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## The Asymmetry Problem: Reflections on Calvin Massey's Standing in State Courts, State Law, and Federal Review

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# The Asymmetry Problem: Reflections on Calvin Massey's Standing in State Courts, State Law, and Federal Review

## **Abstract**

This paper is based on remarks delivered at a symposium to honor my University of New Hampshire School of Law colleague Calvin Massey, who passed away in the fall of 2015. The paper discusses an asymmetry in federal standing law. The asymmetry lies in the fact that, when a state's highest court decides the merits of a federal claim brought in circumstances where the claimant has standing under state law but not federal law, the United States Supreme Court has jurisdiction to review the decision only if the state supreme court upholds the federal claim. This asymmetry was the subject of a 2015 essay that was Calvin's last piece of published scholarship. In the essay, Calvin used a hypothetical state-aid-to-religion fact pattern to illuminate the asymmetry, to emphasize its problematic nature, and to propose a solution.

This paper agrees with Calvin that the asymmetry is problematic and advances three preliminary hypotheses, to be developed in future work, about how various federal and state institutional actors could ameliorate the problem. The first hypothesis is that Congress should consider legislating to ensure that a party facing a federal claim in state court in circumstances where a federal justiciability doctrine would bar the claim in federal court can remove the claim and obtain its dismissal. The second hypothesis is that the United States Supreme Court should consider using its power to create constitutional common law to fashion remedy-limiting doctrines drawn from federal justiciability principles and to impose these doctrines on state courts as affirmative defenses to federal claims. The third hypothesis is that, even in the absence of a federal mandate, state courts should apply conflict-of-laws theory to withhold relief for claims based on federal law in circumstances where federal courts would lack the power to afford the claimant a remedy.

## **Keywords**

justiciability, jurisdiction, constitutional common law, standing, state courts, conflict of laws

## Essay

# The Asymmetry Problem: Reflections on Calvin Massey's *Standing in State Courts, State Law, and Federal Review*

JOHN M. GREABE\*

### ABSTRACT

*This paper is based on remarks delivered at a symposium to honor my University of New Hampshire School of Law colleague Calvin Massey, who passed away in the fall of 2015. The paper discusses an asymmetry in federal standing law. The asymmetry lies in the fact that, when a state's highest court decides the merits of a federal claim brought in circumstances where the claimant has standing under state law but not federal law, the United States Supreme Court has jurisdiction to review the decision only if the state supreme court upholds the federal claim. This asymmetry was the subject of a 2015 essay that was Calvin's last piece of published scholarship. In the essay, Calvin used a hypothetical state-aid-to-religion fact pattern to illuminate the asymmetry, to emphasize its problematic nature, and to propose a solution.*

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\* Professor, University of New Hampshire School of Law. This paper was written at the invitation of the *University of New Hampshire Law Review*. It is based on remarks delivered at a symposium to honor the life and work of Professor Calvin Massey, who passed away on September 23, 2015, after a long and distinguished career in law teaching. The symposium, held on September 24, 2016, was co-sponsored by the University of California Hastings College of Law and the University of New Hampshire School of Law. I am deeply honored to have been asked to participate and thank the editors of the *University of New Hampshire Law Review* for their assistance in getting this paper into its final form.

*laws theory to withhold relief for claims based on federal law in circumstances where federal courts would lack the power to afford the claimant a remedy.*

## CONTENTS

INTRODUCTION .....	274
I. DUNCAN ACTUALIS .....	276
II. DUNCAN REDUX AND THE ASYMMETRY PROBLEM.....	279
III. ADDRESSING THE ASYMMETRY PROBLEM .....	282
CONCLUSION.....	288

## INTRODUCTION

Calvin Massey was my faculty colleague for only a few short years.<sup>1</sup> During much of that time, Calvin actively battled the illness that would claim his life. Yet even as he fought his disease, Calvin continued to teach a broad array of courses; to give generously to students, colleagues, and the institution; to update his wonderful constitutional law and property casebooks; and to produce the thought-provoking scholarship that made him a towering figure (quite literally!) in the legal academy. Because Calvin was open about his declining health as he carried on his life’s work, he provided those of us lucky enough to spend time with him over the last few years with an extraordinary gift—an opportunity to observe the riches that flow from a life of engagement, dedicated service, and kindness lived through one’s very final days. I will be forever grateful for Calvin’s friendship and example of a life well lived.

I would like to share some reflections prompted by Calvin’s last piece of published scholarship—an essay titled *Standing in State Courts, State Law, and Federal Review* that came out in the *Duquesne Law Review* in the summer of 2015.<sup>2</sup> The essay addresses an asymmetry in federal standing law that Calvin described as “odd”—namely, that when a state’s highest court decides the merits of a federal claim brought in circumstances where the

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<sup>1</sup> In 2012, after a quarter century of distinguished service on the faculty of the University of California Hastings College of Law, Calvin R. Massey was appointed the first Daniel Webster Distinguished Professor of Law at the University of New Hampshire School of Law.

<sup>2</sup> See Calvin Massey, *Standing in State Courts, State Law, and Federal Review*, 53 DUQ. L. REV. 401 (2015).

claimant has standing under state law but not federal law, the United States Supreme Court has jurisdiction to review the decision only if the state supreme court upholds the federal claim.<sup>3</sup> To illuminate this asymmetry and its problematic consequences, Calvin employed a re-imagination of the facts of *Duncan v. New Hampshire*,<sup>4</sup> a 2014 decision of the New Hampshire Supreme Court involving an aid-to-religion challenge to a state tax-credit program under the state constitution. The program was authorized by a statute the New Hampshire legislature enacted in 2012 over Governor Maggie Hassan's veto.<sup>5</sup> Calvin dubbed his hypothetical *Duncan Redux* and built his essay around it.<sup>6</sup> The essay concludes with a proposed solution to the asymmetry problem tailored to the facts of *Duncan Redux*.<sup>7</sup>

In this paper, I discuss Calvin's essay and seek to press a bit beyond it. Part I summarizes the actual *Duncan* litigation that Calvin used as his point of entry. I have a deep interest in *Duncan* because I was retained by Governor (now United States Senator) Hassan to present to the New Hampshire Supreme Court her views on why the state tax-credit program was unconstitutional.<sup>8</sup> Part II describes Calvin's *Duncan Redux* and the asymmetry problem. Part III sets forth Calvin's possible solution to the problem within the context of the scenario presented by *Duncan Redux*. Part III also discusses the work of other scholars who have written about the problem. Finally, Part III advances three preliminary hypotheses, to be developed in future scholarship, about how various institutional actors at the federal and state levels might act to ameliorate the problem. The first hypothesis is that Congress should consider legislating to ensure that a party facing a federal claim in state court in circumstances where a federal justiciability doctrine would bar the claim in federal court can remove the claim and obtain its dismissal. The second hypothesis is that the United

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<sup>3</sup> See *id.* at 401–02; see also *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–19 (1989) (explaining that the state court's ruling that some party violated the claimant's federal rights suffices to confer on that party standing to seek Supreme Court review of the ruling under federal standing principles).

<sup>4</sup> 102 A.3d 913 (N.H. 2014).

<sup>5</sup> See *id.* at 917–18. Governor Hassan vetoed the bill because she thought it unconstitutional.

<sup>6</sup> See Massey, *supra* note 2, at 404.

<sup>7</sup> See *id.* at 409–11.

<sup>8</sup> See *supra* note 5 and accompanying text; see also Brief of Amici Curiae Governor Margaret W. Hassan, Governor of New Hampshire, with Lucy Hodder, Office of Legal Counsel to the Governor, in Support of Plaintiffs/Cross-Appellants, *Duncan*, 102 A.3d 913 (N.H. 2014) (No. 2013-0455) (arguing that the tax credit program is unconstitutional insofar as it permits an award of scholarships to students at religious schools). Governor Hassan appeared separately because her views on the merits of the case differed from those of New Hampshire Attorney General Joseph A. Foster, who defended the statute's constitutionality. See *Duncan*, 102 A.3d at 916–17.

States Supreme Court should consider using its power to create constitutional common law to fashion remedy-limiting doctrines drawn from federal justiciability principles and to impose these doctrines on state courts as affirmative defenses to federal claims. The third hypothesis is that, even in the absence of a federal mandate, state courts should apply conflict-of-laws theory to withhold relief for claims based on federal law in circumstances where federal courts would lack the power to afford the claimant a remedy.

### I. *DUNCAN ACTUALIS*

The *Duncan* litigation challenged New Hampshire RSA 77-G, a statute enacted in 2012 that authorizes entities that owe state business profits or business enterprise taxes to take a tax credit of up to eighty-five percent of their contributions to approved scholarship organizations.<sup>9</sup> Under the statute, an eligible student may receive a scholarship “to attend (1) a nonpublic school . . . or (2) a public school located outside of the student’s school district,” or to defray homeschooling expenses.”<sup>10</sup> The statutory scheme thus allows scholarships to be awarded to students who attend religious institutions.<sup>11</sup>

Eight individual taxpayers and one corporation subject to the state business profits and business enterprise taxes petitioned for declaratory relief in state court, contending that the program, insofar as it permits scholarship awards to students at religious schools, violates Part II, article 83 of the New Hampshire Constitution.<sup>12</sup> This constitutional provision, enacted in 1877, states that “no money raised by taxation shall ever be granted or applied for the use of schools or institutions of any religious sect or organization.”<sup>13</sup> It is popularly known as New Hampshire’s “Blaine Amendment.”<sup>14</sup>

New Hampshire is one of a number of states that adopted similar constitutional amendments shortly after the failure in 1876 of a campaign, led by Representative James Blaine of Maine, to add such a provision to the federal Constitution.<sup>15</sup> The question how to operationalize a Blaine

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<sup>9</sup> N.H. REV. STAT. ANN. § 77-G (Supp. 2013); *see also Duncan*, 102 A.3d at 917-18.

<sup>10</sup> *Duncan*, 102 A.3d at 918 (quoting N.H. REV. STAT. ANN. § 77-G:2, I(a)) (brackets omitted).

<sup>11</sup> Brief of Amici Curiae Governor Margaret W. Hassan, *supra* note 8, *passim*.

<sup>12</sup> *Duncan*, 102 A.3d at 917.

<sup>13</sup> N.H. CONST. pt II, art. 83; *see also Duncan*, 102 A.3d at 917.

<sup>14</sup> *See, e.g.,* Jill Goldenziel, *Blaine’s Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 68–69, 69 n.98 (2005).

<sup>15</sup> *See, e.g.,* Michael P. Dougherty, *Montana’s Constitutional Prohibition on Aid to Sectarian Schools: “Badge of Bigotry” or National Model for the Separation of Church and State*, 77 MONT. L. REV. 41, 43–45 (2016) (providing brief historical overview of the failure of the proposed amendment to the federal Constitution and

Amendment is a complicated one. On the one hand, Blaine Amendments such as New Hampshire's have a sorry history, for they are undeniably rooted in 19<sup>th</sup> century, anti-Catholic bigotry.<sup>16</sup> But on the other hand, their plain language evinces a commitment to separation of church and state that many regard as striking an appropriate constitutional balance.

The *Duncan* litigation was initiated in circumstances where the petitioners quite clearly would have lacked standing to challenge New Hampshire RSA 77-G in federal court as a violation of the First Amendment's Establishment Clause. We know this because the New Hampshire tax credit program was strikingly similar to the Arizona tax credit program at issue in *Arizona Christian School Tuition Organization v. Winn*,<sup>17</sup> a 2011 United States Supreme Court decision holding (5-4) that Arizona taxpayers lacked standing to challenge the program under the Establishment Clause.<sup>18</sup> Both programs permit state taxpayers to take tax credits for contributions to organizations that award students scholarships to attend private schools of their choice, including religious schools.<sup>19</sup>

We may safely assume that the *Duncan* petitioners sued in state court and invoked only the state constitution for at least four reasons. First, as just observed, *Winn* made a federal court Establishment Clause challenge impossible.<sup>20</sup> Second, New Hampshire's Blaine Amendment far more specifically addresses the question of state aid to religious schools than does the text of the First Amendment's Establishment Clause, which states only that "Congress shall make no law respecting an establishment of religion."<sup>21</sup> Third, in 2012, the New Hampshire legislature had amended state law to authorize taxpayer lawsuits of precisely the type filed by the *Duncan* petitioners. The new law provided that "any taxpayer in the jurisdiction of [a] taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district . . . has engaged, or proposes to engage, in conduct that is unlawful or unauthorized . . . [without having to

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the subsequent enactment of similar provisions in a number of state constitutions); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y, 551, 556-602 (2003) (providing comprehensive historical overview and detailing the different types of state Blaine Amendments); see also Goldenziel, *supra* note 14, at 58-95 (similar, but arguing that many state constitutional provisions barring funding of religious schools should *not* be treated as descendants of the failed federal Blaine Amendment).

<sup>16</sup> See Dougherty, *supra* note 15, at 42; Goldenziel, *supra* note 15, 60-61; DeForrest, *supra* note 15, at 556-76.

<sup>17</sup> 563 U.S. 125 (2011).

<sup>18</sup> See generally *id.*

<sup>19</sup> See *id.* at 130-32.

<sup>20</sup> See *id.*; N.H. REV. STAT. ANN. § 77-G:2, I(a).

<sup>21</sup> U.S. CONST. amend. I.

demonstrate] that his or her personal rights were impaired or prejudiced.”<sup>22</sup> Fourth, the New Hampshire Constitution allows the New Hampshire Supreme Court to issue advisory opinions in specified circumstances.<sup>23</sup> Thus, the New Hampshire Constitution explicitly confers on the New Hampshire Supreme Court broader decisional authority than that conferred on federal courts by Article III of the federal constitution, which has been construed since the founding to ban advisory opinions.<sup>24</sup>

Three New Hampshire citizens who wanted their children to remain eligible to receive scholarships to attend religious schools under New Hampshire RSA 77-G, along with a scholarship organization authorized by the statute, intervened.<sup>25</sup> The intervenors contested petitioners’ standing; challenged the constitutionality of the new taxpayer standing provisions of New Hampshire RSA 491:22, I, to the extent that they might be read to authorize petitioners’ standing; and defended the constitutionality of New Hampshire RSA 77-G on its merits.<sup>26</sup> A state superior court upheld the petitioners’ standing under New Hampshire RSA 491:22, I, as well as the constitutionality of the statute’s new taxpayer standing provisions.<sup>27</sup> The superior court further held New Hampshire RSA 77-G unconstitutional under the New Hampshire Constitution’s Blaine Amendment insofar as the statute authorized scholarship organizations to award scholarships to schools or institutions of any religious sect or denomination.<sup>28</sup> But the New Hampshire Supreme Court, relying heavily on federal precedents interpreting the scope

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<sup>22</sup> See N.H. REV. STAT. ANN. § 491:22, I (Supp. 2013); see also *Duncan*, 102 A.2d at 917.

<sup>23</sup> N.H. CONST. pt. II, art. 74 (“Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.”).

<sup>24</sup> See, e.g., *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792).

<sup>25</sup> See *Duncan*, 102 A.3d at 917. The New Hampshire Attorney General challenged the individual petitioners’ standing but conceded the standing of the petitioner organization subject to the state’s business profits and business enterprise taxes under New Hampshire RSA 491:22, I. See *Duncan v. New Hampshire*, No. 219-2013-CV-00011, slip op. at 12 (N.H. Super. Ct. June 17, 2013), <http://nhtaxadv.com/premium/wp-content/uploads/2013/06/Duncan-v-State-of-New-Hampshire-219-2012-CV-00121-2013.pdf> [<https://perma.cc/AX9S-Q7RS>] (order granting petitioner’s requests for declaratory and injunctive relief), *vacated and remanded*, 102 A.3d 913 (2014). In doing so, the Attorney General implicitly conceded the constitutionality of New Hampshire RSA 491:22, I.

<sup>26</sup> See *Duncan v. New Hampshire*, No. 219-2013-CV-00011, slip op. at 14–20 (N.H. Super. Ct. June 17, 2013), <http://nhtaxadv.com/premium/wp-content/uploads/2013/06/Duncan-v-State-of-New-Hampshire-219-2012-CV-00121-2013.pdf> [<https://perma.cc/AX9S-Q7RS>] (granting petitioner’s requests for declaratory and injunctive relief), *vacated and remanded*, 102 A.3d 913 (2014).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 40; see also *Duncan*, 102 A.3d at 918.



of Article III, vacated and dismissed on the ground that the petitioners lacked standing under the New Hampshire Constitution.<sup>29</sup> The Court also held unconstitutional the amendment to New Hampshire RSA 491:22, I, authorizing taxpayer standing.<sup>30</sup>

## II. *DUNCAN REDUX* AND THE ASYMMETRY PROBLEM

There is much that is deeply interesting about the actual *Duncan* case, including its standing holdings and the merits question that the New Hampshire Supreme Court avoided—*i.e.*, how to operationalize a constitutional provision whose roots lie in anti-Catholic nativism but whose terms express a constitutional principle that many tolerant individuals think entirely proper.<sup>31</sup> For present purposes, however, let us turn to Calvin's re-imagining of the *Duncan* case, *Duncan Redux*. Calvin asked his readers to assume, first, that the New Hampshire Supreme Court had held the tax credit program authorized by New Hampshire RSA 77-G constitutional on its face and as-applied; second, that the Court had relied on the Establishment Clause (and not the state constitution) in reaching its holding; and, third, that the petitioners wished to challenge the New Hampshire Supreme Court's understanding of Establishment Clause principles in the United States Supreme Court.<sup>32</sup> In such circumstances, Calvin explained, the petitioners would lack standing to do so under the logic of the United States Supreme Court's holding in *ASARCO, Inc. v. Kadish*.<sup>33</sup>

In *ASARCO*, Arizona taxpayers and an association of public school teachers brought a state-court action seeking a declaration that Arizona's law governing mineral leases on state lands was incompatible with both the federal statute that admitted Arizona as a state and the Arizona Constitution.<sup>34</sup> The suit alleged that federal law and the Arizona Constitution require that leases of public land be at full-appraised value, whereas the Arizona statute had dispensed with this requirement.<sup>35</sup> Because extant leases were bringing in lower payments than those that would be earned if this requirement were observed, and because the royalties are held in trust for the support of public schools, petitioners alleged that they had been injured by being forced to pay "unnecessarily higher taxes" to subsidize public education than they otherwise would have to pay.<sup>36</sup>

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<sup>29</sup> See *Duncan*, 102 A.3d at 925–28.

<sup>30</sup> *Id.* at 918–25.

<sup>31</sup> See *supra* note 15 and accompanying text.

<sup>32</sup> See Massey, *supra* note 2, at 404.

<sup>33</sup> 490 U.S. 605 (1989); Massey, *supra* note 2, at 404–05.

<sup>34</sup> See *ASARCO*, 490 U.S. at 610.

<sup>35</sup> *Id.* at 625–27.

<sup>36</sup> *Id.* at 614.

If the taxpayers and teachers' association had initially filed this suit in a federal court, the *ASARCO* Court observed, they would have faced dismissal because they lacked Article III standing.<sup>37</sup> Because all citizens share the same interest in levels of taxation, the taxpayers' alleged injury was not sufficiently personal and individualized to satisfy Article III requirements.<sup>38</sup> Moreover, the alleged injury to both the taxpayers and the teachers' association was not capable of being redressed by a judicial remedy.<sup>39</sup> A decree voiding the Arizona law would not necessarily lead to an increased contribution to the public schools or to lower taxes.<sup>40</sup> Rather, such eventualities would depend on exercises of discretion by Arizona's elected politicians that could not properly be dictated by a federal court.<sup>41</sup>

But the taxpayer and teachers' association did not initially file suit in federal court; they filed suit in an Arizona state court.<sup>42</sup> And because the constraints of Article III do not apply to state courts, state courts are permitted to recognize standing in situations where the federal courts would not—even in circumstances (such as those in *ASARCO*) where they are being asked to adjudicate claims brought under federal law.<sup>43</sup> Indeed, in *ASARCO*, the Arizona courts recognized the petitioners' standing, and the Arizona Supreme Court ruled in their favor on the merits.<sup>44</sup> The question thus was posed: Could the United States Supreme Court—whose jurisdiction is bounded by Article III—review the decision of a state court on the meaning of federal law in circumstances where Article III would have prohibited a lower federal court from entertaining the suit?<sup>45</sup>

The Supreme Court said yes, on the ground that the state court judgment had altered the tangible rights of mineral leaseholders, who had intervened in the Arizona state court proceedings and petitioned the Supreme Court for review.<sup>46</sup> The Court's reasoning made it clear, however, that if the state courts had *rejected* the state taxpayers' and teacher's association's federal claims, and if *those parties* had sought Supreme Court review, the Court would have lacked the power to entertain their challenge.<sup>47</sup> This is the asymmetry problem with which Calvin was concerned.<sup>48</sup>

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<sup>37</sup> *Id.* at 612–17.

<sup>38</sup> *See id.* at 613–14.

<sup>39</sup> *See id.* at 614–15.

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *Id.* at 610.

<sup>43</sup> *See id.* at 617.

<sup>44</sup> *Id.* at 610.

<sup>45</sup> *See id.* at 617–24.

<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 618–19.

<sup>48</sup> *See Massey, supra* note 2, at 401.

Let us put it back into the terms of his *Duncan Redux* hypothetical. If state taxpayers were to bring a First Amendment Establishment Clause challenge to New Hampshire's tax-credit program in state superior court,<sup>49</sup> challenge or defend the state superior court's First Amendment ruling in the New Hampshire Supreme Court, and prevail on the merits in the New Hampshire Supreme Court, the intervenors—students at religious schools and a scholarship organization that would lose money as a consequence of that ruling—would have Article III standing to petition the United States Supreme Court for review.<sup>50</sup> The intervenors' Article III injury would be straightforward: The New Hampshire Supreme Court had invoked the First Amendment's Establishment Clause to alter their tangible rights under New Hampshire RSA 77-G.<sup>51</sup> But if the state taxpayers who had brought the action were to lose on the merits of their Establishment Clause challenge in the New Hampshire Supreme Court, they would lack a cognizable injury—and therefore Article III standing—to petition the United States Supreme Court for review.<sup>52</sup>

Calvin raised a number of concerns about this jurisdictional asymmetry.<sup>53</sup> Distilled to their essence, the concerns Calvin identified serve to highlight two interrelated problems. First, as a consequence of the asymmetry, state courts can erroneously reject federal claims *on their merits* without any possibility of federal review.<sup>54</sup> Recall that, in *Arizona Christian*

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<sup>49</sup> Under current law, the defendant would not be permitted to remove such a claim to federal court under 28 U.S.C. § 1441(a) and then obtain its dismissal on the ground that plaintiff lacked federal standing. The plaintiff's lack of federal standing is presently understood to deprive the federal court of "original jurisdiction" within the meaning of the statute and to oblige the district court to remand to state court under 28 U.S.C. § 1447(c). See, e.g., *Smith v. Wis. Dept. of Agric., Trade and Consumer Prot.*, 23 F.3d 1134, 1142 (7th Cir. 1994) (noting that the proper procedure for a case brought in state court by a plaintiff lacking federal standing that is improperly removed is to remand the case to state court under 28 U.S.C. § 1447(c)); *Me. Ass'n of Interdependent Neighborhoods v. Comm'r, Me. Dept. of Human Services*, 876 F.2d 1051, 1053–54 (1st Cir. 1989) (same). An important factor, although not the exclusive factor, informing this reading of the statute is the fact that state courts are not required to heed federal justiciability doctrines. See *Smith*, 23 F.3d at 1142; *Me. Ass'n of Interdependent Neighborhoods*, 876 F.2d at 1054.

<sup>50</sup> See Massey, *supra* note 2, at 406.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 404–06 (explaining why, under *ASARCO*, petitioners facing such a loss in the New Hampshire Supreme Court would lack the standing to bring a United States Supreme Court challenge); see also *supra* notes 37–43 and accompanying text.

<sup>53</sup> See Massey, *supra* note 2, at 407–09.

<sup>54</sup> *Id.* at 407–08.

*School Tuition Organization v. Winn*,<sup>55</sup> the United States Supreme Court did not say that the Arizona taxpayers' Establishment Clause claims lacked merit; it said only that the Arizona taxpayers lacked standing to raise such a claim.<sup>56</sup> Now, suppose that, in the wake of *Winn*, a number of states were to follow New Hampshire's lead and enact tax-credit programs such as Arizona's. Suppose further that, in those states, state taxpayers seek to take advantage of expansive state court standing to challenge these schemes under the First Amendment's Establishment Clause. Finally, suppose that each of these challenges terminates in a state supreme court decision rejecting the taxpayers' Establishment Clause claims on the merits. The net result would be a patchwork of state supreme court rulings on the meaning of the Establishment Clause—perhaps rulings with which the United States Supreme Court would disagree—that are impervious to United States Supreme Court review.

Surely, Calvin was correct to describe such a scenario as “odd.”<sup>57</sup> Especially when one considers the second problem with this asymmetry that Calvin identified—that each of these cases would have been adjudicated in the absence of certain adversarial prerequisites that have traditionally defined the limits of the judicial role in federal court cases and serve (we are told) to produce better calibrated judicial judgments.<sup>58</sup> And there are other oddities about this class of cases as well. For example, a defendant sued under federal law in state court by a plaintiff or petitioner who does not meet federal standing prerequisites is treated differently from all other defendants sued under federal law in state court; such a defendant cannot remove the claim to federal court under 28 U.S.C. § 1441(a).<sup>59</sup> Courts have held that the plaintiff or petitioner's lack of standing under federal law acts to deprive the federal court subject matter jurisdiction and thus the “original jurisdiction” required for removal under § 1441(a).<sup>60</sup>

### III. ADDRESSING THE ASYMMETRY PROBLEM

So, what is to be done about the asymmetry problem? Calvin proposed a hypothetical solution that was both tailored to the anti-establishment claim that animated his *Duncan Redux* hypothetical and rooted in the United States Supreme Court's “procedural right” jurisprudence.<sup>61</sup> Under this line of cases, a legislature can create a procedural right to protect concrete interests without meeting all of the normally required standards for redressability or

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<sup>55</sup> 563 U.S. 125.

<sup>56</sup> *Id.* at 133–46.

<sup>57</sup> Massey, *supra* note 2, at 401.

<sup>58</sup> *See id.* at 409.

<sup>59</sup> *See supra* note 49.

<sup>60</sup> *See id.*

<sup>61</sup> Massey, *supra* note 2, at 409–11.

immediacy.<sup>62</sup> Suppose, Calvin suggested, that New Hampshire were to enact a law that gives any taxpayer the right to request from the state's revenue department an estimate of the amount of reduction in state spending for other purposes that will occur by virtue of the de facto state expenditures occasioned by the state tax-credit program challenged in *Duncan*.<sup>63</sup> Suppose further that this hypothetical law were to provide that if the estimated total reduction, multiplied by the requesting taxpayers' tax payments as a percentage of state revenue, exceeds some specified figure (Calvin proposed \$100), the taxpayer may sue the state and call into question the validity of the tax-credit program under the federal and state constitutions.<sup>64</sup> In such a situation, Calvin argued, the state legislature may have succeeded in creating a defined injury and articulating a chain of causation sufficient to give rise to a "case or controversy" under Article III (as well, presumably, as the New Hampshire Constitution) if the taxpayer's claim is rejected.<sup>65</sup>

As Calvin acknowledged, the United States Supreme Court's procedural right jurisprudence is far from settled, and neither the vitality nor the scope of the line of cases he relied upon in fashioning his hypothetical solution is altogether clear.<sup>66</sup> Therefore, let us take a quick look at how other scholarly commentators have viewed the asymmetry problem. Some have asserted that it is not in fact a problem; for them, the possibility that state courts might entertain and reject federal claims on their merits without any opportunity for United States Supreme Court review is a perfectly acceptable consequence of

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<sup>62</sup> See *id.* at 409–10 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

<sup>63</sup> *Id.* at 410.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 410–11. In advancing this proposal, Calvin relied on the United States Supreme Court's holdings in *Env'tl. Prot. Agency v. Mink*, 410 U.S. 73, 80 (1973) (reading the federal Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A), to give "any person" a "judicially enforceable public right to secure [certain] information from . . . official hands"), and *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (reading the Federal Election Campaign Act of 1971, 2 U.S.C. § 431(4), to create a similar public right to the disclosure of information about political contributions to a lobbying organization classified as a political committee). Calvin contrasted these holdings with the Court's holding in *United States v. Richardson*, 418 U.S. 166 (1974), where the Court found an absence of standing to assert a judicially enforceable public right to information under the Constitution's Public Accounts Clause, U.S. Const. art. I, § 9, cl. 7, regarding Central Intelligence Agency expenditures. The difference, Calvin explained, is that "Congress had specifically created . . . new informational right[s] that authorized the suit[s]" brought in *Mink* and *Akins*. Massey, *supra* note 2, at 411 (citing *Akins*, 524 U.S. at 20).

<sup>66</sup> See *id.* at 411 (acknowledging that "perhaps [his hypothetical solution] is a gimmick but, if so, it calls into questions cases such as . . . *Akins*").

our federal structure.<sup>67</sup> Another has argued that the Court should return to its original practice by reinterpreting federal standing principles to permit it to review state-court decisions adverse to claims of federal right.<sup>68</sup> Still others have proposed that the Court ameliorate the problem by requiring state courts to apply federal justiciability requirements to federal claims under a type of “reverse-*Erie*” analysis.<sup>69</sup> And yet another has suggested situating and addressing the problem within a broader look at other “federalism standing” issues.<sup>70</sup>

The asymmetry problem is deeply interesting. At bottom, I share Calvin’s belief that it is a problem worthy of attention. In my view, there ought to be a possibility of federal court review for *any* issue of federal law that is subject to a merits adjudication in *any* American court. Indeed, my preliminary assessment is that state courts *never* should provide remedies on the basis of federal claims in circumstances where, because of the applicability of a federal justiciability doctrine, federal courts would be barred from doing so. I intend to develop this position, along with arguments concerning how the asymmetry might be addressed by a variety of federal and state institutional actors, in a longer paper that builds upon and pushes beyond the existing literature. As I presently conceive it, the paper will advance and consider the following three hypotheses.

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<sup>67</sup> See, e.g., Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L. J. 1003 (2001); 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).

<sup>68</sup> Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257 (2011).

<sup>69</sup> See William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263 (1990); see also Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315 (2005) (confining arguments to the context of state-court enforcement of claims under federal statutory law). For a comprehensive treatment of the “reverse-*Erie*” question, see Kevin S. Clermont, *Federal Courts, Practice & Procedure: Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006).

<sup>70</sup> See Heather Elliott, *Federalism Standing*, 65 ALA. L. REV. 435 (2013). To Professor Elliott, the asymmetry problem implicates issues that run parallel to those raised in *Hollingsworth v. Perry*. 133 S. Ct. 2652 (2013) (holding that the proponents of a ballot initiative that led to the amendment of the California Constitution lacked standing to challenge a lower federal court judgment striking down the amendment when the state officials who normally defend state law declined to do so). See *id.* at 436. The problem also ought to be considered in connection with its inverse—*i.e.*, whether *federal* courts should apply *state* justiciability principles to claims they adjudicate under their diversity jurisdiction. See *id.*; see also F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417 (2013) (arguing that diversity cases in federal court should be judged by the standing doctrine of the alternative state forum rather than by Article III standards).

First, Congress might consider whether state courts should be adjudicating the merits of federal claims in circumstances where justiciability doctrines would prevent federal courts from doing so. In evaluating this question, Congress should weigh the likely costs and benefits of having state court judges decide claims under federal law without the adversarial prerequisites that limit the judicial role in the federal courts. In conducting this cost-benefit analysis, Congress should bear in mind that state court judges are frequently elected and typically lack the independence from the political branches enjoyed by their federal counterparts.

If Congress concludes, as I am inclined to believe it should, that the likely costs of the present regime outweigh the likely benefits, there are a number of ways in which it could effectively end state court adjudications of federal law in circumstances where federal justiciability requirements are not satisfied. One straightforward way would be to enact a statute providing that federal justiciability standards preempt conflicting, more liberal state-law standards in all federal-question claims, and authorizing the removal to federal court and dismissal of all such claims.<sup>71</sup> Alternatively, Congress might simply amend the federal removal statute, 28 U.S.C. § 1441(a), to permit *all* defendants faced with federal-question claims in state court—even those defendants facing federal claims that would not be justiciable in a federal court—to remove such claims to the local federal district court, which would then dismiss them.<sup>72</sup>

Second, the United States Supreme Court might conduct a similar analysis and consider using its power to create constitutional common law to impose on state courts an obligation to withhold relief for claims based on

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<sup>71</sup> For an example of such a statute, see the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p(b), which states that private state-law “covered” class actions alleging untruth or manipulation “in connection with the purchase or sale” of a “covered” security may not “be maintained in any State or Federal court,” and 77p(c), which authorizes removal to federal district court of “[a]ny covered class action brought in any State court involving a covered security.” See also *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006) (discussing these provisions).

<sup>72</sup> In fact, a principal reason why federal courts presently require a remand of removed federal claims in circumstances where federal justiciability standards are not satisfied is that state courts are *not* understood to be under an obligation to dismiss such claims. See *supra* note 49. So perhaps a changed understanding of this foundational question could support a re-interpretation of 28 U.S.C. §§ 1441 and 1447—one that would permit removal and dismissal of federal claims in circumstances where federal justiciability standards are not satisfied—*without* congressional amendment. *But see* 28 U.S.C. § 1447(c) (providing that “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall be* remanded”) (emphasis added); *supra* note 49 (summarizing decisional law holding that federal courts lack “original jurisdiction” under 28 U.S.C. § 1441(a) over non-justiciable federal claims).

federal law in circumstances where federal courts would lack the power to afford the claimant a remedy. Such a principle, which would be operationalized in state courts as an affirmative defense, could be analogized to other remedy-limiting doctrines that the Supreme Court has imposed in connection with claims for relief under federal law that are asserted and adjudicated in state courts—doctrines such as the qualified-immunity defense to civil rights claims under 42 U.S.C. § 1983,<sup>73</sup> exceptions to the Fourth Amendment’s exclusionary rule,<sup>74</sup> and the *Chapman v. California*<sup>75</sup> harmless-error principle.<sup>76</sup> If the Court can impose by constitutional common law remedy-limiting doctrines applicable to particular classes of federal claims heard by state courts,<sup>77</sup> why could it not also require that state

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<sup>73</sup> Section 1983, authorizes lawsuits against persons who, “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any . . . person within the jurisdiction [of the United States] to the deprivation [of a federally protected right].” In *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the United States Supreme Court recognized a parallel cause of action against *federal* officials accused of violating the Fourth Amendment. In *Harlow v. Fitzgerald*, 457 U.S. 800, 814–19 (1982), the Supreme Court recognized a “qualified immunity” for public officials accused of federal right violations while “performing discretionary functions . . . insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known.” *Id.* at 818.

<sup>74</sup> See *Davis v. United States*, 564 U.S. 229 (2011) (holding that the exclusionary rule does not apply to an unconstitutional search or seizure conducted in objectively reasonable reliance on binding judicial precedent); *Herring v. United States*, 555 U.S. 135 (2009) (holding that the exclusionary rule does not apply to an unconstitutional search or seizure unless the unconstitutional conduct was a consequence of police conduct that was deliberate, reckless, or grossly negligent, or was traceable to recurring or systemic police negligence); *Hudson v. Michigan*, 547 U.S. 586 (2006) (holding that the exclusionary rule does not apply to a search or seizure conducted in violation of the constitutional “knock and announce” rule); *Arizona v. Evans*, 514 U.S. 1 (1995) (holding that the exclusionary rule does not apply to an unconstitutional search or seizure conducted in reasonable reliance on erroneous database information maintained by judicial employees); *Illinois v. Krull*, 480 U.S. 340 (1987) (holding that the exclusionary rule does not apply to a search or seizure conducted in reasonable reliance on of a subsequently invalidated statute); *United States v. Leon*, 468 U.S. 897 (1984) (holding that the exclusionary rule does not apply to a search or seizure conducted in reasonable reliance on a faulty warrant).

<sup>75</sup> 386 U.S. 18 (1967)

<sup>76</sup> See *id.* at 24 (holding that appellate courts should withhold remedies for most constitutional errors that take place at trial if the government establishes “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained”).

<sup>77</sup> I have previously argued that constitutional remedies such as the cause of action available under *Bivens*, the Fourth Amendment’s exclusionary rule, the



courts honor substantive remedial barriers to *any* federal claim that federal courts must observe? The fact that the state courts do not operate within the justiciability constraints of Article III of the United States Constitution should not disable the United States Supreme Court from placing limits on *remedies* available in state courts under federal law in circumstances where such remedies could not be ordered by a federal court.

Third, even in the absence of a federal-law mandate from Congress or the United States Supreme Court, state courts ought to consider applying state conflict-of-laws doctrine to withhold relief for a claim based on federal law in circumstances where a federal court would lack the power to afford the claimant a remedy. Justiciability limitations on a federal court's ability to entertain a federal claim embody more than merely *procedural* interests going to *how* litigation is to be conducted in federal courts.<sup>78</sup> Rather, such limitations are at least partially *substantive* insofar as they seek to ensure that pronouncements of federal law—particularly federal constitutional law—are appropriately calibrated, and that remedial decrees for violations of federal law do not intrude upon the operational prerogatives of the political branches of government.<sup>79</sup>

Thus, state courts should consider recognizing the applicability of a federal justiciability doctrine (if the case had been brought in federal court) as an affirmative defense or as a ground for dismissal for failure to state a claim on which relief might be granted. The idea is *not* that the state court should observe justiciability limits to which the federal Constitution does not make them subject. Rather, it is that state courts should recognize that the reasons why federal courts would not adjudicate the claim involve substantive federal interests. As a matter of state/federal comity, state courts

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harmless-error principle of *Chapman*, and the various remedy-limiting exceptions thereto, see *supra* notes 73–76 and accompanying text, are properly regarded as constitutional common law. See John M. Greabe, *Remedial Discretion in Constitutional Adjudication*, 62 BUFF. L. REV. 881, 919–23 (2014).

<sup>78</sup> Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971) (providing that “[a] court usually applies its own local law rules prescribing *how litigation shall be conducted* even when it applies the local law rules of another state [including the federal government] to resolve other issues in the case”) (emphasis added). See *generally* KERMIT ROOSEVELT, CONFLICT OF LAWS 19–21 (2d ed. 2015) (discussing the importance of the substance/procedure distinction in conflict-of-laws theory).

<sup>79</sup> Cf. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952) (holding that important federal interests must be vindicated when federal law issues are decided in state court, even when state law conflicts with federal law); Roosevelt, *supra* note 78, at 171–74 (discussing the reverse-*Erie* doctrine, see *supra* note 69 and accompanying text, and more generally circumstances when federal law must displace state law in state courts). See *generally* Fletcher, *supra* note 69 (arguing that federal interests are sufficiently strong to require state courts to honor federal justiciability limits); Katz, *supra* note 69 (similar, in the context of state courts enforcing federal statutes).

should refuse requests for relief that a federal court could not award without running afoul the limitations imposed by Article III.

#### CONCLUSION

It is impossible to do justice to Calvin Massey's scholarship, imprint on the legal academy, and positive effect on thousands of University of California, Hastings and University of New Hampshire law students in a law review symposium. Nonetheless, I hope that this paper, and the other papers appearing in this volume of the *University of New Hampshire Law Review*, will provide some sense of the breadth, depth, and importance of Calvin's many and varied scholarly contributions. Certainly, they reveal the esteem in which Calvin's colleagues hold him. I am deeply grateful to Calvin for, among so many other things, focusing my attention on the asymmetry problem discussed in this paper. I look forward to continuing to honor Calvin's legacy through further exploration of this problem and how it exposes different ideas about federalism and the concurrent exercise of judicial power over federal-law claims by federal and state courts.