inadequate to divest state courts of concurrent jurisdiction.<sup>111</sup> The MMPA features an innocuous

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103. *Id.* § 11046(c).

104. 15 U.S.C. § 2619(a).

105. *Id.*

106. *Andrews v. Caron Bros.*, No. 45136, 1992 WL 67396 (Conn. Super. Ct. Mar. 26, 1992).

107. 16 U.S.C. § 1540(g)(1) (1994).

108. *Id.* § 1540(g)(3)(A) (emphasis added).

109. 493 U.S. 455, 460-61 (1990) (finding concurrent jurisdiction under RICO).

110. 42 U.S.C. § 300j-8 (1994).

111. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).

authorization of district court jurisdiction much like the ESA's.<sup>112</sup> Neither the MMPA nor the SDWA includes a venue clause.

On only four occasions have state courts confronted claims under these statutes. None of the decisions sheds much light on concurrent jurisdiction. In one case, the state court assumed jurisdiction without question or analysis;<sup>113</sup> in another, the state court abstained because the claim implicated a federal agency;<sup>114</sup> and in the others, the courts perfunctorily and incorrectly deemed federal jurisdiction exclusive.<sup>115</sup>

c. *Clean Water Act (CWA), Clean Air Act (CAA), and Surface Mining Control and Reclamation Act (SMCRA)*

Like the statutes just discussed, the CWA, the CAA, and SMCRA have innocuous "jurisdiction" clauses that grant federal courts authority to hear citizen suits while remaining silent, expressly and by implication, on the question of exclusivity.<sup>116</sup> But these statutes also have distinct "venue" provisions that might appear to oust state courts of jurisdiction. So, for instance, the venue clause of the CWA specifies that actions "may be brought . . . *only in the* judicial district [in which the polluting source is located]."<sup>117</sup> Again, the article "the" denotes a single system of disjunct judicial districts, that is, the federal courts. Had Congress planned for concurrent jurisdiction, the semantically correct formulation of the venue clause would have been: "[A]ctions may be brought . . . *only in a* judicial district [in which the polluting source is located]."

112. 33 U.S.C. § 1415(g)(1) (1994) ("The district courts shall have jurisdiction . . . to enforce such prohibition, limitation, criterion, or permit [as is provided by the act].").

113. *Hammond v. N. Slope Borough*, 645 P.2d 750 (Alaska 1982) (resolving ESA and MMPA claims by importing the decision of a federal judge in parallel litigation).

114. *San Bernardino Valley Audubon Soc'y v. Metro. Water Dist.*, 83 Cal. Rptr. 2d 836 (Ct. App. 1999) (discussing the fact that the plaintiff contested the adequacy of an Incidental Take Permit issued by the U.S. Fish and Wildlife Service, an issue deemed inappropriate for state court resolution).

115. *See Prairie Dog Advocates v. City of Lakewood*, No. 98CA2396, 2000 WL 674879 (Colo. Ct. App. May 25, 2000) (ESA); *Andrews v. Caron Bros.*, No. 45136, 1992 WL 67396 (Conn. Super. Ct. Mar. 26, 1992) (SDWA). *Caron Bros.* is worthless as precedent: Both the plaintiff and the defendant conceded exclusive federal jurisdiction, and the court made only the most superficial of inquiries into the matter, failing even to appreciate the difference between the SDWA's plain vanilla authorization of federal jurisdiction and TSCA's decree that citizen suits "shall be brought" in federal district court. *Caron Bros.*, 1992 WL 67396, at \*3-4. *Prairie Dog Advocates* is no more respectable, stating in one brief sentence that the ESA establishes exclusive federal jurisdiction. *Prairie Dog Advocates*, 2000 WL 674879, at \*3.

116. The CWA provides: "[D]istrict courts shall have jurisdiction . . . to enforce . . . an effluent standard or limitation . . ." 33 U.S.C. § 1365(a). The CAA uses the same phrase, 42 U.S.C. § 7604(a) (1994), and SMCRA also states that "district courts shall have jurisdiction," 30 U.S.C. § 1270(a) (1994).

117. 33 U.S.C. § 1365(c)(1) (emphasis added). The analogous venue provisions of the CAA and SMCRA are found, respectively, at 42 U.S.C. § 7604(c)(1) and 30 U.S.C. § 1270(c)(1).

Thus the CWA, the CAA, and SMCRA seem to recapitulate the puzzle seen earlier in the citizen-suit provisions of RCRA and EPCRA. And the reasons for finding concurrent jurisdiction under those statutes apply equally to the CWA, the CAA, and SMCRA. Here, though, the case for concurrent jurisdiction is stronger yet. These statutes provide for jurisdiction and venue in separate clauses, with venue coming later in the statutory scheme, much as RICO and Title VII provide separately for jurisdiction and federal court procedures.<sup>118</sup> The Supreme Court treated the RICO and Title VII provisions as operating subsequent to the decision to bring a claim in federal court; similarly, judges should read the venue provisions of the CWA, the CAA, and SMCRA as operating subsequent to the choice between state and federal judiciaries. This analogy was plausible enough in the context of RCRA and EPCRA; it is even better here, where the “layout” of the jurisdiction and venue clauses precisely mirrors the layout of the jurisdiction and federal court procedure clauses in Title VII.

Furthermore, the venue clauses of the CWA, the CAA, and SMCRA specify that actions be brought only in “the judicial district” in which the alleged violation occurred, whereas the venue language of RCRA and EPCRA requires that actions be brought in “the district court for the judicial district” in which the alleged violation took place. This is but a hair-splitting distinction; still, one might think the reference to “district court” in RCRA and EPCRA means “federal district court,” whereas the use of “judicial districts” in the CWA, the CAA, and SMCRA reflects only the typical venue concern of making the place of trial convenient to the defendant.<sup>119</sup>

No court has applied the Supreme Court’s concurrent-jurisdiction jurisprudence to citizen suits brought under the CAA, the CWA, or SMCRA, though state courts have thrice confronted claims under the CWA and once considered a SMCRA petition.<sup>120</sup>

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118. This obviates the contrarian’s reply to my argument for concurrent jurisdiction under EPCRA and RCRA. *See supra* note 91.

119. But Black defines the secondary usage of “district court” thus: “The name for inferior state courts of record having general jurisdiction.” BLACK’S LAW DICTIONARY 476 (6th ed. 1990).

120. In *Berens v. Cook*, 694 N.Y.S.2d 684 (App. Div. 1999), the New York court did not question or otherwise address the propriety of state court adjudication of CWA citizen suits. The same is true for *Puget Soundkeeper Alliance v. State*, 9 P.3d 892 (Wash. Ct. App. 2000). In *Kerns v. Dukes*, 707 A.2d 363 (Del. 1998), the Delaware Supreme Court affirmed state court jurisdiction over the CWA, but, strangely, neither *Yellow Freight* nor its antecedents figured into the court’s reasoning. Instead, the finding of concurrent jurisdiction turned on the competence of Delaware courts to grant the relief called for by the CWA. *Id.* at 369-70. This line of thinking echoes the “clear incompatibility” test for ousting state courts of jurisdiction. The only SMCRA claim to appear before state courts arises in *Castle Valley Special Service District v. Utah Board of Oil, Gas, & Mining*, 938 P.2d 248 (Utah 1996). It does not address the jurisdictional question.

### 3. *Cooperative Federalism as an Alternative to Concurrent Jurisdiction?*

Most of the major environmental statutes authorize state agencies to assume control over implementation if the state legislature enacts a corresponding statute at least as stringent as the federal law, and the state agency demonstrates its competence and diligence to the satisfaction of the U.S. Environmental Protection Agency.<sup>121</sup> One might think, then, that citizen suits in state court would be brought pursuant to the state analogue of the federal law, rather than the federal law itself. It is certainly true that citizens often turn to state courts with gripes about state environmental agencies' implementation of the state versions of the federal statutes.<sup>122</sup> It is not true, however, that cooperative federalism renders concurrent jurisdiction irrelevant, or that cooperative federalism seems a likely explanation for the paucity of federal-law citizen suits litigated in state courts by environmentalists.

As to the first matter—irrelevance—the degree to which states have assumed responsibility for implementing federal environmental law varies from state to state and from federal statute to federal statute. Direct enforcement of federal law is needed to fill the gaps. One important gap may be claims against private parties—my search for recent citizen suits pursuant to state laws that incorporate federal requirements turned up no such claims.<sup>123</sup> As to the second issue, few state court claims have been brought under any of the federal environmental statutes; there is no discernable concentration of federal-law/state-court claims under those

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121. 16 U.S.C. § 1379 (1994) (authorizing the transfer of management responsibilities to the states under the MMPA); *id.* § 1535 (authorizing cooperative agreements under the ESA); 30 U.S.C. § 1253 (authorizing state implementation under SMCRA); 33 U.S.C. § 1342(b) (authorizing state implementation of National Point Source Discharge Elimination System permits under the CWA); 42 U.S.C. § 300g-2 (allocating primary enforcement responsibility to the state regarding public water systems during any period for which the EPA administrator determines that the state has adopted and is implementing regulations no less strict than those in the SDWA); *id.* § 6926 (authorizing state implementation of hazardous waste management under RCRA); *id.* § 7410 (authorizing “state implementation plans” to enforce national air-quality standards under the CAA).

122. For recent examples, see *In re BASF Corp.’s Exemption Permit from Hazardous Waste Land Disposal Restrictions*, 765 So. 2d 1171, 1176 (La. Ct. App. 2000), which addresses a state law that incorporates portions of the federal SDWA; *Friends of Ottawa River v. Schregardus*, No. 98AP-1314, 1999 WL 717314 (Ohio Ct. App. Sept. 16, 1999), which addresses claims under a state law implementing the federal CWA; *New York Public Interest Research Group, Inc. v. New York State Department of Environmental Conservation*, 710 N.Y.S.2d 521 (Sup. Ct. 2000), which addresses state implementation of the federal CAA; and *Bowers v. Pollution Control Hearing Board*, 13 P.3d 1076 (Wash. Ct. App. 2000), which addresses state laws that incorporate standards from the federal CAA.

123. This was only a superficial search, encompassing only air- and water-quality cases decided in the last eighteen months. I have not undertaken the mind-numbing task of sifting through the universe of environmental claims under state law to ascertain fully the “indirect” reach of federal environmental law. For claims against state defendants, see *supra* note 122.

statutes that do not allow for state implementation, or that in practice leave the states with minimal roles.<sup>124</sup>

#### IV. NORMATIVE CONSIDERATIONS: DEFENDING THE STATUS QUO

This Part defends the Supreme Court's current practice of allowing state courts to hear federal claims from non-Article III plaintiffs. Defending the status quo might seem an uninteresting project. It becomes intriguing, however, when one realizes that the sparse legal scholarship on state court standing for federal law claimants almost universally supports the contrary position.<sup>125</sup> The level of interest grows further when one ventures, as I do in this Note, into the underexplored terrain that connects the separation-of-powers interpretation of standing to *ASARCO* and its antecedents.

Moreover, the doctrinal status quo may come under pressure if the practice of environmental lawyering changes in line with the predictions of this Note. It is no secret that a wing of the Rehnquist Court disdains the "public interest" bar. *ASARCO* is a short, conclusory decision, which exists in tension with some of its antecedents.<sup>126</sup> Its durability may depend on a rationale more compelling than the one furnished by the Court.<sup>127</sup>

This Part divides the case for imposing Article III on state courts (when they hear federal claims) into three kinds of arguments: a prophylactic defense of the separation of powers; a policy argument; and an argument for improved consistency across "the legal landscape." I proceed to show that separation-of-powers concerns do not undercut *ASARCO*; that policy arguments grounded in the constitutional text favor the *ASARCO* rule; and that *ASARCO* comports nicely with the contemporary legal landscape.

##### A. Introduction: Answering *ASARCO*'s Critics

Scholarly commentary on state courts, federal claims, and Article III dates back to Professor Freund's suggestion in the wake of *Doremus* that the standing of state court plaintiffs with federal claims be treated as a

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124. TSCA and EPCRA do not provide for state implementation (but note that TSCA may not accommodate concurrent jurisdiction, either). The ESA and the MMPA are administered almost entirely by federal agencies; the Clean Water and Clean Air Acts place the states on the front lines. Yet state court claims under the ESA and the MMPA do not seem any more common than state court claims under the CWA and the CAA. See Appendix.

125. The sole exception is Brian A. Stern, Note, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*, 69 N.Y.U. L. REV. 77 (1994). The footnotes in my Note track the points of congruence between his argument and mine, and also the weaknesses in his argument that I claim to solve.

126. See cases cited *supra* note 47.

127. For the Court's rationale, see *supra* text accompanying notes 49-51.

federal question.<sup>128</sup> This suggestion would eliminate the possibility of unreviewable state court interpretations of federal law, a possibility perhaps incompatible with the Supremacy Clause. Subsequent commentators embraced Freund's position;<sup>129</sup> the most thoughtful and nuanced exposition came from then-Professor (now Judge) Fletcher.<sup>130</sup>

Critiques of *ASARCO* operate on three levels. There is an argument for institutional formalism, an argument about policy, and an argument from the legal landscape. By "institutional formalism," I mean the view of some commentators and jurists that the Constitution should be read to protect absolutely a core domain for each instrumentality of governance. Institutional formalism is a trump card. If the Supremacy Clause means that the Supreme Court must have appellate jurisdiction over *every* federal question decided in state court, or, equivalently, that in *no* circumstance may a non-Article III plaintiff raise a federal question, then our inquiry is over, and *ASARCO* was wrongly decided.

The pages to come describe sympathetically the case for institutional formalism in constitutional law. I contend, however, that state court adjudication of non-Article III plaintiffs' federal claims does not generate the kind of ailment appropriately remedied with institutional formalism. This question resolved, I examine the policy considerations that undergird the Supremacy Clause, and then survey the legal landscape. Both exercises reinforce the *ASARCO* rule.

#### B. *Formalism in Structural Constitutional Law*

Out of the receding floodwaters of the New Deal and Second Reconstruction, the Rehnquist Court has dredged up and re-enlivened a structural Constitution. Theirs is a Constitution that separates powers among the executive branch, the legislative branch, and the federal courts; that reserves certain rights and privileges to the several states; and that withholds from Congress the general police power. Commentators divide the Court's separation-of-powers jurisprudence into formal and functional strands, a taxonomy that well serves the aims of this Note. Formalists would separate the branches of government with sharp, role-distinguishing

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128. SUPREME COURT AND SUPREME LAW 35 (Edmond Cahn ed., 1955) (remarks of Professor Paul Freund).

129. See generally Fletcher, *supra* note 45; William P. Murphy, *Supreme Court Review of Abstract State Court Decisions on Federal Law: A Justiciability Analysis*, 25 ST. LOUIS U. L.J. 473 (1981); Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 311-13 (1980).

130. Fletcher, *supra* note 45.

doctrines;<sup>131</sup> functionalists prefer flexible standards that—they hope—substantially maintain certain (admittedly fuzzy) core functions and relations.<sup>132</sup> Formalist separation-of-powers jurisprudence is “formal” in two senses. First, it is institutionally formal, favoring a kind of role-specific rigidity in the functions of each branch of government. Second, it imposes these distinctions with rule-based doctrines (“doctrinal formalism”) that admit of very little judicial discretion.<sup>133</sup>

Functionalists decry separation-of-powers formalism as a gawky hindrance to experimenting with new models of democratic governance, in line with emerging pressures and sentiments.<sup>134</sup> “Pragmatic” formalists demur, then lay claim to the lesser of evils.<sup>135</sup> Theirs is foremost a prudential thesis: that the threat to governmental efficiency and innovation posed by formalism pales in comparison to the risk that jurists applying the ad hoc balancing tests of functionalism would fail to block the incremental but (eventually) tyrannical accumulation of power in one branch.<sup>136</sup> Policing the arrogation of power to one branch at the expense of another is at once too indefinite and too politically charged a task for judges to execute using anything but bright-line rules—rules that corral judicial discretion, rules to which judges, public officials, and citizens alike become so inured that their use in a time of crisis would be second-nature.

Formalist and functionalist thinking also figure into the federalism debates, but with an altogether different cast. Self-professed formalists like Justice Scalia carry the standard for the states’-rights movement, yet the formalism of their new doctrines is extraordinarily confined. Only where federalism implicates the separation of powers has the Supreme Court issued an arguably formalist ruling that Congress cannot circumambulate.<sup>137</sup> The other formalist rulings—the anticommandeering<sup>138</sup>

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131. In my view the most compelling defense of formalism is Martin H. Redish & Elizabeth J. Cisar, *“If Angels Were To Govern”*: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 1991 DUKE L.J. 449.

132. A classic exposition of the functionalist position is Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

133. The comparative advantages of “rules” and “standards” occupy most debates about formalism and functionalism in law. See, e.g., Larry Alexander, *“With Me, It’s All er Nuthin”*: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530 (1999).

134. E.g., E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 509-13 (1989) (bemoaning rigid separation-of-powers jurisprudence that stymies governmental innovation).

135. The concept of “pragmatic formalism” is developed in Redish & Cisar, *supra* note 131, at 476. Redish and Cisar differentiate between (good) “pragmatic” formalism, motivated consequentially, and (bad, or at least false) “epistemological formalism,” motivated by a philosophic commitment to the categorical interpretation of texts. *Id.* at 453-54.

136. *Id.* at 454.

137. *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997) (holding that Congress’s effort to reinstate by legislation the Court’s earlier and more expansive view of free-exercise rights under the Fourteenth Amendment transgresses the separation of powers and that the definition of Fourteenth Amendment is the province of the judiciary, not the legislature).

and sovereign immunity<sup>139</sup> cases—are basically expressive.<sup>140</sup> Congress can get around them by using the spending power or the threat of preemption to induce the states to submit to its will.

Standards also take precedence over rules as the Court fiddles with limits to congressional power under the Commerce Clause. Twice in the last five years has the Court struck down laws enacted (nominally) pursuant to the Commerce Clause,<sup>141</sup> closing a sixty-year run of unequivocal, “rational basis” deference to Commerce Clause legislation.<sup>142</sup> But these cases do not resuscitate the troubled, pre-New Deal categorical distinctions between proper and improper objects of legislation under the Commerce Clause. Rather, they turn on the vaguest of standards: whether the target of the law at issue “substantially affects” interstate commerce. That political considerations figured into these rulings is obvious. Both decisions struck down recently enacted legislation, long before the laws could become ingrained in American life. Open-ended standards enable and call forth politically sensitized decisions.

The federalism cases reinforce Redish and Cisar’s belief that the Court’s power to backtrack is very constrained once the Court has allowed a structural change in American governance. The Court is not powerless, but its power is largely one of signaling or reinforcing ideas, and tracking political movements, rather than braking runaway trains. Fixing the status quo in place with institutional formalism may be within the judicial competence; unilaterally undoing the status quo is not.

### C. *The Supremacy Clause and the Separation of Powers*

Back to the Supremacy Clause. The task at hand is to decide whether this Clause should be read to permit state court adjudication of federal claims brought by non-Article III plaintiffs. The leading choices are both doctrinally formal; they assume the guise of clear-cut rules. *ASARCO*

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138. *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not require state and local government officials to execute federal law); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not require state legislatures to enact congressionally specified legislation).

139. *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress cannot abrogate state sovereign immunity against private suits in state court); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state sovereign immunity against private suits in federal court).

140. Cf. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1504, 1556-64 (2000) (arguing that expressive theory better explains the anticommandeering rule than does consequentialist theory).

141. *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the civil-remedy provision of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down a portion of the Gun-Free School Zones Act of 1990).

142. The deferential stance began with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), in the wake of Franklin Roosevelt’s court-packing threat.



*always* permits state courts to apply their lenient, home-grown rules of justiciability to federal claims. The Freund-Fletcher alternative would *never* permit deviations from Article III for federal questions. Neither approach will yield maybe-yes/maybe-no cases that require discernment and balancing. This is appropriate. There are no common practices of governance to be unsettled, as in the federalism setting, nor are there sensitive, individualized questions of justice that evoke equitable sensibilities. Simple rules will serve just fine.

Though *ASARCO* and the Freund-Fletcher alternative are both doctrinally formal, only the latter is institutionally formal, in the sense that it protects without qualification the Supreme Court's ability to review all lower court decisions on federal questions. This sharp demarcation of the role of the Court echoes the thinking of separation-of-powers formalists. *ASARCO*, by contrast, makes a minor intrusion on the Supreme Court's customary domain. But is there a looming threat that must be warded off with the Freund-Fletcher prophylaxis? To pose the question seems almost laughable.

*ASARCO* does not position state courts to usurp federal law. It traverses no slippery slope bereft of doctrinal toeholds. The "threat" to federal law, if that is the term for it, is that state courts will interpret federal law too narrowly.<sup>143</sup> Improperly broad interpretations would only arise in the setting of a plaintiff victory, which by *ASARCO* amounts to an injury in fact to the defendant, allowing the Supreme Court to hear the case on appeal. Public-interest groups would surely answer unduly narrow interpretations by soliciting Article III plaintiffs to challenge the same law in federal court, giving the federal judiciary a chance to correct the state court's mistake.<sup>144</sup> In exceptional cases, no Article III plaintiffs may exist. Here, though, a U.S. Attorney presumably could step in with a federal court enforcement action.<sup>145</sup> Congress could respond, too, by stripping the state courts of jurisdiction over federal claims,<sup>146</sup> or by amending citizen-suit provisions to require Article III standing. All three branches of the federal government

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143. Improperly broad interpretations would only arise in the setting of a plaintiff victory, which by *ASARCO* amounts to an injury in fact to the defendant, so the Supreme Court could hear the case on appeal.

144. As a matter of comity, state courts then would defer to the federal interpretation, just as federal courts defer to state court interpretations of state law in diversity cases.

145. But this raises an interesting question: Would the federal courts be overstepping their Article III bounds by hearing a case, brought by a U.S. Attorney, in which no private citizen has suffered an injury in fact? I think the answer is context-specific. Certainly the public attorney may no more seek an advisory opinion than her private counterpart. But in most environmental enforcement actions the government has a tangible interest—civil penalties owed to the Treasury—that private parties lack. Beyond penalties, the government has interests by virtue of its property holdings (for example, public lands, conservation easements) and contractual positions (for example, habitat conservation plans under the Endangered Species Act) that private parties lack.

146. Brian Stern also makes this point. Stern, *supra* note 125, at 96.

share an interest in the supremacy of federal law. Together they can rebuff any state court that improperly restricts federal law. Not only does this coincidence of interest lessen the utility of the Freund-Fletcher rule, it also means the Supreme Court could backtrack and overturn *ASARCO* with only a modicum of trauma, especially if *ASARCO* is seen to hang on a contingent understanding of consequences.<sup>147</sup> State courts might be resentful, but the Supreme Court's move would not risk a constitutional crisis—unlike, say, the Court's reversal of a previously approved usurpation by one of the coordinate branches. Prophylactic formalism is of little moment.

Or is it? All three branches do share a common interest in the supremacy of federal law, if supremacy is understood to mean uniform and faithful interpretations, or precedence over conflicting state and local laws. But the three branches may *not* agree on the desirability of enforcement actions brought by citizens who lack Article III standing. Justice Scalia, for one, maintains that citizen suits brought by plaintiffs who have not suffered a concrete, redressable injury—one that separates them out from the general public—violate the separation of powers.<sup>148</sup> Others share his view that standing has something to do with the separation of powers, but few have limned the connection so precisely.<sup>149</sup>

Scalia asserts that suits by “uninjured” or “ideological” plaintiffs disrupt the constitutionally prescribed distribution of powers in three ways. First, they shift the timing of judicial action.<sup>150</sup> Issues that might have been resolved through the elected branches get pressed on the courts immediately, forcing the courts to speak while political fires burn hot. Second, ideological suits bring to the courts' attention matters that properly belong to the elected branches.<sup>151</sup> Quite simply, statutes and constitutional clauses that neither create nor prevent concrete, individualized harms do not belong in the courts. Third, these suits supplant “the Chief Executive's most important constitutional duty,” namely, to “take Care that the Laws be faithfully executed.”<sup>152</sup> Were Congress positioned to empower “any citizen” to enforce its laws, Congress could usurp a central element of the executive's Article II prerogatives. Justice Scalia has always presented his

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147. See *infra* Section IV.D for one such explanation of *ASARCO*.

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

149. For example, Judge Fletcher's cryptic assertion that the case-or-controversy requirement is a “valuable, even indispensable” limitation on the judicial power suggests a latent concern for the separation of powers. See Fletcher, *supra* note 45, at 283.

150. Scalia, *supra* note 148, at 892.

151. *Id.*

152. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3); cf. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 209-10 (Scalia, J., dissenting) (stating that citizen suits for civil penalties supplant the executive's Article II prerogatives).

analysis in terms of the federal courts, yet it would seem to apply just as forcefully to the adjudication of federal claims in state courts.

Recall my purpose in wandering down the separation-of-powers lane: to detect a threat, a trace of creeping tyranny, that might justify the prophylactic, “pragmatic formalism” of Professors Redish and Cisar,<sup>153</sup> which in turn might justify the institutional formalism of the Freund-Fletcher rule. So motivated, I need concern myself only with Justice Scalia’s charge that lenient standing allows Congress to usurp the executive’s Article II duties. It is hard to see incidental changes in the *timing* of judicial decisions (Scalia’s first complaint) as an encroachment on or suppression of one of the coordinate branches. A quick turnaround from the courts may affect the tenor of politics and the modes of political expression, but it does not deprive the judicial branch of any powers or accrete judicial responsibilities to the legislative or executive domains. If the implication of standing for the timing of judicial decisions is a separation-of-powers concern at all, it belongs to a different genus than do the encroachments and suppressions properly warded off with a prophylaxis of formalism.

Justice Scalia’s second quibble with liberalized standing—that it presents the courts with issues the executive and legislative branches should decide—collapses into his first and third concerns. If a statute creates no material injuries to private persons, and injury in fact is requisite to standing, it does not follow that the courts will never adjudicate a challenge to the statute. The state remains a prospective plaintiff. The absence of citizen plaintiffs would make a challenge less likely (changing the timing of judicial action) and would let the attorney general nurse a statute into desuetude (an Article II prerogative?), but the lack of citizen plaintiffs would not categorically exclude judicial resolution of the issue.

I have pared Justice Scalia’s separation-of-powers theory down to a single issue—the executive’s Article II prerogatives—that may call for the Freund-Fletcher rule on grounds of pragmatic formalism. To Article II I now turn.

Justice Scalia’s theory of congressional usurpation (of executive duties) via citizen suits turns on probabilities and political accountability. It is an almost certain bet that for any statute Congress enacts, *someone*—accountable to no one—is chomping at the bit to enforce it. Absent an injury-causation-redressability requirement for standing, Congress could shunt these activists into court and get immediate declaratory judgments, which the rule against advisory opinions bars Congress from obtaining for itself. Not so if the activist must bring her claim before state courts. Congress wields no control over jurisdiction there. All Congress can do is

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153. See *supra* note 135.

*authorize* state-court citizen suits by non-Article III plaintiffs. Whether the would-be private attorney general actually gets into court depends on jurisdictional rules adopted by courts and legislatures accountable to state electorates.<sup>154</sup> This is no slippery slope toward tyranny. The Court may need pragmatic formalism in its separation-of-powers jurisprudence to guard against the arrogation of power to a single branch, but there is not the remotest threat of incipient tyranny in congressional actions that displace power to democratically accountable state institutions.<sup>155</sup> Quite the contrary: This discharge of federal executive powers *enhances* the diffusion of authority, adding a “vertical” separation (between the national government and the states) to the “horizontal” division of powers among Congress, the executive branch, and the federal courts.

To my mind, the fact that state-court citizen suits by non-Article III plaintiffs do not effect a congressional usurpation of executive power eliminates the separation-of-powers concern. Others may not be satisfied, though, because the executive’s prosecutorial prerogatives remain unprotected.<sup>156</sup> Redish and Cisar, for instance, would guard against any diminishment of a branch’s powers, even if the powers removed from or restricted within that branch are not assumed by another.<sup>157</sup> But there is a problem with imposing Article III on state courts in the interest of Article II: A theory of standing constructed from injury, causation, and redressability does little to advance the executive’s enforcement priorities. As Dean Nichol has observed, the “injured” plaintiff is no more likely than the “uninjured” plaintiff to have objectives that coincide with the executive’s.<sup>158</sup> Indeed, a public-spirited executive sensitive to public choice pressures might prefer that citizen groups focus on violations that have not yet created exceptional, localized injuries. Political imperatives lead the executive to respond to concentrated harms, so the usual story goes, whereas diffuse or distant problems receive too little attention. The redressability requirement generates similar dilemmas. Faced with resource constraints, the executive may well prefer to train its prosecutorial

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154. Bear in mind that many state court judges face the threat of ballot-box sanctions, or recall by the other branches. Lifetime appointments for state judges are relatively uncommon.

155. One implication of this analysis is that congressional “incentives” (for example, grants-in-aid, threats of preemption) for the states to open up their courts, as suggested in Grantham, *supra* note 13, would pose a separation-of-powers problem.

156. But my view better fits the constitutional text, which in at least one place authorizes acts by one branch that diminish the reach of another, yet without allowing interbranch transfer of powers. *See infra* p. 1037 (discussing the Exceptions Clause).

157. *See* Redish & Cisar, *supra* note 135, at 480-90.

158. Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1163-65 (1993).

capacities on present and looming violations, and leave it to citizens' groups to collect the fines for past misfeasances.<sup>159</sup>

Jurists devoted to prosecutorial and administrative discretion would do well to scrutinize provisions for executive oversight and control of private attorneys general, rather than exhaust their energies on standing. Perhaps Article II should be read to entitle the executive to call off certain citizen-initiated enforcement actions, but it should not be understood to mandate an injury-causation-redressability brand of standing.

Moreover, it is by no means clear that Article II authorizes the executive to ignore statutory directives. Professor Sunstein argues that both the text and the history of the Take Care Clause point to an executive duty commensurate with the executive's power.<sup>160</sup> This clause does not instruct the executive to implement the laws as if they were written to fit the executive's policy preferences; rather the executive is to implement the laws *faithfully*, in accord with their structures, purposes, plain meanings, and the like. Viewed from this perspective, Scalia's executive has the sheen of an unconstitutional *über*-executive.

To recap, solicitude for the separation of powers does not warrant imposing Article III on state court adjudication of federal questions. The possibility of unreviewable state court decisions on federal questions poses no practical threat to the supremacy of federal law. Nor can Congress usurp executive prerogatives via the state courts. Statutes that authorize non-Article III plaintiffs to bring claims in state court displace control over standing law to the states; such statutes certainly do not arrogate executive powers to Congress. Dispersals of power ought not to be countered with institutionally formal separation-of-powers doctrines. My intuitions on this point find reassurance in two further observations, which cast doubt on the injury-causation-redressability theory of standing. First, conditioning citizen suits on Article III standing does little to advance the executive's role in implementing the law. Second, the Take Care Clause may not even grant to the executive the discretion that Article III standing purportedly safeguards. If the constitutional merits of Article III standing doctrine are doubtful, judges should be chary of extending the reach of the doctrine. Allowing state courts to apply their own standing law to federal claims may ultimately feed back into better Article III doctrine, a point developed below.

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159. Justice Scalia's opinion for the Court in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), erects an Article III bar to this division of responsibilities.

160. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 212 (1992).

D. *Toward a (Loosely) Textually Anchored Defense of ASARCO*

Given that a pragmatically formal conception of the separation of powers does not condemn *ASARCO*, I propose to make a presumptive decision between *ASARCO* and its competitor, the Freund-Fletcher rule, with an even-handed assessment of the meaning of supremacy, and textually anchored considerations of policy. With a presumption made, one can survey the legal landscape for signs of reassurance, or reasons for reconsideration.

Supremacy has twin meanings: power and quality. (Doubters may check the dictionary.)<sup>161</sup> To uphold the supremacy (power) of federal law is to ensure that the states do not infringe upon the constitutionally circumscribed domain of federal law, and to give maximal effect to the will of Congress expressed in law, insofar as Congress acts within its limited powers. These principles are exemplified, respectively, by the dormant Commerce Clause<sup>162</sup> and the nondiscrimination doctrine.<sup>163</sup> But to uphold the supremacy (quality) of federal law is also—if secondarily, for surely supremacy as power was the Framers’ main concern—to nourish rule-of-law values like uniformity, to safeguard the political legitimacy of the courts and other governing institutions,<sup>164</sup> and to make interpretations with an eye to good results.

The *ASARCO* rule better comports with the twin meanings of supremacy than does the Freund-Fletcher alternative. Most importantly, *ASARCO* poses no threat to the will of Congress (power) as embodied in its environmental statutes. To the contrary, federal environmental law typically provides for citizen-suit enforcement by “any person.” It is the Supreme Court’s Article III jurisprudence that prevents the congressional scheme from being realized in the federal courts. Allowing non-Article III plaintiffs to be heard in state courts would enable the private attorney general to work, functionally, more like Congress intended.

Second, even though *ASARCO* authorizes state courts to issue nonreviewable interpretations of federal law, the holding presents virtually no risk of state encroachment on the federal domain, and it poses only a minor, short-term threat to uniformity. If a state’s high court decides for a

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161. 17 THE OXFORD ENGLISH DICTIONARY 274 (2d ed. 1989) defines supremacy as follows: “1. The condition of being supreme in authority, rank, or power; position of supreme or highest authority or power. . . . 2. Supreme position in achievement, character, or estimation.”

162. Dormant Commerce Clause jurisprudence bars state legislatures from burdening interstate commerce without express authorization from Congress. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-2 to 6-26 (3d ed. 2000) (discussing Supreme Court dormant Commerce Clause cases).

163. *See supra* Section III.D.

164. Here quality and power run together: Legitimacy is a feature of good law, and in the long run, it may be necessary for powerful law too.

non-Article III plaintiff, there is no problem at all—the U.S. Supreme Court may review the state court ruling. If the state court decides against the plaintiff, it creates unreviewable state court precedent for an improperly narrow reading of the federal law. This is no cause for concern. As suggested earlier,<sup>165</sup> Article III plaintiffs would forum-shop, pressing their claims in federal court, where state court decisions carry no authority beyond their intrinsic persuasiveness. In the rare circumstance that the law at issue affects no particular, individualized, concrete interests, and thus no Article III plaintiff conceivably exists, the question could still reach the federal courts on appeal from another state supreme court's (contrary) decision or, more likely, through enforcement proceedings brought by a U.S. Attorney. During the intervening period, the only parties who would be hurt by the state court's restrictive interpretation are those without Article III standing—parties who would be forever excluded from the courts, against the statutorily expressed will of Congress, under the Freund-Fletcher model.<sup>166</sup>

Moving beyond quality-as-uniformity, my approach to the Supremacy Clause inquires about impacts on the legitimacy of lawgiving institutions. Judge Fletcher claims to have identified one problem with *ASARCO* in this regard, namely, that it allows state courts to issue decisions binding in the state yet untouchable by the institutional procedures—state legislative action or constitutional amendment—that ordinarily correct judicial overreaching.<sup>167</sup> Yet *ASARCO* positions the U.S. Supreme Court to correct any instance of state court overreaching; it is only judicial *underreaching* that remains immune to review. Nothing stands in the way of a state legislature that wants to shore up (with state law) any federal statute or constitutional clause that the state's courts have interpreted meanly.

Finally, one must ask whether *ASARCO* or the Freund-Fletcher competitor would yield better results. One should proceed cautiously, though, and not use this opening as a pretext for feeding personal policy preferences into the Supremacy Clause. To this end I propose to read “good results” in terms of immanent constitutional norms and opportunities for learning about the consequences of constitutional doctrine. This connects the good results and legitimacy facets of my analysis. Judicial rulings that abjure the idea of judge as policy-kingmaker help to safeguard people's trust in the courts. So too should interpretations that describe a coherent, integrated Constitution.

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165. See *supra* text accompanying notes 143-147.

166. Those who share Judge Fletcher's unwavering commitment to uniformity and remain skeptical of my rebuttal may find it helpful to distinguish between state court adjudication of statutory and constitutional claims brought by non-Article III plaintiffs. Congress can remedy aberrant statutory interpretations. This process may not be easy or quick, but it is a far more realistic check on state court error than constitutional amendment.

167. Fletcher, *supra* note 45, at 288-93.

Understanding “good results” in terms of immanent constitutional norms leads me at last to federalism, the most obvious rationale for the *ASARCO* rule. Judge Fletcher dismisses federalism concerns by comparing the common case-or-controversy requirement to exclusive federal jurisdiction.<sup>168</sup> His analogy is inapt. The Freund-Fletcher rule burdens state courts with responsibility for the arcane and cumbersome Article III jurisprudence, whereas exclusive federal jurisdiction abates the federal lading on state courts. State court rules of justiciability reflect state judicial and legislative judgments about the efficient administration of justice and the institutional competence of state courts. In a federal system, the national branches ought to respect, presumptively, state courts’ self-governance. A plausible, incidental benefit of national respect for state courts is greater state court attentiveness to federal interests and the fine points of federal questions—which increases the effective supremacy of federal law.<sup>169</sup>

I am not suggesting that the federal structure of the Constitution mandates the *ASARCO* rule, or prevents Congress from requiring state courts to abide by Article III when hearing federal questions. I propose only that federalism, as a constitutional norm, should guide interpretive choices when multiple avenues are open, as they are here.<sup>170</sup>

There remains but one more issue to consider, the opportunities-for-learning aspect of “good results.” Judge Fletcher maintains that the common case-or-controversy requirement would make state and federal courts “genuine partners,” with salutary consequences for the doctrine of standing.<sup>171</sup> Here again he shoots wide of the mark. True, state courts well-practiced in the ways of liberal standing might vent their frustration with federal strictures to the Supreme Court, to good effect. But it is a stretch to maintain, as Judge Fletcher does, that this would make the Supreme Court accountable to state courts.<sup>172</sup> The Supreme Court would remain free to spin out the meaning of Article III as it wishes, and state courts would have to follow suit. As for the alleged need for state court accountability to the Supreme Court in standing decisions,<sup>173</sup> this seems to be either an opaque

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168. *Id.* at 286-87.

169. *Cf.* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 624-25 (1981) (speculating about the psychology of state judges’ attentiveness to federal questions).

170. Here again I part ways with Brian Stern, who makes a much stronger federalism claim than I do. *See* Stern, *supra* note 125, at 97-101. Stern insists that the Freund-Fletcher rule would impinge on the states’ right to distribute powers among the three branches of state government as they see fit. This argument fails, however, because the Freund-Fletcher rule applies only when state courts adjudicate *federal* questions, that is, when state courts serve as instrumentalities of the national government. Under the Freund-Fletcher rule states would remain free to define the judicial role without regard to Article III as regards questions of *state* law and *state* self-governance.

171. Fletcher, *supra* note 45, at 284.

172. *Id.*

173. *Id.*



reformulation of the institutionally formal Supremacy Clause argument, or an unwarranted assault on state courts' competence. State supreme courts are perfectly capable of developing standing doctrine without federal oversight.

Contrary to Judge Fletcher's supposition, a common standard of justiciability probably would impede the development of better standing law. Students of standing would be positioned for keener insight were the courts to apply a diversity of standing protocols to the same subject matter. Right now, the requisite doctrinal array exists among the state courts, but only rarely are these doctrines applied to the same substantive issues.<sup>174</sup> Yet if the evolution of environmental law vindicates the predictions of this Note, these varied conceptualizations of standing will come to be applied with some frequency to the same body of substantive law. This will allow academics better to assess the strengths and limitations of the Supreme Court's standing doctrine. It thus augurs well for constructive developments in case-or-controversy jurisprudence, more so than would a forced "conversation" that amounts to lecture from one side and futile protestation from the other.

To summarize, the Supreme Court is right to tolerate state court adjudication of federal citizen-suits brought by non-Article III plaintiffs. This practice allows a fuller realization of Congress's purpose in deputizing private attorneys general. It respects the autonomy of state courts and background norms of federalism. It bodes well for useful developments in the doctrines of justiciability. And it poses at most only minor, short-term threats to the uniformity of federal law.

#### E. ASARCO and the Legal Landscape

*ASARCO* compliments a number of jurisprudential developments that recognize roles for public entities other than the federal courts in the interpreting and developing of federal law. Judge Fletcher's survey of the legal landscape emphasizes older sources: *The Federalist Papers*, the Judiciary Act of 1789, and Chief Justice Marshall's pontifications on the self-sufficiency of the federal government.<sup>175</sup> Wrote Marshall, famously, in *McCulloch v. Maryland*:

No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are

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174. Consider how infrequently federal claims are brought in state courts. *See supra* Subsection III.C.2.

175. Fletcher, *supra* note 45, at 283.

adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends.<sup>176</sup>

Marshall's rhetoric fit his age, when the idea of Union was still up for grabs. Since then jurists have beaten a retreat from the rigid, absolutist position that federal courts have sole responsibility for tracing the lineaments of federal law. Consider four examples. First, administrative law. Federal courts nowadays defer to administrative agencies' reasonable constructions of ambiguous statutes. Though these statutes admit of many interpretations, even the Supreme Court declines to enshrine its favorite.<sup>177</sup> Second, the political question doctrine, which reserves certain "political" questions of law for resolution by the elected branches.<sup>178</sup> Third, interpretations of the Exceptions Clause, which gives Congress a degree of control over the Supreme Court's docket.<sup>179</sup> Fourth, "takings" of property worked by state and local government. Occasionally the Supreme Court grants certiorari to make known its views on local government regulations,<sup>180</sup> but just as often it takes cases to advance a doctrine of abstention, or to impose a new exhaustion requirement.<sup>181</sup> To paraphrase Professors Tribe and Sager, ours is a Constitution of (federally) judicially underenforced norms.<sup>182</sup>

Less noticed are the incipient fissures in federal courts' enforcement of statutory law. Consider, for example, the Indian Civil Rights Act (ICRA), which imposes most of the Bill of Rights on the relationship between

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176. 17 U.S. (4 Wheat.) 316, 424 (1819).

177. See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

178. See generally J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988) (describing how the three branches share responsibility for constitutional interpretation).

179. U.S. CONST. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). As a historic matter, Congress has withheld Supreme Court review of most federal criminal cases (for nearly a century); has limited Supreme Court review of state supreme court decisions; and has enacted one "retaliatory" withdrawal of Supreme Court jurisdiction (upheld in *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868)). Paul M. Bator, 27 VILL. L. REV. 1030, 1040 (1982); cf. Stern, *supra* note 125, at 109-10 (mentioning some of the same history).

180. When land-use zoning became popular in the 1920s, the Supreme Court decided in a pair of cases that zoning was not unconstitutional on its face but could be applied unconstitutionally. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (examining due process challenges to zoning); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (same). The Supreme Court got out of the land use business for sixty years, and reentered the debate mostly to voice its approval of the predominant rules emerging from the state courts. *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994) (adopting and renaming the majority doctrine from the state courts); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 838-40 (1987) (aligning U.S. constitutional law with the "approach taken by every other court . . . with the exception of the California state courts").

181. *E.g.*, *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

182. TRIBE, *supra* note 162, §§ 4-12 to 4-13, at 260-64 (discussing Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978)).

Indians and their tribal governments.<sup>183</sup> The Supreme Court reads the Indian Civil Rights Act to allow only habeas claims in federal court; all other claims must be resolved in tribal tribunals.<sup>184</sup> This interpretation yields a workable balance and dialogue between national and tribal norms.

I concede that principles of statutory construction peculiar to federal Indian law figured into the Supreme Court's interpretation of the ICRA. But on a much more pedestrian front, the federal courts are now affirming an isomorphic pairing of federal law and state jurisdiction under the Telephone Consumer Protection Act of 1991.<sup>185</sup> Four circuit courts have read this law to vest exclusive jurisdiction in the state courts.<sup>186</sup> Only a lone district court in Indiana views the matter otherwise.<sup>187</sup>

Reflect for a moment on the occasions in which federal courts have stayed their hand. These outcroppings of restraint are not random aberrations.<sup>188</sup> They cohere, when viewed through the Supremacy Clause lens described in this Note. Deference to administrative agencies, even on ambiguous questions of law, makes sense because, first, the agencies are better positioned to evaluate consequences for public welfare (quality of federal law), and, second, there is no "external" threat (that is, no threat from the states) to the power of federal law. The political question doctrine makes sense because, for a limited set of issues, the political legitimacy costs of judicial involvement are feared to exceed the rule-of-law benefits.

An account of the Supremacy Clause sensitive to the legitimacy of federal law is the only way to make sense of the Exceptions Clause. A delicate measure, the Exceptions Clause allows Congress to retaliate against a "bad" Court—but not by arrogating judicial powers to the legislative branch. Rather, when Congress withdraws appellate jurisdiction from the Supreme Court, it is the state courts and lower federal courts that gain authority. A theory of the separation of powers that mandates the *Freund-Fletcher* rule would also require that the Exceptions Clause be read out of the Constitution.

Finally, the Court's reluctant policing of local government "takings" bears a relation to the Court's self-denying gloss on the ICRA. While counties and municipalities are not "sovereigns" like Indian tribes, valued histories and practices of self-governance do exist among counties and

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183. 25 U.S.C. §§ 1301-1341 (1994).

184. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

185. 47 U.S.C. § 227 (1994).

186. *Murphey v. Lanier*, 204 F.3d 911 (9th Cir. 2000); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998); *Foxhall Realty Law Offices, Inc. v. Telecomm. Premium Servs.*, 156 F.3d 432 (2d Cir. 1998); *Int'l Sci. & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997).

187. *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997).

188. With the possible exception of the Telephone Consumer Protection Act, which presents a routine question of statutory construction.

municipalities, particularly as regards the use of land. Federalism norms cry out for protection. The Supremacy Clause meets federalism halfway in a compromise that gives state courts primary responsibility for the interpretation and enforcement of federal constitutional restraints on local land-use controls.

## V. CONSEQUENCES

Lest the arguments of this Note come across as idle speculation, I now draw the reader's attention to a practical, real-world domain that could be thoroughly restructured by non-Article III plaintiffs in state courts: citizen suits for "past" violations of federal environmental laws. Recall the illogic of constitutional barriers to citizen suits for past violations. Public choice pressures lead the executive to focus on exceptional and immediate harms; citizens' groups can help fulfill a statute's promise of deterrence by bringing claims for past violations that otherwise would be overlooked.<sup>189</sup>

In *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation*,<sup>190</sup> decided in 1987, a unanimous Supreme Court read the jurisdictional language of the CWA to preclude citizen suits for wholly past violations. This case had widespread implications, for several other statutes parroted the jurisdictional provision of the CWA, which authorizes citizen suits against parties alleged "to be in violation" of their discharge permits.<sup>191</sup> Since the mid-1980s, Congress has been somewhat more fastidious in its diction.<sup>192</sup> EPCRA, for instance, authorizes any person to sue an owner or operator of a facility "for failure to do" any of several mandates, some of which are time-specific.<sup>193</sup>

EPCRA requires companies to divulge their annual releases of toxic chemicals. Prospective defendants who receive notice of a pending suit usually disclose the requisite information and move for dismissal if the suit is filed. Until 1995, when the Sixth Circuit decided *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*,<sup>194</sup> every district court that had faced the question distinguished EPCRA from the CWA and allowed these suits to proceed.<sup>195</sup> *United Musical Instruments*

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189. See *supra* pp. 1030-31.

190. 484 U.S. 49 (1987).

191. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1088-89 (1996).

192. *Id.*

193. 42 U.S.C. § 11046 (1994).

194. 61 F.3d 473 (6th Cir. 1995).

195. This claim is advanced by the Seventh Circuit in *Citizens for a Better Environment v. Steel Co.*, 90 F.3d 1237, 1243 (7th Cir. 1996) (citing *Del. Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132 (E.D. Pa. 1993); *Williams v. Leybold Techs.*, 784 F. Supp. 765 (N.D. Cal. 1992); *Atl. States Legal Found. v. Writing Roll-up Door Mfg. Corp.*, 772 F. Supp. 745 (W.D.N.Y. 1991)).

shut the door, extending the Supreme Court's conclusions in *Gwaltney* to EPCRA. Less than a year later, however, the Seventh Circuit nudged it open again in *Citizens for a Better Environment v. Steel Co.*<sup>196</sup>

The Supreme Court granted certiorari and forged a new path, in effect reinterpreting *Gwaltney* as a standing decision. Justice Scalia, writing for the Court, held that the citizen-plaintiffs failed the test of redressability.<sup>197</sup> The plaintiffs had sought a declaratory judgment, civil penalties, costs and attorneys fees, an order requiring the petitioner to provide the respondent with copies of reports submitted to the EPA, and authorization to inspect Steel Company's facilities. None of these, posited Scalia, would ameliorate or compensate for past harms. Concurring in the judgment, Justice Stevens, joined by Justices Souter and Ginsburg, declined to reach the question of standing, ruling instead that the jurisdictional provisions of EPCRA do not allow citizen claims for wholly past violations.

In the wake of *Steel Co.*, public interest groups basically gave up on EPCRA suits,<sup>198</sup> just as the Seventh Circuit feared they would.<sup>199</sup> This is no trivial matter. Suits for disclosure under EPCRA can be keystones for community organizing, and the unwelcome publicity that disclosure of pollution data attracts has led many companies to reduce their chemical emissions voluntarily.<sup>200</sup>

The arguments developed in this Note suggest that citizen suits for past violations have a future in state courts, but whether EPCRA, as it now stands, will prove enforceable in state courts remains an open question. Concurrent jurisdiction is debatable,<sup>201</sup> and state courts may adopt the statutory construction endorsed by Justices Stevens, Souter, and Ginsberg in *Steel Co.*<sup>202</sup> Still, the window of opportunity remains. If state courts

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196. 90 F.3d 1237.

197. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 104-09 (1998). The defendant had made the disclosures required by EPCRA upon receiving the plaintiffs' notice-of-intent-to-sue letter.

198. Interview with Alex Levinson, Coordinating Attorney, The Sierra Club, in San Francisco, Cal. (July 10, 1999).

199. *Steel Co.*, 90 F.3d. at 1244 ("The incentives created by the district court's interpretation [eventually reinstated by the Supreme Court] would render the citizen enforcement provision virtually meaningless.").

200. For a general overview of EPCRA's role and impact, see Julie Shambarger Mitchell, Note, *Environmental Law—A Citizen Suit Under EPCRA Is No Longer a Threat—Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), 21 U. ARK. LITTLE ROCK L. REV. 343 (1999), and sources cited therein.

201. See *supra* notes 81-106 and accompanying text.

202. But they should not. The *Steel Co.* concurrence is an exemplar of construction to avoid constitutional doubt. With the constitutional question settled (by the majority), there is no longer a reason for courts to twist the meaning of the statute, as the *Steel Co.* concurrence would have done.

prove reluctant to construe EPCRA to allow citizen suits for wholly past violations, Congress may amend the law to clarify its intent.<sup>203</sup>

I use the example of EPCRA only to illustrate how state court lawsuits can embolden environmental plaintiffs, not to channel strategizing. State court standing will be useful not only for sidestepping the “past violations” problem under EPCRA and other laws, but also for suits where “injury” depends on ecologically complex causal links, or where human activity threatens remote and rarely visited lands. It follows, *inter alia*, that endangered species that persist among the wildland fringes of our quite thoroughly cultivated and built-up nation may also number among the main beneficiaries of state-court citizen suits.

It is worth remembering, though, that state-court citizen suits will not prove a panacea for non-Article III plaintiffs. The reasons are varied. State court jurisdiction over federal claims exists by grace or oversight of Congress. The background law of standing surely remains strict in some states, as yet unleavened by public-import exceptions or environmental rights acts. Courts in states with “liberal” standing may yet decide to apply Article III jurisprudence to federal claims; there appear to be no substantial doctrinal roadblocks to this sort of “discrimination” against federal claims.<sup>204</sup>

More fundamentally, non-Article III plaintiffs’ claims against the national government or its agents face bleak prospects. As defendants, federal employees and agencies have an “absolute” right to remove lawsuits to federal court, under 42 U.S.C. § 1442,<sup>205</sup> in contradistinction to other defendants’ right of removal under 42 U.S.C. § 1441.<sup>206</sup> Thus two federal circuits have stated that dismissal, not remand, is the proper response to non-Article III lawsuits removed pursuant to § 1442.<sup>207</sup>

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203. The legislative trend points toward strengthened citizen-suit provisions. See Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions*, SD88 ALI-ABA 819 (1999).

204. Rooted in the Supremacy Clause, the Supreme Court’s “nondiscrimination doctrine” bars state courts from discriminating against “federal rights” except in limited circumstances that to date have included only “neutral rules of judicial administration.” *Howlett v. Rose*, 496 U.S. 356, 374-75 (1990). Using different rules of standing for state-law and federal-law claims would hardly seem neutral. But dicta in *Alden v. Maine* discredit the notion that the Supremacy Clause might require state court judges to entertain federal law cases beyond the competence of Article III judges. 527 U.S. 706, 753 (1999) (“There can be no serious contention . . . that the Supremacy Clause imposes greater obligations on state court judges than on the Judiciary of the United States itself.”). By equating “federal right” not with “federal claim” but with “federal claim enforceable in federal court,” the Supreme Court could rescue the state court that “discriminates” against federal claims by importing Article III standing. The state court’s practice would discriminate, but not against a federal right. In light of the forceful dicta in *Alden*, and the separation-of-powers concerns canvassed in Section IV.C *supra*, it would be foolish to expect the High Court to decide otherwise.

205. *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981).

206. See *supra* notes 55-56 and accompanying text.

207. *Int’l Primate Prot. League v. Adm’rs of the Tulane Educ. Fund*, 895 F.2d 1056, 1061 (5th. Cir. 1990), *rev’d on other grounds*, 500 U.S. 72 (1991); *Maine Ass’n of Interdependent*

Moreover, dicta from the Supreme Court casts doubt on state courts' ability to enforce judgments against federal defendants.<sup>208</sup>

In short, the niche I have identified for non-Article III plaintiffs extends only to claims against private and state parties, and exists largely at the sufferance of state courts and legislatures. That the niche is small does not make it trivial. Many state courts and legislatures have shown surprising solicitude for public-interest plaintiffs in general, and environmental petitioners in particular. And in our world of market economics and "cooperative federalism," environmental outcomes everywhere depend on private actors and state agencies.

This Note assesses the state of the law, not the state of environmental lawyering. Out of curiosity, though, I asked some of the leading plaintiff-side environmental lawyers for their views on why environmentalists have not considered and encouraged state court enforcement actions by non-Article III plaintiffs. Some expressed anxiety about biased adjudication, or state judges' lack of familiarity with the technical content of national environmental law.<sup>209</sup> Others observed that many public-interest lawyers once clerked for federal judges and now practice principally in federal court; they are simply most comfortable in the federal setting.<sup>210</sup> Two of the lawyers wondered if the defendant's right of removal would pose an impediment to federal law claims brought in state court by non-Article III plaintiffs.<sup>211</sup>

None of my respondents suggested that state "cooperative federalism" laws (enabling state implementation of national programs) obviate the need

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Neighborhoods v. Comm'r, Maine Dep't of Human Serv., 876 F.2d 1051, 1055 (1st Cir. 1989). These cases make questionable inferences from *Manypenny*, 451 U.S. 232, but they nonetheless constitute discouraging precedent for the would-be non-Article III plaintiff with claims against federal defendants.

208. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 825 (1990); cf. *San Bernardino Valley Audubon Soc'y v. Metro. Water Dist.*, 83 Cal. Rptr. 2d 836 (Ct. App. 1999) (abstaining from judging the adequacy of an Incidental Take Permit issued by the U.S. Fish and Wildlife Service).

209. Interview with Michael Bean, Senior Attorney, Environmental Defense, in Washington, D.C. (Dec. 28, 2000); E-mail Interviews with Mitchell Bernard, Senior Staff Attorney, Natural Resources Defense Council (Jan. 23, 2001); Rebecca Bernard, Associate Attorney, Earthjustice Legal Defense Fund (Jan. 24, 2001); Doug Honnold, Managing Attorney, Northern Rockies Office, Earthjustice Legal Defense Fund (Jan. 22, 2001); Vickie Patton, Senior Attorney, Environmental Defense (Dec. 26, 2000) (describing the "conventional but unsupported view" that federal courts are more hospitable); and Michael Sherwood, Managing Attorney, San Francisco Office, Earthjustice Legal Defense Fund (Jan. 26, 2001).

210. Interview with Alex Levinson, Environmental Legal Director, The Sierra Club, in San Francisco, Cal. (July 10, 1999); Telephone Interviews with Jim Morman, President and CEO, Taxpayers Against Fraud (Jan. 19, 2000); and Robert Wiygul, Senior Attorney, Earthjustice Legal Defense Fund (Jan. 23, 2000).

211. Interview with Jim Morman, *supra* note 210; E-mail Interview with Vickie Patton, *supra* note 209. Regarding the legal bases for their concern, see *supra* notes 55-56, 205-206, and accompanying text.

for federal-law citizen suits aimed at state and private defendants.<sup>212</sup> Yet only one of the practitioners had investigated state courts as a solution to Article III standing.<sup>213</sup> “No one ever questioned AT&T’s long distance monopoly,” quipped one veteran public interest lawyer, “until a brazen fellow founded a company called MCI and proved that AT&T had no statutory basis for its position.”<sup>214</sup> State-court/federal-law enforcement actions by non-Article III plaintiffs will not revolutionize environmental law like MCI did telecommunications, but the comparison ought not to tarnish any modest gains around the margins.

## VI. CONCLUSION

Standing is an especial problem for the enforcement of environmental laws, many of which do not aim, or aim directly, to prevent “injuries” to people. The existence of an Article III plaintiff positioned to challenge a violation can be fortuitous. This Note predicts and defends a turn toward the state courts, which can hear the federal claims of plaintiffs who lack Article III standing.

My prediction of a new role for state courts in the enforcement of federal environmental law emerges from three recent developments in Supreme Court jurisprudence. During the late 1980s and 1990s, the Supreme Court extended its doctrine of standing in ways that curb environmentalists’ access to the federal courts. Meanwhile, the Court strengthened the presumption of state court jurisdiction over federal laws. Lastly, in *ASARCO v. Kadish*, the Supreme Court affirmed the right of state courts to hear the federal claims of non-Article III plaintiffs, and gave judgments in favor of non-Article III plaintiffs collateral effect in federal court.

The new niche for state courts will not extend to every violation of the federal environmental statutes. There are three limiting factors. First, the environmental statutes tend to be textually ambiguous on the question of state court jurisdiction, though seven of the nine major statutes likely admit of concurrent jurisdiction when read in the light of the Supreme Court’s most recent decisions. Second, claims against the instrumentalities of the federal government face constitutional and statutory barriers. Finally, the states have discretion to impose Article III standing on federal law claimants—though many state courts interpret standing quite liberally, especially in environmental cases.

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212. On cooperative federalism and the indirect enforcement of federal standards through state law, see *supra* text accompanying note 121.

213. This was Alex Levinson of the Sierra Club, for whom I did the research that grew into this Note.

214. Interview with Jim Morman, *supra* note 210.



State court adjudication of non-Article III plaintiffs' federal claims has encountered some resistance from academics over the years. The most thoughtful attack issued from the pen of Judge Fletcher, a year after the Supreme Court decided *ASARCO*. This Note calls into question Judge Fletcher's critique.

I locate my defense of *ASARCO*—and the associated conception of the Supremacy Clause—in the context of the Supreme Court's recent holdings on federalism and the separation of powers. When interpreting a structural feature of the Constitution, I argue, the Supreme Court should begin with an inquiry into dangers. If the provision guards against “tyranny” or another catastrophe, the Court should impose a doctrine of formal rules that keep one branch from assuming control over the settled practices of another. If the provision calls into doubt core, settled practices of governance that do not hint at a looming conflict or a power grab between the executive and legislative branches, the Court has little choice but to cast its decision in terms of flexible standards. Otherwise, the Court should assemble doctrine from an even-handed reading of the constitutional text.

State court adjudication of federal claims raised by non-Article III plaintiffs neither suggests the prospect of an interbranch power-grab, nor calls into doubt settled practices of governance. Thus my argument turns to the text. Supremacy has twin meanings: power and quality. The *ASARCO* rule, I suggest, better serves the power and quality of federal law than would the common case-or-controversy alternative favored by Professor Freund and Judge Fletcher. As regards power, *ASARCO* gives maximal effect to the will of Congress as expressed in federal statutes, and permits virtually no state encroachment on the domain of federal law. As regards quality, *ASARCO* meshes with immanent norms of federalism and creates new opportunities for learning about standing doctrine. Any threat *ASARCO* may pose to the uniformity of federal law is *de minimis*. Furthermore, *ASARCO* fits comfortably into the modern legal landscape, which features important roles for institutions other than the federal courts in developing federal law.

## APPENDIX: FEDERAL ENVIRONMENTAL CLAIMS IN STATE COURTS

Federal Statute	Number of Citizen Suits in State Courts <sup>215</sup>	Case Citations
Clean Air Act	0	n/a
Clean Water Act	3	Kerns v. Dukes, 707 A.2d 363 (Del. 1998); Berens v. Cook, 694 N.Y.S.2d 684 (App. Div. 1999); Puget Soundkeepers Alliance v. State, Dep't of Ecology, 9 P.3d 892 (Wash. Ct. App. 2000)
Comprehensive Environmental Response, Cleanup, and Liability Act	n/a <sup>216</sup>	n/a
Emergency Planning and Community Right-To-Know Act	0	n/a
Endangered Species Act	3	Hammond v. N. Slope Borough, 645 P.2d 750 (Alaska 1982); San Bernardino Valley Audubon Soc. v. Metro. Water Dist., 83 Cal. Rptr. 2d 836 (Ct. App. 1999); Prairie Dog Advocates v. City of Lakewood, 2000 WL 674879 (Colo. Ct. App. 2000)
Marine Mammal Protection Act	1	Hammond v. N. Slope Borough, 645 P.2d 750 (Alaska 1982)
Resources Conservation and Recovery Act	3	Jilot v. State, 944 P.2d 566 (Colo. Ct. App. 1996); Grand E. Props. v. Phillips, No. CV 940364608, 1996 WL 151229 (Conn. Super. Ct. Mar. 4, 1996); *Andrews v. Caron Bros., No. 45136, 1992 WL 67396 (Conn. Super. Ct. Mar. 26, 1992)*
Safe Drinking Water Act	1	Andrews v. Caron Bros., No. 45136, 1992 WL 67396 (Conn. Super. Ct. Mar. 26, 1992)*
Surface Mining Control and Reclamation Act	1	Castle Valley Special Serv. Dist. v. Utah Bd. of Oil, Gas, & Mining, 938 P.2d 248 (Utah 1996)

215. This enumeration may be slightly underinclusive. *See supra* note 80.

216. This statute reserves exclusive jurisdiction to the federal courts. *See* 42 U.S.C. § 9613(a)-(b) (1994).

\* At issue here are tort claims that purport to establish negligence per se by showing the violation of a federal statute; but in both cases the state court analyzes its jurisdiction to hear citizen suits under the federal statute.