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STATE STANDING TO CHALLENGE FEDERAL AUTHORITY IN THE MODERN ADMINISTRATIVE STATE

Shannon M. Roesler*

Abstract: The modern administrative state relies on a model of shared governance. Federal regulatory regimes addressing a range of economic and social issues depend on the participation of state governments for their implementation. Although these state-federal partnerships are often cooperative, conflicts over the allocation of regulatory authority and administrative policy are inevitable. In recent years, states have sought to resolve some of these conflicts in the federal courts. Well-known state challenges to federal authority include challenges to environmental rules, health insurance legislation, and immigration policies. In these cases, courts have struggled to decide whether states have constitutional standing to bring suit against the federal government.

This Article fills a gap in the legal scholarship by proposing a "governance" approach to state standing that would allow states to challenge federal authority when the federal statute at issue contemplates an implementation role for state governments. The governance approach finds support both in historical precedent and in modern regulatory reality. The approach makes state-standing doctrine less susceptible to judicial manipulation and ensures that courts focus on other threshold questions often obscured by overly broad, incoherent standing analyses.

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INTRODUCTION

Although political debates often inspire rhetoric couched in "states' rights," the reality is that the separate-spheres or dual-sovereignty conception of federalism no longer accurately describes the relationship between the states and the federal government. Rather, as the administrative state has grown to address the complexities of modern life, governments at all levels—federal, state, and local—have sometimes collaborated and sometimes competed for regulatory pieces of various problems. Governmental jurisdiction over many social issues, including environmental and public health issues, is largely concurrent and overlapping as states and local governments are charged with the authority to implement and enforce federal regulations and policies. An ever-growing number of scholars have recognized this shift in the jurisdictional landscape and seek to replace old notions of dual sovereignty with new accounts that capture the overlapping, contingent nature of federal-state authority.[1] Scholars use adjectives, such as

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1. *See, e.g.*, Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, *in* FEDERALISM AND SUBSIDIARITY 363 (James E. Fleming & Jacob T. Levy eds., 2014); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145 (2007); Heather Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

"interactive,"[2] "dynamic,"[3] and "polyphonic"[4] to capture contemporary federalism.

The federalism scholarship identifies the potential virtues of concurrent jurisdiction, noting that it can encourage regulatory innovation, learning, and experimentation.[5] Even so, unproductive conflicts between states and the federal government can and do arise.[6] That is, federal and state regulatory approaches do not always complement each other, and states and local governments will not always agree with federal prerogatives. When irreconcilable differences arise, the federal courts provide a logical forum for their resolution.

Although this may seem obvious, it is under-theorized in the federalism scholarship[7] and is far from settled law. In fact, federal standing doctrine is notoriously unclear about the extent to which governments, and in particular the states, have constitutional standing to litigate questions of governmental authority in federal courts.[8] Courts have grappled with state standing in recent cases on pressing social

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2. *See generally* Buzbee, *supra* note 1.

3. *See generally* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006).

4. *See generally* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009).

5. *See, e.g.*, Schapiro, *supra* note 1, at 288–90.

6. Some of these conflicts are reflected in the recent trend of state "opposition statutes" (i.e., statutes resisting federal policies). Austin Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613, 624–34 (2015).

7. *See, e.g.*, Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 538 (2011) (arguing that we do not have "doctrines that attempt to recognize, much less negotiate, the relationship that is created between state and federal agencies when Congress gives them both concurrent authority to implement federal law but is ambiguous about how that authority should be allocated"); Schapiro, *supra* note 1, at 285 (arguing that we lack "rules of engagement" for "monitoring federal-state relations" in cooperative governance and arguing "federalism as polyphony" provides guidance); *see also* Robert A. Schapiro, *Judicial Federalism and the Challenges of State Constitutional Contestation*, 115 PENN ST. L. REV. 983, 1004–05 (questioning whether federalism principles support state standing to sue when private litigants would lack standing).

8. *See, e.g.*, Jonathan Remy Nash, *Standing Doctrine Notwithstanding*, 93 TEX. L. REV. SEE ALSO 189, 190–99 (2015) (examining the "fragmentation" of governmental standing); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015) (exploring the pros and cons of standing's fragmentation, as well as the patterns that have emerged from the Supreme Court's opinions over time); Heather Elliott, *Standing Lessons: What Can We Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 558 (2012) (noting the considerable body of scholarship criticizing standing doctrine); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 263 (6th ed. 2009) [hereinafter HART AND WECHSLER] (describing the Court's state-standing cases as "hard to reconcile").

issues such as climate change regulation, health insurance reform, and immigration policy. In *Massachusetts v. EPA*,[9] states challenged the EPA's decision not to regulate the emission of greenhouse gases (GHGs) from new motor vehicles.[10] In the wake of new federal health insurance legislation, Virginia and other states sought declaratory judgments that portions of the new law exceeded Congress's constitutional authority.[11] In 2015, states also challenged federal immigration policies of deferred action (or prosecution) for some individuals not legally present in the United States.[12] And in late 2015, states filed lawsuits challenging the EPA's newly released rules governing the emission of GHGs from power plants (known as the "Clean Power Plan").[13]

Supreme Court precedent identifies three kinds of state interests sufficient to meet Article III's case or controversy requirement for suit in federal court: proprietary interests, sovereignty interests, and quasi-sovereign interests.[14] The first type of interest is analogous to private common law interests (state property and contracts, for example), which have long been recognized as legally justiciable.[15] Though courts may grapple with whether a state has alleged a sufficient injury (one that is actual, concrete, and direct), proprietary injuries resemble injuries in suits between private parties and do not therefore raise questions unique to suits by states and local governments. The doctrinal puzzles grow instead out of decisions regarding the other two categories: sovereignty and quasi-sovereign interests.

This is not surprising given that state sovereignty (and therefore

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9. 549 U.S. 497 (2007).

10. *Id.*

11. Virginia *ex rel*. Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011); Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011), *rev'd in part sub nom.* Nat'l Fed. of Indep. Bus. v. Sebelius, __ U.S. __, 132 S. Ct. 2566 (2012).

12. Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016). After the Fifth Circuit affirmed the district court's preliminary injunction of the federal policy, the Supreme Court granted the federal government's petition for a writ of certiorari and will likely issue a decision in June 2016. Texas v. United States, 809 F.3d 134, 162 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016).

13. *See* Opening Brief of Petitioners on Core Legal Issues, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Feb. 19, 2016), http://www.eenews.net/assets/2016/02/22/document_ew_02.pdf [https://perma.cc/68PV-LUVY]. After the D.C. Circuit denied the petitioners' requests for a stay of the Clean Power Plan, the petitioners applied for a stay in the Supreme Court. Over the dissent of four justices, the Court stayed the Clean Power Plan pending disposition of the appellate court's review and resolution of any review by the Court itself. Order Granting Stay, West Virginia v. EPA, __ U.S. __, 136 S. Ct. 1000 (2016).

14. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel*. Barez, 458 U.S. 592, 601–05 (1982).

15. *See* Raines v. Byrd, 521 U.S. 811, 833 (1997) (describing the "traditional common-law cause of action" as "at the conceptual core of the case-or-controversy requirement").

quasi-sovereignty) simply cannot mean the same thing today as it did a century or more ago. Before the advent of the modern administrative state, federal law was less pervasive and less dependent on the collaboration of state and local actors for its implementation and enforcement. It makes little sense to look to early Supreme Court decisions analyzing federal-state conflicts regarding lawmaking authority in an age when states and local governments are intimately involved in the implementation and enforcement of federal law. Because states and localities must bear sizable social and economic costs when they agree to participate in federal regulatory schemes, states clearly have a concrete interest in litigating questions of governmental power before agreeing to shared governance. Moreover, allowing them to do so ex ante promotes the efficient resolution of difficult preemption questions that might otherwise be litigated piecemeal by private parties alleging various injuries.

Although legal scholars have questioned restrictive doctrines limiting state access to federal court,[16] the literature on constitutional standing has not adequately addressed when states have Article III standing to challenge federal authority.[17] This Article aims to fill this gap by conceptualizing injuries to state "governance" interests in a way that is both consistent with Supreme Court doctrine and grounded in today's multijurisdictional regulatory landscape. To be sure, scholars often dismiss standing doctrine as muddled beyond repair, arguing that judges manipulate it to reach their preferred ends.[18] While tension in the case law lends support to this claim, it should not silence critical commentary. In fact, it should inspire commentary because a doctrinally sound, contemporary theory of state standing should be less susceptible to judicial manipulation.

The main argument of the Article is that states should have "governance" standing to challenge federal power and action when the federal law at issue contemplates an implementation role for state governments. Congress will sometimes specifically authorize suits by states and others to facilitate enforcement of regulatory schemes—like

16. *See, e.g.*, Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1 (2014) (arguing that governments should enjoy implied *public* rights of action to vindicate states' administrative and institutional interests); Heather Elliott, *Federalism Standing*, 65 ALA. L. REV. 435, 442–56 (2013) (discussing the federalism implications of the Court's decision in Hollingsworth v. Perry, __U.S.__, 133 S. Ct. 2652 (2013) (holding that proponents of a ballot initiative banning same-sex marriage lacked standing to defend the initiative)).

17. Most of the recent commentary surrounding state standing is a response to *Massachusetts v. EPA*. *See* sources cited *infra* note 132.

18. Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011).

the state suit challenging EPA's decision not to regulate GHG emissions in *Massachusetts v. EPA*. But as *Massachusetts v. EPA* demonstrates, congressional authorization does not always remove standing concerns under current doctrine. The approach advocated here would make state standing in such cases more straightforward by acknowledging that states have been and should be treated differently for purposes of standing in certain cases.

The Article proceeds as follows. Part I is a historical analysis of Supreme Court decisions involving issues of sovereignty. The analysis demonstrates that the Court has long recognized the justiciability of governance interests. In Part II, close analysis of later and more contemporary cases, including *Massachusetts v. EPA*, reveals that much of today's confusion regarding state standing can be traced to the gradual expansion of representative (*parens patriae*) suits by states suing on behalf of their citizens. In order to develop a clear doctrinal approach to state standing in suits against the federal government, we must first understand how the doctrine regarding representative standing has clouded the analysis of standing based on governance interests.

Part III lays out a new approach grounded in Supreme Court jurisprudence, but updated to reflect a "post-sovereignty" state-federal relationship. The governance approach to state standing allows states to challenge federal laws and actions when the federal law underlying the challenge contemplates an implementation role for state governments. In the modern administrative state, a "sovereign" state government does not regulate apart from the federal government in most arenas, but constitutional sovereignty nevertheless guarantees that a state can and should be accountable to its citizens in how it governs. Because states often govern *with* the federal government under federal administrative laws, they have concrete governance interests that flow from this modern-day shared sovereignty. They suffer injury to these interests when the federal government fails to govern or act according to federal law.

Part III explains how a governance approach to state suits challenging federal authority would provide federal courts with a clear, coherent approach to state standing—making the doctrine less susceptible to manipulation. Instead of analyzing state standing under both the traditional injury-in-fact test *and* the unclear "special solicitude" test that *Massachusetts v. EPA* arguably creates, the governance approach would combine the two inquiries. In essence, when a state can show that federal action implicates a governance interest, it establishes an Article III injury. Part III also examines how the approach facilitates the clear resolution of other threshold questions, such as whether the court has

federal subject-matter jurisdiction and whether the state plaintiff has a federal right of action. Currently, courts tend to overlook these threshold questions, which are obscured by overly broad state standing analyses. To illustrate the value of the approach, the Article ends with analyses of two recent cases: Virginia's challenge to the Affordable Care Act and Texas's recent challenge to a federal immigration policy regarding deferred action. As the administrative state continues to address our most pressing social and economic problems, state suits seeking to litigate federal authority will only increase. Now is the time to clarify when these states have standing under Article III.

I. THE LITIGATION OF SOVEREIGNTY INTERESTS: HISTORICAL PERSPECTIVES

Article III, Section 2 of the Constitution grants the judicial power to the federal courts.[19] Based on the provision's language and history, the early Court interpreted Article III to limit judicial power to "cases" or "controversies," a requirement that precludes review of hypothetical questions and generally prevents the issuance of advisory opinions.[20] Article III, Section 2 also specifies that the Supreme Court shall have original jurisdiction "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls and those in which a State shall be a Party."[21] In the First Judiciary Act in 1789, Congress further specified that the Court had original and exclusive jurisdiction in all civil controversies between states and had original, but not exclusive jurisdiction, in suits "between a state and citizens of other states."[22] The Act did not expressly contemplate suit *against* the federal government, although later statutes specified that the Court has original (but not exclusive) jurisdiction over controversies between the federal government and a state.[23]

The authors of the most influential historical analysis of state standing in modern scholarship contend that Supreme Court precedent does not generally support the justiciability of sovereignty (or "governance") interests under Article III.[24] They argue that the federal courts generally

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19. U.S. CONST. art. III, § 2, cl. 1.

20. HART AND WECHSLER, *supra* note 8, at 52–57 (noting the long-held and widely accepted view that advisory opinions are unconstitutional and raising questions based on the critical commentary surrounding this assumption).

21. U.S. CONST. art. III, § 2, cl. 2.

22. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

23. 28 U.S.C. § 1251 (2012).

24. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 412 (1995). Ann Woolhandler recently reaffirmed this view in light of intervening scholarship. Ann

recognized only private common law interests as justiciable.[25] In their view, states were free to enforce their own laws in their own courts, but could sue in federal court only when they could allege a traditional common law injury to person or property.[26]

The historical analysis that follows in this part of the Article suggests a different reading of this precedent. In the nineteenth and twentieth centuries, states did sue to vindicate governance interests in federal court. What I call "governance" interests, the Court has called "sovereign" or sometimes "quasi-sovereign" interests.[27] It has recognized them as justiciable under Article III in cases brought by a state against another state and in state suits against the federal government. Even cases frequently cited to support the nonjusticiability thesis prove to be weak bases for a sweeping conclusion that the federal courts have always understood these interests as outside Article III's grant of judicial power.

A. *Early Cases and Interstate Disputes*

Early Supreme Court cases are sometimes read to suggest the Court's reluctance to consider sovereignty claims by state plaintiffs.[28] In 1831, for example, the Court refused to hear the Cherokee Nation's request to enjoin Georgia from enforcing its state laws in Cherokee territory recognized by treaty with the United States.[29] The state had enacted various laws authorizing the acquisition and distribution of Cherokee lands and otherwise flouting the Tribe's rights to self-government.[30] Historical accounts illuminate not only the tragic circumstances of this

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Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209 (2014).

25. Woolhandler & Collins, *supra* note 24, at 412.

26. *Id.*

27. *See, e.g.*, Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel*. Barez, 458 U.S. 592, 601–02 (1982).

28. *See id.*

29. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Although American Indian Tribes have interests as separate sovereigns under federal law, their political and legal relationship with the federal government is established by a series of treaties, which recognize the Tribes' right to self-determination, as well as a federal trust responsibility over Indian Tribes and territory. Seth Davis, *Tribal Rights of Action*, 45 COLUM. L. REV. 499, 528–29 (2014). Strong arguments may be made that Tribes should have access to the federal courts to litigate their sovereignty interests. *Id.* at 529–43; *see also* Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 464 (2d Cir. 2013) (holding that Tribe had standing based on sovereignty interest in self-government to challenge imposition of state tax on slot machines at Tribe's casino). But because their historical, legal, and political relationship with the federal government differs in many ways from the state-federal relationship, the historical and doctrinal analyses in this Article do not necessarily extend to Tribes.

30. *Cherokee Nation*, 30 U.S. at 7–8.

case, but also the precarious political environment in which it was brought.[31] Given the very real concern that a judicial injunction would not be enforced, Chief Justice Marshall's characterization of the requested relief as an exercise of "political power" outside the judiciary's "proper province" is hardly surprising.[32] Even so, this characterization is dicta; his conclusion that the Court lacked jurisdiction was based not on the case or controversy requirement, but on an analysis that excluded the Cherokee Nation from the phrase "foreign state" in Article III.[33] In addition, two justices dissented, arguing that the Court did have jurisdiction to enjoin the enforcement of state laws that violated property rights secured to the Tribe by federal treaties.[34]

Other early decisions regarding the justiciability of sovereignty interests must also be placed in historical context. In *Mississippi v. Johnson*[35] and *Georgia v. Stanton*,[36] states challenged the federal government's authority under the Reconstruction Acts following the Civil War. In both cases, the Court held that it lacked jurisdiction to enjoin the executive branch in its enforcement of laws that replaced state government with federal military rule.[37] In *Stanton*, the Court explained that the judicial power does not extend to "the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State," but is instead confined to rights of persons or property traditionally litigated by individuals.[38]

Because this language distinguishes judicial from political power by

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31. *See, e.g.*, Rennard Strickland, *The Tribal Struggle for Sovereignty: The Story of the Cherokee Cases*, *in* INDIAN LAW STORIES 72 (Carole E. Goldberg et al. eds., 2011); JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS (1996); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969). One year later, the Court did invalidate a Georgia state law as infringing on the Cherokee Nation's sovereignty, but the state simply ignored the ruling, and the federal government did not enforce it. *See* Rennard Strickland & William Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, The Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111, 112–15 (1994) (discussing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

32. *Cherokee Nation*, 30 U.S. at 20. In early cases, the Court often discussed justiciability under Article III by distinguishing between "judicial" and "political" power. These cases are the precursors to today's standing *and* political question doctrines under Article III. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 224–26 (1962) (discussing Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1868) as precedent relevant to the political question doctrine).

33. *Cherokee Nation*, 30 U.S. at 20.

34. Justice Thompson wrote the dissent, in which Justice Story concurred. *Id.* at 80 (Thompson, J., dissenting).

35. 71 U.S. (4 Wall.) 475 (1867).

36. 73 U.S. (6 Wall.) 50 (1868).

37. *Mississippi*, 71 U.S. at 499; *Stanton*, 73 U.S. at 77.

38. *Stanton*, 73 U.S. at 77.

reference to individual common law rights, some commentators have argued that the early Court required states to allege common law injuries, and sovereignty interests were nonjusticiable.[39] This argument is arguably strengthened by the fact that the Court did entertain constitutional challenges to Reconstruction legislation in habeas cases brought by *individuals* held pursuant to military authority.[40] But the relief requested in these two kinds of cases was very different; in the cases brought by states, the Court was asked to enjoin all executive enforcement of two pieces of federal legislation, while in the habeas cases, the Court was asked to grant more limited relief. Because a declaration that the Reconstruction Acts were unconstitutional in their entirety would have provoked a serious political conflict, the justices were understandably reluctant to reach the merits of the case.[41] The language suggesting that states could not litigate "rights of sovereignty" is therefore deeply rooted in historical context and should not be used to support generalizations regarding the justiciability of governance interests today.

Moreover, these cases are simply not representative of the Court's approach to sovereignty interests. States did in fact litigate sovereignty interests—primarily in cases involving border disputes. As early as 1838, in *Rhode Island v. Massachusetts*,[42] the Court exercised its original jurisdiction to hear disputes regarding interstate borders, reasoning that the authors of the Constitution had such suits in mind in giving the Supreme Court original jurisdiction over disputes between states.[43] The argument that border disputes involve nonjusticiable questions of political sovereignty appeared in Chief Justice Taney's

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39. *See* Woolhandler & Collins, *supra* note 24, at 418–19; DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 303 (1985).

40. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866). When the Court was poised to rule on the constitutionality of a detention in the South, Congress expressly repealed the Court's jurisdiction—a result that illustrates the political position of the Court at this time. *See Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868). Congress limited the Court's appellate jurisdiction in habeas cases to preserve the terms of Reconstruction and not out of a desire to limit judicial power generally. As others have noted, the same Congress expanded the federal courts' jurisdiction in various ways. *See* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1158–59 (2011).

41. *See* Friedman & Delaney, *supra* note 40, at 1157–59 (describing the political tensions of the time).

42. 37 U.S. (12 Pet.) 657 (1838).

43. *Id.* at 723–24; *see also* Louisiana v. Texas, 176 U.S. 1, 15 (1900) (recognizing that the Constitution gave the Supreme Court broader jurisdiction over interstate disputes than the common law and that this "new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the states").

dissenting opinion[44] and essentially faded over time as the Court routinely decided cases involving borders and interstate water allocation.[45]

By 1892, in a dispute between Texas and the United States regarding territory in Oklahoma, the Court not only treated interstate border disputes as an accepted part of its jurisdiction, but also distinguished interstate litigation from suits involving states and private parties, noting that the states consented to judicial resolution of intergovernmental disputes when they entered into the union.[46] Moreover, in deciding that the case was appropriately brought as a suit in equity rather than law, the Court explicitly characterized the dispute as one involving governmental authority: "[i]t is not a suit simply to determine the legal title to, and the ownership of [lands] . . . . It involves the larger question of governmental authority and jurisdiction over that territory."[47]

The intergovernmental litigation of sovereignty interests also occurred in cases in which one state sued another to invalidate laws and actions that allegedly interfered with the free flow of interstate commerce. The Court initially grounded its jurisdiction in the state's own proprietary interests, as well as its interests in representing its citizens. When Pennsylvania and Ohio challenged a West Virginia law limiting the removal of natural gas from the state, the Court stressed the states' status as consumers of natural gas and as representatives of citizen consumers whose use of the resource would be similarly curtailed by the West Virginia restriction.[48]

But what is perhaps most remarkable about this case is that the Court was willing to entertain a suit seeking a declaration regarding the constitutionality of a state law prior to its application, rather than an injunction against specific enforcement of its provisions.[49] Indeed, in his dissent, Justice Brandeis detailed the numerous procedural steps (including application to West Virginia's public service commission)

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44. *Rhode Island*, 37 U.S. at 753 (Taney, J., dissenting).

45. *See* Wyoming v. Colorado, 259 U.S. 419, 464 (1922) (exercising original jurisdiction over a dispute between two states regarding allocation of water from interstate stream), *vacated on other grounds*, 353 U.S. 953 (1957); Kansas v. Colorado, 206 U.S. 46, 84–85 (1907) (holding that the Court had original jurisdiction over a dispute between Kansas and Colorado regarding the appropriation of water from the Arkansas River); United States v. Texas, 143 U.S. 621, 640 (1892) (citing several cases as evidence that the Court's jurisdiction over border disputes between states is a settled question of law).

46. *Texas*, 143 U.S. at 646.

47. *Id.* at 648.

48. Pennsylvania v. West Virginia, 262 U.S. 553, 591–92 (1923).

49. *Id.* at 581.

that would precede state enforcement of export restrictions.[50] Because none of these steps had apparently been taken, Justice Brandeis characterized the case as one to enjoin "legislation" (rather than executive action) by seeking a "general declaration" regarding the state law's constitutionality—an abstract ruling that he argued fell short of the case or controversy requirement of Article III.[51]

Decades later, the Court again concluded that states had standing to challenge the constitutionality of a state law under the Commerce Clause—in this case, Louisiana's "first-use" tax on some natural gas brought into Louisiana (which ultimately increased the price of such gas to out-of-state consumers).[52] Again, the Court concluded that the states had standing as consumers of natural gas (a proprietary interest) and as representatives of their consumer citizens.[53] Though Justice Rehnquist dissented, he actually agreed that the Court had original jurisdiction under Article III and relevant statutes, but would have declined to exercise that jurisdiction as a prudential matter because the states had not advanced a sovereignty interest.[54] He argued that the Court's original jurisdiction should be used only when a state "seeks to vindicate its rights as a State, a political entity."[55] Justice Rehnquist's characterization of sovereignty is striking; in his view, questions of political sovereignty (now described as states' "rights") are not only justiciable—they are the questions most worthy of the Court's original jurisdiction.

Only a decade later, in *Wyoming v. Oklahoma*,[56] a majority of the Court again agreed that sovereignty interests are appropriate grounds for exercise of the Court's original jurisdiction.[57] In deciding to exercise its original jurisdiction over Wyoming's claim that an Oklahoma law violated the Commerce Clause, the Court emphasized the sovereign interests of both states. In underscoring the "seriousness and dignity" of the claim, Justice White noted that Oklahoma, "acting in its sovereign capacity," had passed legislation that limited Wyoming's ability to collect severance taxes from in-state coal companies.[58]

Moreover, in rejecting the argument that the Court should dismiss the

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50. *Id.* at 611–15 (Brandeis, J., dissenting).

51. *Id.* at 610.

52. Maryland v. Louisiana, 451 U.S. 725 (1981).

53. *Id.* at 737–38.

54. *Id.* at 766 (Rehnquist, J., dissenting).

55. *Id.*

56. 502 U.S. 437 (1992).

57. *Id.* at 451–52.

58. *Id.* at 451.

suit because the issues could be litigated (by the coal companies) in another forum, Justice White emphasized that no such suit was currently pending, and even if it were, Wyoming's interests as a "sovereign" might not be adequately considered.[59] In addition, he suggested that Wyoming's injury implicated its sovereign interests and that the magnitude, or seriousness, of that injury should be assessed not only by evaluating the impacts of Oklahoma's discriminatory legislation, but also by considering the impacts of similar laws should other states decide to follow Oklahoma's example.[60] The fact that the state plaintiff raised a question of governmental authority (in this case, federal authority under the Commerce Clause) actually helped the state overcome objections that its alleged injury to tax revenues was both indirect and trivial (less than one percent of collected taxes).[61]

Indeed, in his dissenting opinion, Justice Scalia highlighted the attenuated nature of the alleged injury: though Oklahoma utilities had certainly bought less Wyoming coal since the state law's enactment, that fact did not necessarily establish that Wyoming coal companies had sold less coal (and that Wyoming had therefore suffered a loss in severance tax revenues).[62] But in contrast to the majority, Justice Scalia analyzed state standing just as he would the standing of a private party, giving no weight to the governance interests asserted or implicated by the case[63]—a critical and continuing tension in contemporary Supreme Court opinions regarding state standing. An approach to state standing that explicitly recognizes governance interests would help explain decisions like *Wyoming v. Oklahoma* and address "floodgate" objections to expanding state standing, such as those raised by Justice Scalia in his dissent, by acknowledging that state standing is and should be grounded in different principles of justiciability.

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59. *Id.* at 452.

60. *Id.* at 453 ("[T]he practical effect of [Oklahoma's] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, State adopted similar legislation." (internal quotation marks omitted)).

61. *Id.* at 448–49, 452–53.

62. *Id.* at 466 (Scalia, J., dissenting).

63. *Id.* at 465–68 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissenting opinion, in which he argued that Wyoming had failed to allege facts sufficient to show an injury in fact under Article III, and if it had met this burden, he would still decline to exercise the Court's original jurisdiction for prudential reasons.

B. *State Challenges to Federal Power in the Twentieth Century*

Early in the twentieth century, the Court concluded it lacked jurisdiction in cases in which states sought declarations that federal law exceeded constitutional authority. In 1923, in *Massachusetts v. Mellon*,[64] Massachusetts challenged a federal law that granted states federal funding if they cooperated with the federal government in efforts to improve maternal and infant health.[65] The state argued that Congress had violated the state's rights under the Tenth Amendment by forcing it to choose either to yield some of the authority (reserved to it under the amendment) or to lose the federal funds appropriated under the act.[66] The Court labeled the question presented as "political" and outside the judicial power conferred by Article III, quoting older cases, such as *Georgia v. Stanton* and *Cherokee Nation v. Georgia*, for the proposition that it may not render abstract opinions on the constitutionality of state or federal laws.[67] Other cases from this time period appear to use the same logic to resolve similar state challenges to federal law.[68]

But a close reading of these cases reveals that they turn more on the merits of the states' claims than on the Court's unwillingness to resolve governance conflicts. In *Mellon*, though the Court dismissed the case for "want of jurisdiction" and expressly stated that it was not deciding the constitutional questions, it actually did decide the state's Tenth Amendment question.[69] Rather than framing its analysis in terms of constitutional jurisdiction, the Court inquired into the "nature of the right" asserted by the state and analyzed what effect, if any, the federal law had on that right.[70] In disposing of the case, the Court expressly acknowledged the state's arguments in support of its Tenth Amendment claim, particularly its contention that the federal law burdened the state by attaching conditions to federal funding:

> But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the states where they

64. 262 U.S. 447 (1923).

65. *Id.*

66. *Id.* at 479–80.

67. *Id.* at 483–84.

68. Florida v. Mellon, 273 U.S. 12, 16–17 (1927); New Jersey v. Sargent, 269 U.S. 328, 331 (1926).

69. *Mellon*, 262 U.S. at 480.

70. *Id.* at 482.

> reside. Nor does the statute require the states to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.[71]

The Court then concluded that the federal law imposed no burden on the states because it did not operate without state consent—foreshadowing later cases under the Spending Clause.[72] In effect, the Court *did* decide the question of the statute's constitutionality.

Other cases follow a similar path. In *Florida v. Mellon*,[73] the Court held that it lacked Article III jurisdiction over Florida's challenge to a federal tax on inheritances, but in doing so, it also declared that the federal law was a constitutional exercise of Congress's taxing power under the Court's precedent.[74] The Court further explained that, under the Supremacy Clause, state law must yield and if the federal law interfered with state authority or indirectly caused loss of tax revenue, "that is a contingency which affords no ground for judicial relief."[75] The Court also characterized the state's alleged injury to its tax revenues—premised on the theory that the federal law would cause taxpayers to remove their property from the state—as "speculative" and "indirect."[76] In other words, the state's claim that the federal government intruded on the state's regulatory authority lacked merit, and any argument that the federal law somehow injured the state failed to state a valid claim for judicial relief.

Similarly, in *New Jersey v. Sargent*,[77] the Court held that the state had not presented an Article III case or controversy in challenging parts of the Federal Water Power Act as an unconstitutional exercise of authority over intrastate waters, but it did so after discussing the reach of Congress's Commerce Clause power and the absence of a true conflict with state authority.[78] The state objected to the imposition of a federal licensing and permitting scheme for the use of navigable waters in the

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71. *Id.*

72. *Id.* at 483. Not surprisingly, in writing for the majority in *South Dakota v. Dole*, Chief Justice Rehnquist cited *Massachusetts v. Mellon* in support of the proposition that state sovereignty is not violated under the Tenth Amendment when a state may simply decline federal funds and thereby avoid the federal conditions attached to such funds. 483 U.S. 203, 210 (1987).

73. 273 U.S. 12 (1927).

74. *Id.* at 17.

75. *Id.*

76. *Id.* at 18.

77. 269 U.S. 328 (1926).

78. *Id.* at 337 (summarizing "settled" doctrine regarding Congress's power to regulate navigable waters and characterizing the states' power over waters within their borders as "subordinate").

state, but no specific license or permit was at issue and the state had not alleged facts showing that the federal act interfered with any state law or action that the state wished to take.[79] Like *Massachusetts v. Mellon* and *Florida v. Mellon*, the state had failed to show a true conflict regarding federal-state authority over relevant activities or a direct injury to the state itself as a regulated entity. Using modern legal concepts, we might say today that the states in these cases failed to state a claim upon which a court might grant relief.[80]

Language regarding the Court's "lack of jurisdiction" must therefore be placed in its historical context.[81] The Court did not characterize its disposition in terms of failure to state a valid claim because these cases predate important legal developments, including the Supreme Court's adoption of the Federal Rules of Civil Procedure in 1938. Prior to this time, in the absence of a federal statutory or constitutional right, the right to sue in federal court depended on the existence of an appropriate "form of proceeding" taken from state law in cases at law and English chancery practice in cases in equity.[82] In order to have a "cause of action," a plaintiff's case had to conform to one of these forms of proceeding.[83] Each form of proceeding had its own procedural rules and prescribed the

79. *Id.* at 338–40; *see also* Texas v. ICC, 258 U.S. 158, 162 (1922) (holding that Court lacked jurisdiction, in part, because no "right" of the state was yet affected by application of challenged federal law).

80. *Compare* FED. R. CIV. P. 12(b)(1) (motion to dismiss for lack of subject matter jurisdiction), *with* FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted).

81. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 180 (1992) ("The development of standing limitations in the early part of the twentieth century was indeed a novelty, in the sense that no separate body of standing law existed before this period.").

82. Anthony J. Bellia, Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 667–77 (2015); *see also* Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 258–89 (2010) (arguing that nineteenth-century federal courts applied uniform, non-state equity principles based on English chancery sources—at least with regard to remedies and procedures); John Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 24 (2013) (arguing that the federal courts adopted English equity practices). In 1851, the Supreme Court explicitly recognized the "common law of chancery" in cases in equity. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 563 (1851). Of course, in 1945, the Court made clear that, in federal diversity cases, state law would apply to substantive rights even when the plaintiff seeks equitable relief. Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945).

83. Bellia & Clark, *supra* note 82, at 632–34. The forms of proceeding specified remedies for various injuries. For example, to recover damages for personal property taken by force, the appropriate form of proceeding at common law would be one for an action of *trespass vi et armis*. *Id.* at 633. If a plaintiff could not find a form of proceeding that provided the remedy for a given injury, the plaintiff had no cause of action and therefore no access to the courts.

relief, or remedy, available.[84] Not surprisingly, federal courts often spoke in terms of "jurisdiction" or the scope of judicial power when analyzing whether a plaintiff had a "right" to sue—that is, when analyzing whether the plaintiff's case fit an appropriate form of proceeding.[85]

Moreover, before the adoption of the Federal Rules of Civil Procedure and the merger of law and equity into a uniform "civil action," federal judges would have understood the concept of "jurisdiction" to refer to either *legal* or *equitable* jurisdiction. This distinction is critical to understanding the relevance of premerger cases to Article III doctrines of justiciability. Before the Federal Rules of Civil Procedure erased the legal distinction between law and equity, the Court's threshold "jurisdictional" determination turned on whether the plaintiff alleged a cause of action that fit a recognized form of proceeding or judicial remedy.[86] When states sought access to federal court to challenge federal power, they filed bills in equity seeking declaratory and injunctive relief.[87] A federal court could not exercise its jurisdiction (legal or equitable) unless the plaintiff state could establish a cause of action by fitting its grievance and desired remedy into a form of proceeding recognized by the federal courts. Indeed, even in *Georgia v. Stanton*, a case often cited to support the proposition that states lack standing to litigate sovereignty interests, the Court dismissed the case because an injury to political rights did not establish a cause of action

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84. *Id.* at 634.

85. *See, e.g.*, New Jersey v. Sargent, 269 U.S. 328, 337 (1926) (concluding that the allegations in the bill in equity "do not suffice as a basis for invoking an exercise of judicial power"); Massachusetts v. Mellon, 262 U.S. 447, 482 (1923) (framing its jurisdictional inquiry as one about the "right of the state" and how that right is affected by the federal statute); *see also* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 827 (2004) (arguing that *Massachusetts v. Mellon* "was only one of several cases decided before the promulgation of the Federal Rules of Civil Procedure that today we characterize as 'standing' cases, but that the Court in fact decided under traditional equitable principles").

86. *See* Bellia, *supra* note 85, at 826 ("Standing did not emerge as a question distinct from whether the plaintiff had a cause of action under a recognized form of proceeding until the merger of law and equity in the federal system and the adoption of the Federal Rules of Civil Procedure."). Although other scholars have also argued that constitutional standing doctrine is a twentieth-century invention, there is obviously some disagreement in the scholarship. Ann Woolhandler and Michael Collins have argued that a discernable doctrine regarding state standing exists in early Supreme Court cases. *See generally* Woolhandler & Collins, *supra* note 24. Ann Woolhandler and Caleb Nelson have similarly argued that early cases demonstrate a standing doctrine hostile to the litigation of public rights by private citizens. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 694–711 (2004).

87. *See, e.g.*, *Sargent*, 269 U.S. at 330 (considering a bill in equity seeking declaratory and injunctive relief).

under the appropriate form of proceeding in an equitable action for an injunction.[88] In other words, the Court concluded that it lacked *equitable* jurisdiction.[89]

In a recent decision, the Supreme Court acknowledged that some of its precedents conflate questions of Article III standing with the merits question of whether the plaintiff has stated a valid claim for relief.[90] Recent cases suggest that the modern Court is inclined to apply a default rule that distinguishes the two analyses: standing involves a determination of whether the court has the "constitutional power to adjudicate the case," whereas the validity of an alleged cause of action requires a merits determination that does not raise jurisdictional issues.[91] Early nineteenth and twentieth-century precedents must therefore be interpreted today in ways that are consistent with contemporary doctrine. To determine whether the Court actually dismissed a state's case for lack of Article III jurisdiction requires a close reading of the Court's analysis. In many cases, the Court analyzes the reach of federal power and essentially decides the merits of the state's claim.

Furthermore, even if these early cases suggest an arguable reluctance by the Court to decide regulatory conflicts between a state and the federal government, they fall short of demonstrating that the Court *never* exercised jurisdiction over such conflicts. Indeed, in one early twentieth-century case, the Court expressly decided that it had equitable jurisdiction over a state-federal conflict. In *Missouri v. Holland*,[92] Missouri brought suit to enjoin a federal game warden from enforcing the Migratory Bird Treaty Act.[93] The state alleged that the Act

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88. The state asked the Court to enjoin the federal executive branch based on the state's right to exist—a request that did not fit neatly into an equitable action for an injunction:

> [A]ccording to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 75–76 (1868).

89. *Id.*

90. Lexmark Int'l, Inc. v. Static Control Components, Inc., __ U.S. __, 134 S. Ct. 1377, 1386–88 (2014); Bond v. United States, 131 S. Ct. 2355, 2361–2363 (2011).

91. *Lexmark Int'l, Inc.*, 134 S. Ct. at 1387 n.4 (noting that the "absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case" (internal quotations omitted)); *see also* John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849, 887–94 (2015) (arguing that the cause-of-action and jurisdictional inquiries continue to be related in some contexts, such as determinations regarding state sovereign immunity and statutory standing analyses).

92. 252 U.S. 416 (1920).

93. *Id.* at 430–31.

unconstitutionally invaded the regulatory authority reserved to the states under the Tenth Amendment.[94] Writing for the Court, Justice Holmes acknowledged the state's asserted proprietary interest as owner of wild game within its borders, but emphasized a different basis for jurisdiction. He indicated that the state could bring the case to adjudicate its right to control a resource over which it claimed ownership in its "sovereign capacity."[95] Although it is impossible to know why the Court was willing to expressly reach the merits in *Holland*, the existence of a state statute recognizing state title in migratory birds arguably presented a clearer regulatory conflict.[96]

In any event, state standing to adjudicate the proper division of federal-state authority continued and—much like state standing to challenge other states' authority under the Commerce Clause—it evolved over time to reach new questions of intergovernmental authority. For example, in *South Carolina v. Katzenbach*, the Court granted South Carolina leave to challenge provisions of the 1965 Voting Rights Act (VRA) as exceeding federal constitutional authority.[97] The Court quickly dismissed many of the state's constitutional arguments on the ground that certain constitutional protections (such as those found in the Due Process and Bill of Attainder Clauses) do not extend to states.[98] The only remaining question was whether Congress exceeded its authority under the Fifteenth Amendment (which prohibits racial discrimination in voting) in passing legislation that imposed various requirements on certain states and localities.[99] The Court reached the merits, holding that Congress did not exceed its constitutional authority.[100]

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94. *Id.* at 431.

95. *Id.* at 432. Justice Holmes also characterized the state's rights as "quasi sovereign," but did not elaborate on what the term means. *See id.* at 431. I discuss the Supreme Court decisions that refer to quasi-sovereign rights in Part II *infra*.

96. *See Holland*, 252 U.S. at 434. Justice Holmes's opinion that federal law could constitutionally preempt state authority in this area predates later cases in which he joined the Court in holding it lacked jurisdiction. *See* David P. Currie, *The Constitution in the Supreme Court: 1921–1920*, 1986 DUKE L.J. 65, 125 & nn.327–28 (noting that the Court followed *Georgia v. Stanton* and *Cherokee Nation v. Georgia* in *Massachusetts v. Mellon* despite Justice Holmes's "intervening" opinion in *Missouri v. Holland*).

97. South Carolina v. Katzenbach, 382 U.S. 898 (1965) (mem.) (granting South Carolina leave to file in Court's original jurisdiction). Justices Black, Harlan, and Stewart indicated that they would not have granted leave to file.

98. South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966), *abrogated by* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

99. *Id.* at 324.

100. *Id.* at 325.

Scholars have attempted to distinguish *Katzenbach* from earlier cases, such as *Massachusetts v. Mellon*, that the Court dismissed on jurisdictional grounds by characterizing the state's interest in *Katzenbach* as unique—either because the Constitution specifically recognizes the state interest or because private parties are not likely to have standing to vindicate it.[101] But it is difficult to see why the specific state interest in elections is determinative. Although the Constitution acknowledges that states have regulatory authority over elections, it also expressly acknowledges that Congress has the authority to preempt state laws in this area.[102] Furthermore, the second argument—that states have standing because private litigants may not—has not been identified as a basis for state standing in the Court's jurisprudence. It is a normative argument that partially justifies state standing in cases like *Katzenbach*, but it does not fully theorize *when* states should have standing. At best, it is a necessary condition, but no authority suggests that it is a sufficient condition for state standing under Article III.

Moreover, under the reading of *Massachusetts v. Mellon* that I propose, there is no need to distinguish *Katzenbach*. The preclearance requirements imposed on states under the VRA forced covered states to submit to significant federal oversight and therefore required state action. The Act required certain states and localities to seek federal approval of changes to local laws and to take various other actions that they did not wish to take.[103] In contrast, the federal laws challenged by states in *Mellon* and contemporaneous cases did not require state action. In those cases, the states either alleged no injury (e.g., Massachusetts had not chosen to participate in the federal scheme to improve maternal and infant health)[104] or an indirect injury (e.g., Florida's feared loss of revenue as a result of a federal tax on inheritances).[105] Even though the Court framed its discussion in terms of jurisdiction, it nevertheless resolved the constitutional challenges to federal authority raised by the states. Though the Court's modern standing inquiry requires that a plaintiff establish an injury in fact, this was not established doctrine in the early twentieth century. In these early cases, the state's lack of injury is a conclusion on the merits, not on the threshold issue of standing.

As the federal administrative state and budget grew in the latter half

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101. *See, e.g.*, Stephen I. Vladeck, *States' Rights and State Standing*, 46 U. RICH. L. REV. 845, 858–65 (2012).

102. U.S. CONST. art. I, § 4.

103. *Katzenbach*, 383 U.S. at 319–20.

104. Massachusetts v. Mellon, 262 U.S. 447, 482 (1923).

105. Florida v. Mellon, 273 U.S. 12, 18 (1927).

of the twentieth century, states more frequently challenged federal authority as unconstitutionally coercive, and their standing to do so went unquestioned. These Tenth Amendment challenges generally fall into two categories: challenges to conditions on federal funding designed to influence state policy and challenges to federal laws that direct state officials in the executive or legislative branches to administer or enact federal laws.[106] For example, in *South Dakota v. Dole*,[107] the state (unsuccessfully) challenged the conditioning of federal highway funds on the adoption of a minimum drinking age of twenty-one.[108] Recently, states (successfully) challenged federal conditions on funding tied to the expansion of Medicaid under the Patient Protection and Affordable Care Act.[109] State standing has also been unremarkable in cases, such as *New York v. United States*[110] and *FERC v. Mississippi*,[111] where states have claimed that the federal government is unconstitutionally "commandeering" state officials into the service of the federal government by forcing them to enact or administer federal laws and policies.[112]

Given this more recent history, it is hardly surprising that when the Court recently decided to revisit the constitutionality of preclearance provisions of the VRA, Chief Justice Roberts, in writing for the majority, did not even mention Article III or address whether the local government that brought the suit had standing.[113] In fact, this case goes

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106. There is a third category of cases challenging federal power under the Tenth Amendment: cases in which states challenge federal authority to regulate states qua states, that is, in the same way it regulates private parties. *See* South Carolina v. Baker, 485 U.S. 505 (1988) (challenge to federal law denying income tax exemption for interest on certain state and local bonds); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (challenge to federal overtime and minimum-wage requirements applied to state and local entities). State standing is less controversial in these cases because the state's claim looks like that of a private party.

107. 483 U.S. 203 (1987).

108. *Id.* at 205.

109. Nat'l Fed'n of Indep. Bus. v. Sebelius, __ U.S. __, 132 S. Ct. 2566, 2608 (2012).

110. 505 U.S. 144 (1992).

111. 456 U.S. 742 (1982).

112. *New York*, 505 U.S. at 202. Woolhandler and Collins distinguish cases like *New York v. United States* on the ground that the contested federal law is acting directly on "state machinery." Woolhandler & Collins, *supra* note 24, at 510. This factual distinction leads to their normative argument: state standing is appropriate in these cases because it reinforces the federalism norm that states and the federal government "act independently." *Id.* But this argument ignores regulatory reality: states and the federal government do *not* act independently in many areas. Moreover, the line between acting directly on "state machinery" and acting in cooperation with state regulatory machinery is impossible to draw.

113. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013). The coverage formula determines which states and localities must seek federal approval of changes in election laws.

much further than *Katzenbach* because, as Justice Ginsburg argued in her dissent, the majority decided the case by looking at how the Act's "coverage formula" applies generally, rather than focusing on the Alabama county that brought the case.[114] The Court's willingness to consider a facial challenge to the statute allowed one county to adjudicate the interests of nonparties.[115] The fact that Chief Justice Roberts did not recognize this as a separate Article III concern suggests that state litigation of governance interests is an accepted part of the federal courts' role today.[116]

The reality is that federal courts have been hearing these kinds of cases—brought by states and localities challenging federal power—for some time.[117] At one point, state standing to litigate Tenth Amendment issues had become so accepted that some federal courts of appeals refused to hear Tenth Amendment claims brought by individuals on the theory that such claims involved injuries to *states'* rights.[118] Although these courts relied heavily on an old case in which the Supreme Court refused to hear a Tenth Amendment challenge by private power companies, they also bolstered their conclusions with prudential standing analyses.[119] In holding that only states had standing to litigate

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114. *Id.* at 2645 (Ginsburg, J., dissenting) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." (citation omitted)).

115. *Id.* at 2621–22 (stating that Shelby County sought "a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional").

116. Facial challenges have long been the exception in standing jurisprudence—reserved essentially for First Amendment challenges based on freedom of speech. Interestingly, however, a body of constitutional scholarship recognizes the Court's willingness to decide facial challenges in cases questioning the extent of Congress's power under the Commerce Clause—cases brought by *individual* litigants. Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1456–57 (2013) (discussing facial challenges based on a structural right, e.g., the Tenth Amendment); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 907 (2005) (discussing the Court's willingness to decide facial challenges to Commerce Clause legislation).

117. *See, e.g.*, Wyoming *ex rel.* Crank v. United States, 539 F.3d 1236, 1242 (10th Cir. 2008) (holding that Wyoming had standing because federal agency interpretation of regulation would "interfere[] with Wyoming's ability to enforce its legal code"); Alaska v. Dep't of Transp., 868 F.2d 441, 443 (D.C. Cir. 1989) (holding that state had standing based on sovereignty interest to challenge federal agency orders that preempted state consumer protection laws). The governance approach I propose in Part III would actually stop short of granting state standing in these two examples. I note these cases only as examples of state litigation of sovereignty interests in the lower courts.

118. *See* Bond v. United States, 564 U.S. 211, 216 (2011) (citing circuit court cases); Mountain States Legal Found. v. Costle, 630 F.2d 754, 761 (10th Cir. 1980) ("Only the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment.").

119. *See, e.g.*, United States v. Hacker, 565 F.3d 522, 527–28 (8th Cir. 2009) (following Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118 (1939), but noting that the court's decision is

questions of federalism, courts noted that their decisions furthered the principle that a party may not establish Article III standing by asserting the legal rights of third parties.[120] In this view, if individuals can challenge federal power by asserting states' sovereignty interests, they may force the federal courts to decide governance issues that no state wishes to decide and that states are generally in the best position to litigate.[121]

In 2011, in *Bond v. United States*,[122] the Supreme Court rejected this approach to standing in Tenth Amendment cases, holding that individuals may challenge federal law as an unconstitutional interference with state sovereignty provided they satisfy the Article III requirements of injury, causation and redressability.[123] Justice Kennedy, writing for a unanimous Court, emphasized the individual liberty interests protected by the Constitution's vertical division of authority between the federal government and the states.[124] Although he stressed the individual interest in this vertical allocation of power, he did so against a clear background assumption that states also have standing to bring constitutional challenges to federal laws that interfere with their sovereignty interests.[125] Indeed, because individuals must demonstrate their own concrete, particular injury, along with causation and redressability, Justice Kennedy acknowledged that, in some cases, a state might be "the only entity capable of demonstrating the requisite injury."[126] The critical point for purposes of state standing analysis is that the Court in *Bond* treated state standing based on *sovereignty* interests as uncontroversial.

II. SEPARATING SUITS BASED ON SOVEREIGNTY INTERESTS FROM REPRESENTATIVE SUITS

If the Supreme Court has a long history of permitting states to litigate

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consistent with a prudential standing analysis).

120. *Id.*

121. *Costle*, 630 F.2d at 761 (noting the reasons for the prudential limitation on third-party standing).

122. 564 U.S. 211 (2011).

123. *Id.* at 225.

124. *Id.* at 220–24.

125. This assumption is clear in his description of an individual's interest in federalism as *additional* to the states' interests: "[t]he limitations that federalism entails are not therefore a matter of rights belonging *only* to the States. . . . Fidelity to principles of federalism is not for the States *alone* to vindicate." *Id.* at 222 (emphasis added).

126. *Id.* at 225; *see also* Huq, *supra* note 116, at 1515 (arguing that, in federalism cases, state standing is more consistent with Article III principles than individual standing).

sovereignty interests, why have the federal courts struggled to articulate doctrinal bases for state standing in recent cases, such as those challenging federal health insurance legislation and federal administrative action in the environmental and immigration contexts? The answer to this question turns in part on how the concept of quasi-sovereign interests developed in twentieth-century opinions regarding state standing.

Early cases recognize a state's quasi-sovereign interest in suing on behalf of its citizens in limited contexts, namely, in situations where an interstate nuisance that originates outside the state threatens the well-being of the state's citizens.[127] Because states had relinquished the right to use force or diplomacy when they entered the federal union, they needed a forum in which to settle these interstate disputes. Jurisdiction in the federal courts, particularly original jurisdiction in the Supreme Court, was part of the founding bargain; states would cede some sovereign prerogatives when they agreed to a federal union, but they would be able to litigate interstate disputes in federal court.[128]

But in 1982, the Court greatly expanded the representative (or *parens patriae*) suit in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,[129] a case that involved a federal statutory scheme with a significant administrative role for the states. In *Puerto Rico*, the Court recognized a state's quasi-sovereign interest in securing for its citizens the benefits of federal laws generally.[130] Because of the tremendous increase in federal statutory law by the middle of the twentieth century, this subtle doctrinal move arguably supports state representative standing to enforce the benefits of most, if not all, federal laws. The majority in *Massachusetts v. EPA* drew from this line of precedent and created further confusion by attempting to reconcile it with the Court's individual standing requirements of injury-in-fact, causation, and redressability.[131]

This Part makes the argument that we cannot understand the state interests that support standing today without understanding how the concept of quasi-sovereignty changed in response to the growing administrative state. It begins by tracing the doctrinal development of the concept of quasi-sovereign interests from its origins to the Court's

127. *See* Pennsylvania v. Kleppe, 533 F.2d 668, 673–74 (D.C. Cir. 1976) (explaining that the early representative state suits involved disputes over water allocation and interstate pollution).

128. *See* HART AND WECHSLER, *supra* note 8, at 16–17 (noting the recognition by delegates to the Constitutional Convention of the need for the federal judiciary to resolve interstate disputes).

129. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592 (1982).

130. *Id.* at 608.

131. 549 U.S. 497, 521–26 (2007).

decision in *Massachusetts v. EPA*. The requirement that a state allege a quasi-sovereign interest began as a tool designed to limit the Court's original jurisdiction in interstate nuisance cases. As federal law grew in an effort to reach various economic and social problems, the Court adapted the concept of quasi-sovereignty to include a state's interest in securing the benefits of federal law for its citizens.

The *Massachusetts* Court used this capacious understanding of quasi-sovereignty to justify "special solicitude" for states in analyzing standing, but quasi-sovereignty's confused doctrinal legacy makes the majority's decision difficult to understand and apply. Legal scholars, practitioners, and judges continue to debate exactly what this "special solicitude" is and when it is triggered.[132] But to date, no one has scrutinized the historical development of core concepts, such as quasi-sovereignty, in the cases relied on by the *Massachusetts* majority. As the following Section demonstrates, the confusion did not begin with *Massachusetts*. It has a much deeper history beginning with interstate public nuisance cases and ending with Puerto Rico's suit to vindicate its citizens' interests under federal law. This Part sheds much-needed light on what the majority's opinion means and how it should be applied in future cases.

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132. *See, e.g.*, Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2079 (2011) (arguing that states should have standing to sue federal government based on their sovereign interests); Kirsten H. Engel, *State Standing in Climate Change Lawsuits*, J. LAND USE & ENVTL. L. 217, 233 (2011) (arguing that the *Massachusetts* Court should have based its standing analysis solely on *parens patriae* doctrine); Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1773 (2008) (arguing that states have special standing as *parens patriae* under pre-*Massachusetts* precedent); Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 281–83 (2009) (arguing that *Massachusetts* allows states standing as *parens patriae* to vindicate generalized injuries when individual citizens would not have standing); Amy J. Wildermuth, *Why State Standing in* Massachusetts v. EPA *Matters*, 27 J. LAND RES. & ENVTL. L. 273, 318–20 (2007) (arguing that the *Massachusetts* Court should have based standing analysis on California's sovereign interest in enacting its own emissions standards under CAA § 209(b)(1)); Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 836–42 (2009) (arguing states should have standing to sue federal government when citizens suffer injury to a public good); Sarah Zdeb, Note, *From* Georgia v. Tennessee Copper *to* Massachusetts v. EPA*:* Parens Patriae *Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059 (2008) (arguing that states should be able to sue the federal government as *parens patriae* in climate change litigation).

A. *Quasi-Sovereign Interests and the Representative (*Parens Patriae*) Suit*

1. *Early Twentieth-Century Cases and the Origins of Quasi-Sovereignty*

A state suing in its representative capacity, on behalf of its citizens, is frequently said to be suing in its capacity as *parens patriae*, which means "parent of his or her country."[133] This concept originated in England as a means of invoking the prerogative of the king, or sovereign.[134] For example, when a charitable bequest would fail for want of a clear beneficiary or because of an illegal purpose, the king as *parens patriae* had the right to dispose of the funds according to the public interest.[135] The king also served as *parens patriae* in matters affecting the rights of individuals otherwise unable to represent their own interests (such as minors or individuals with mental disabilities).[136]

In the nineteenth century, the Supreme Court acknowledged this history and recognized the people—represented through their respective legislatures—as the sovereign equivalent of the English crown:

> When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states. And this power still remains with them, except so far as they have delegated a portion of it to the Federal government. The sovereign will is made known to us by legislative enactment. . . . The state, as a sovereign, is the *parens patriae*.[137]

In other words, the idea of "*parens patriae*" is synonymous with sovereignty, which inheres in the state and federal governments. But it is also tied to specific ends, namely, the protection of the public interest and care for "those who cannot protect themselves."[138]

Given this understanding, the idea of the state acting as *parens patriae* in the early twentieth century appears to overlap considerably

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133. *Parens Patriae*, BLACK'S LAW DICTIONARY 1287 (Bryan A. Garner ed., 10th ed. 2014).

134. Wheeler v. Smith, 50 U.S. (9 How.) 55, 77 (1850).

135. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890).

136. *Id.* at 57–58. *See generally* Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978).

137. *Wheeler*, 50 U.S. at 78.

138. *Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 57; *see also* Michael Malina & Michael D. Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U. L. REV. 193, 197–202 (1970) (tracing the history of the royal prerogative).

with the concept of a state's police power.[139] Both concepts are expressions of the sovereign's power to govern in the public interest. As the Court articulated it in 1894, a state's police power "include[s] everything essential to the public safety, health, and morals, and to justify the destruction or abatement . . . of whatever may be regarded as a public nuisance."[140] Historically, only the sovereign, or king, could bring an action to abate a public nuisance.[141] Of course, to abate an *interstate* public nuisance, that is, a nuisance originating in another state, a state could not seek redress in its own courts, nor could it use diplomatic or military powers to resolve the problem. Not surprisingly, the Supreme Court recognized interstate nuisance cases as proper cases over which to exercise federal jurisdiction.[142]

These cases were suits in equity invoking the Supreme Court's original jurisdiction. The Court was understandably worried about the possibility of states invoking the Court's original jurisdiction in their capacities as *parens patriae* whenever actions occurring in another state had an adverse effect on their citizens' interests. To ensure that its original jurisdiction was not overwhelmed by such cases, at the turn of the twentieth century, the Court made clear that it would look beyond the named parties to ensure that the case presented a controversy

139. One early treatise includes citations to Supreme Court cases discussing the states' police power in an entry on the "doctrine of *parens patriae*." HEMAN W. CHAPLIN, PRINCIPLES OF THE FEDERAL LAW AS IN DECISIONS OF THE SUPREME COURT 267 n.3 (1917). Courts and commentators have often characterized the twentieth-century development of the *parens patriae* lawsuit by state plaintiffs as diverging from or greatly expanding upon earlier cases. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972); Malina & Blechman, *supra* note 138, at 202. But nineteenth-century language regarding sovereignty and state power suggests that courts had already begun harmonizing the English concept with ideas of popular sovereignty.

140. Lawton v. Steele, 152 U.S. 133, 136 (1894). In *Lawton*, the Court listed various state actions that had been held to be within the state police power. *Id.* Among the listed actions are examples of state actions historically falling within its role as *parens patriae*. *Id.* (noting as permissible state action "the compulsory vaccination of children [and] the confinement of the insane or those afflicted with contagious diseases").

141. *See* 4 WILLIAM BLACKSTONE COMMENTARIES *219 (noting that—with few exceptions—a public nuisance action must be brought by "the king in his public capacity of supreme governor, and *pater-familias* of the kingdom").

142. *See, e.g.*, Wyoming v. Colorado, 259 U.S. 419 (1922) (exercising original jurisdiction in suit by Wyoming to enjoin diversion of interstate water by Colorado); Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (exercising original jurisdiction in suit by Georgia to enjoin copper companies from emitting "noxious" gas into Georgia); Kansas v. Colorado, 185 U.S. 125 (1902) (exercising original jurisdiction in suit by Kansas to enjoin diversion of river water by Colorado); Missouri v. Illinois, 180 U.S. 208, 241 (1901) (exercising original jurisdiction over Missouri's suit to enjoin discharge into Mississippi River by the Sanitary District of Chicago). Interstate water disputes arising under interstate compacts continue to be the most common cases over which the Court exercises its original jurisdiction.

between two *states* as required by the Constitution.[143] In *Louisiana v. Texas*, the Court dismissed a suit by Louisiana seeking to enjoin a Texas health official's implementation of quarantine regulations so as to impose an embargo on interstate commerce between Texas and New Orleans.[144] The Court held that the state may not bring a *parens patriae* suit to vindicate its citizens' interests because the original and exclusive jurisdiction of the Court extends only to controversies between states.[145] In reaching this conclusion, the Court reasoned that allowing representative suits by one state against another state would undermine states' Eleventh Amendment sovereign immunity from suit by citizens of another state.[146]

The Court's interest in limiting its original jurisdiction may also be the reason that, in *Georgia v. Tennessee Copper Co.*, Justice Holmes emphasized Georgia's *quasi-sovereign* interest when it sought to enjoin the emission of "noxious" air pollutants from copper companies in Tennessee.[147] In addition to ensuring the case was a suitable one for the exercise of its original jurisdiction, the Court had to ensure that it exercised its equitable jurisdiction according to established principles governing equitable remedies—including the principle that injunctive relief is inappropriate if an adequate legal remedy exists.[148] To justify granting Georgia's request for an injunction, Justice Holmes emphasized the state's quasi-sovereign interests:

> This is a suit by a state for an injury to it in its capacity of *quasi-sovereign*. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.[149]

He then described the state's interests as a private property owner as "merely a makeweight."[150]

This emphasis on a state's quasi-sovereign rights in "all the earth and

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143. Louisiana v. Texas, 176 U.S. 1 (1900).

144. *Id.* at 23.

145. *Id.* at 19.

146. *Id.* at 16; *see also id.* at 25 (Harlan, J., concurring) (reasoning that a state may not "even with [its citizens'] consent, make their case its case and compel the offending state and its authorities to appear as defendants in an action brought in this court").

147. *Tenn. Copper Co.*, 206 U.S. at 236.

148. *Id.* at 237.

149. *Id.*

150. *Id.*

air" within its borders helped support the Court's decision not to engage in the typical balancing of interests required for injunctive relief.[151] Recognizing that federal jurisdiction in the courts is the logical alternative to the force surrendered by states when they entered the union, Justice Holmes emphasized that states "did not sink to the position of private owners subject to one system of private law."[152] Rather, the state had a "sovereign" right to protect its natural resources even if out-of-state interests suffer "possible disaster" as a result.[153]

The notion of quasi-sovereignty therefore began as a means of limiting a state cause of action in the Court's original jurisdiction. Based on their status as *parens patriae*, states could invoke the Court's original (and sometimes exclusive) jurisdiction to seek equitable relief for injuries to their citizens by out-of-state defendants, but only if a quasi-sovereign interest in "earth and air" were at stake. This interpretation is bolstered by the fact that the Court was less troubled by the exercise of its *appellate* jurisdiction in *parens patriae* suits brought by states or state officials. For example, the Court exercised appellate jurisdiction over a state's Tenth Amendment challenge to a law facilitating the conversion of state building and loan associations into federal savings and loan associations.[154] In doing so, the Court noted the state's quasi-sovereign interest in governing corporations created under state law and its *separate* status as "*parens patriae*, acting in a spirit of benevolence for the welfare of its citizens," including the shareholders of corporations.[155]

Only three years later, the Court explicitly noted its concern in allowing *parens patriae* suits to be heard in the Court's original jurisdiction in a representative suit filed by Oklahoma to enforce the liability of a shareholder of an insolvent bank over which the state bank commissioner had control.[156] The Court quoted *Tennessee Copper*'s quasi-sovereign language, but emphasized that quasi-sovereign interests do not include all representative cases—that is, cases "in the name of the State but in reality for the benefit of particular individuals [here the bank's creditors]."[157] The Court concluded by stressing that many states had similar statutory provisions for liquidating insolvent banks and noting that an "enormous burden" would result if it were to exercise

151. *Id.* at 238.

152. *Id.*

153. *Id.* at 239.

154. Hopkins Fed. Sav. & Loan Ass'n v. Cleary, 296 U.S. 315 (1935).

155. *Id.* at 340.

156. Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387 (1938).

157. *Id.* at 393–94.

original jurisdiction over such cases.[158]

In addition to limiting the Court's exercise of its original jurisdiction over representative suits, the idea of quasi-sovereignty also served as a means of protecting state sovereign immunity from suit. The same day that the Court decided *Tennessee Copper*, it also decided a dispute between Kansas and Colorado regarding water rights.[159] Kansas sued Colorado to enjoin a diversion of water from the Arkansas River that would affect water flow in Kansas.[160] In concluding that the case was justiciable in its original jurisdiction, the Court emphasized that, although Kansas was suing on behalf of her citizens, the action did not undermine Colorado's sovereign immunity from suit by private citizens.[161] This was so because the environmental impact of the water diversion would affect the "general welfare of the state."[162] Citing *Tennessee Copper*, the Court characterized the case as "involv[ing] a matter of state interest."[163] In other words, the state's quasi-sovereign interest in a natural resource ensured that Kansas was not simply suing on behalf of private interests in an effort to overcome Colorado's sovereign immunity from suit.[164]

None of this suggests that the exercise of federal jurisdiction over *parens patriae* suits in the lower federal courts would be constitutionally impermissible.[165] But what it does suggest is that the principle of quasi-sovereignty began as a principle designed to limit the Court's original

158. *Id.* at 396. The Court has continued to follow this approach to *parens patriae* suits in its original jurisdiction. In *Pennsylvania v. New Jersey*, for example, the Court denied Pennsylvania's motion for leave to file a *parens patriae* action because its suit "represents nothing more than a collectivity of private suits against New Jersey for taxes withheld from private parties." 426 U.S. 660, 666 (1976).

159. Kansas v. Colorado, 206 U.S. 46 (1907).

160. *Id.* at 47–48.

161. *Id.* at 99.

162. *Id.*

163. *Id.*

164. The Court has extended this reasoning to suits for monetary relief. For example, in a more recent case involving the Arkansas River, the Court held that the Eleventh Amendment did not bar Kansas's original action against Colorado for monetary damages because Kansas was the real party in interest and was not simply seeking to recover damages for individual citizens. Kansas v. Colorado, 533 U.S. 1, 8 (2001); *see also* Texas v. New Mexico, 482 U.S. 124, 132 n.7 (1987) (noting that the "enforcement of [an interstate water] Compact was of such general public interest that the sovereign State was a proper plaintiff").

165. States would, of course, need *statutory* subject-matter jurisdiction. Because states are not "citizens," they lack the "diversity of citizenship" necessary for federal diversity jurisdiction. 28 U.S.C. § 1332 (2012). Subject-matter jurisdiction would therefore depend on the existence of a federal question. Today, this would essentially require that a state suing as *parens patriae* assert a federal statutory or common law cause of action.

jurisdiction over public nuisance cases brought by states and to ensure private litigants could not overcome state sovereign immunity by suing through a nominal state party. The concept of quasi-sovereignty did not originally expand states' standing to litigate questions regarding their regulatory authority (i.e., governance interests) under the Constitution. It also did not limit a state's standing in *parens patriae* actions brought on behalf of its citizenry—*except* in cases brought in the Court's original jurisdiction.

Unfortunately, however, the Court began citing *Tennessee Copper* and other public nuisance cases for the general proposition that a state could sue in a representative capacity as long as a "substantial portion" of its population was threatened with injury and the state had a quasi-sovereign interest, described as "an interest apart from that of the individuals affected."[166] In 1923, the Court extended the Court's original jurisdiction over representative suits by recognizing state representative standing in an interstate commerce case.[167] Two states sought to enjoin enforcement of a West Virginia law restricting the out-of-state flow of natural gas produced in West Virginia as a violation of the Commerce Clause.[168] The fact that the constitutional challenge involved a natural resource made the case appear analogous to the public nuisance cases and amenable to *Tennessee Copper*'s language regarding a state's quasi-sovereign interest in the earth and air.[169] It was this subtle extension of state representative standing beyond interstate nuisance actions to constitutional questions of regulatory authority that provided an opening for the Court's much greater expansion in *Georgia v. Pennsylvania Railroad*[170] in 1945.[171]

In *Pennsylvania Railroad*, in a five-four decision, the Court turned the concept of quasi-sovereignty on its head by using it to support the Court's original jurisdiction over a *parens patriae* suit brought by Georgia to enjoin a private price-fixing scheme in violation of federal antitrust laws.[172] Georgia alleged that the defendant railroads had conspired to fix excessive, discriminatory rates on freight moving into and out of Georgia. The Court allowed Georgia to invoke its original jurisdiction based on general injury to the state's economy (which

166. Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923).

167. *Id.*

168. *Id.* at 583.

169. *See id.* at 592 (citing public nuisance cases).

170. 324 U.S. 439 (1945).

171. *See id.* at 449–51 (discussing Pennsylvania v. West Virginia, 262 U.S. 553 (1923)).

172. *Pa. R.R.*, 324 U.S. at 450.

naturally threatens its citizens' welfare).[173] Likening trade barriers and discrimination in interstate commerce to the "noxious gas" and the "deposit of sewage" found in the public nuisance cases, the Court used sweeping language to describe the potential injuries to the "prosperity and welfare" of the state.[174] Because federal antitrust laws authorized states (as "persons") to sue for injunctive relief, the Court also concluded that Georgia had a cause of action.[175]

This decision disconnected the idea of quasi-sovereignty from its association with natural resources and common law causes of action for interstate nuisance. After *Pennsylvania Railroad*, if a state could establish a right of action under federal law, it could invoke the Court's original jurisdiction in a *parens patriae* suit based on a general injury to its economy.[176] Many questions, such as how widespread the injury must be, remained unanswered, but one thing was clear: the concept of quasi-sovereignty no longer meaningfully limited the Court's original jurisdiction. As the next Section demonstrates, once it was divested of its original purpose, the concept of quasi-sovereignty was free to serve another purpose: it could describe the states' position in a growing federal administrative state.

2. Puerto Rico v. Alfred L. Snapp & Son*: Quasi-Sovereignty Applied to the State-Federal Relationship*

In 1978, Puerto Rico sued Virginia apple growers in federal district court, seeking a declaration that the growers had violated federal labor and immigration laws as well as an injunction against future violations of these laws.[177] According to the complaint, the apple growers violated

173. *See id.* at 447 ("The rights which Georgia asserts, parens patriae, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia.").

174. *Id.* at 451. The Court described the potential injury as "permanent and insidious" and described its consequences in dire terms: "Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States." *Id.* at 451.

175. *Id.* at 462.

176. Because general injury to a state's economy is enough for Article III standing, the main threshold question in these cases is whether a federal right and remedy exist. Indeed, when Hawaii later brought a *parens patriae* suit for damages under the Clayton Act, the key question was whether the federal antitrust statute provided the states with a right of action for monetary damages. Hawaii v. Standard Oil Co., 405 U.S. 251, 259–60 (1972). The Court emphasized that it was not questioning whether Hawaii could sue in its capacity as *parens patriae*, but whether the federal law at issue provided the requested remedy. *Id.*

177. Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Son, Inc., 469 F. Supp. 928, 930 (W.D. Va.

federal law by failing to employ workers from Puerto Rico before employing foreign workers and subjecting Puerto Rican workers to unequal working conditions.[178] Under a federal statute, employers such as the apple growers could not employ foreign workers before taking certain administrative steps to facilitate the hiring of workers from the domestic labor market, which included Puerto Rico.[179] In addition, an employer could not discriminate against domestic workers by treating them less favorably than foreign employees.[180]

Federal statutes then and now establish a national employment service under the oversight of federal authorities, primarily the Secretary of Labor, but dependent on state cooperation and participation.[181] In return for federal funds, a state (including Puerto Rico) must create an agency that supports the objectives of the federal employment service.[182] In Puerto Rico's suit against the apple growers, the critical objective implemented by the relevant state agencies was the maintenance of a clearance system whereby employers in one state could communicate their employment needs to all other participating states.[183] According to Puerto Rico's complaint, the relevant agency, the Puerto Rico Employment Service, received job orders through this system for 2318 temporary workers to harvest apples in east coast orchards.[184] The Puerto Rican government recruited 1094 of its nearly three million citizens, but only 992 traveled to the mainland after someone at the federal labor department reported that Virginia apple growers were refusing to employ workers from Puerto Rico.[185] Only 420 of the 992 workers arrived in Virginia, and fewer than thirty remained after only a few weeks.[186]

Responding to the apple growers' motion to dismiss for lack of constitutional standing, the federal district court analyzed whether Puerto Rico had standing in its capacity as *parens patriae*. Noting that Puerto Rico's quasi-sovereign interest was based solely on its general economy, the court expressed concern that state standing to sue based on

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1979).

178. *Id.*

179. *Id.* at 929.

180. *Id.*

181. 29 U.S.C. § 49 (2012).

182. *Id.* § 49c.

183. *Id.* § 49b(a).

184. *Puerto Rico*, 469 F. Supp. at 930.

185. *Id.*

186. *Id.*

such interest "would permit a state to challenge any business or governmental decision which would adversely affect[] its economy."[187] The court then considered various factors, such as the size of the population affected, the magnitude of the harm, and the availability of private suits for relief.[188] Given that only a relatively small segment of Puerto Rico's population was affected and private suits were available, the district court concluded that Puerto Rico lacked standing.[189]

After a divided panel on the Fourth Circuit reversed the district court's decision,[190] the Supreme Court agreed to review the case.[191] The Court treated the suit as one brought by Puerto Rico on behalf of its citizens (that is, as a *parens patriae* suit) and required that Puerto Rico demonstrate a quasi-sovereign interest.[192] In doing so, the Court subtly extended the quasi-sovereign requirement once again. The concerns that had once motivated the Court to require the state to be more than a "nominal" party were not present in this case. Puerto Rico did not attempt to bring suit in the Court's original jurisdiction. Moreover, because the defendants were not states, the concern that a state could undermine state sovereign immunity by suing in place of individual citizens was not present.

The Court did not mention these concerns,[193] but instead surveyed the precedents in an effort to deduce what quasi-sovereignty might mean. After listing and discussing the interstate public nuisance cases, the Court stressed that "*parens patriae* interests extend well beyond the prevention of such traditional public nuisances."[194] While the Court acknowledged the interstate public nuisance cases, it did not acknowledge that the concept of quasi-sovereignty was historically connected to a state's right to protect its natural resources.[195] Citing *Pennsylvania v. West Virginia*, the Court also characterized the "economic well being" of a state's citizenry as a quasi-sovereign

187. *Id.* at 931.

188. *Id.* at 932–34.

189. *Id.* at 934–35.

190. Puerto Rico *ex rel.* Quiros v. Alfred L. Snapp & Sons, Inc., 632 F.2d 365 (4th Cir. 1980).

191. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592 (1982).

192. *Id.* at 601.

193. In his concurring opinion, Justice Brennan acknowledged these concerns and noted that *parens patriae* suits in the Court's original jurisdiction may require a more "restrictive approach." *Id.* at 611 (Brennan, J. concurring).

194. *Id.* at 605.

195. *Id.* at 604–05.

interest.[196] In concluding its overview of relevant precedent, the Court emphasized that the "public nuisance and economic well-being lines of cases were specifically brought together in *Georgia v. Pennsylvania Railroad*."[197]

The Court then used *Pennsylvania Railroad* to carve out a second category of quasi-sovereign interests related to a state's relationship with the federal government:

> [T]he state has an interest in securing observance of the terms under which it participates in the federal system. In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.[198]

Having created this new category of quasi-sovereign interests, the Court held that Puerto Rico could sue on behalf of its citizens to ensure their "full and equal participation in the federal employment service scheme."[199] According to the Court, Puerto Rico's interest in securing the benefits of federal law for its citizens was "not distinguishable from" Georgia's interest under the federal antitrust laws in *Pennsylvania Railroad*.[200] Instead of viewing the quasi-sovereign interest in *Pennsylvania Railroad* as a state's interest in its general economy, the Court characterized it as an interest in securing the benefits of federal law.[201]

The Court's subtle reasoning in *Puerto Rico* dramatically changed the concept of quasi-sovereignty. No longer was it tied to interstate disputes regarding natural resources or to the preservation of states' immunity from suit by citizens of other states. In addition to bringing traditional *parens patriae* suits based on the general public welfare, a state could now sue to further its citizens' interests under federal statutes. What began as a concept designed to limit federal court jurisdiction over interstate disputes was now a concept describing the state's interest in participating in a federal administrative scheme—even when the federal statutes at issue do not contemplate state enforcement authority.[202] In

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196. *Id.* at 605.

197. *Id.*

198. *Id.* at 608.

199. *Id.* at 609.

200. *Id.* at 610.

201. *Id.*

202. The Court did not analyze whether Puerto Rico had an implied cause of action to sue under the relevant statutes. Given the modern Court's reluctance to find such causes of action without clear evidence of congressional intent, the case would likely be decided differently today. In fact,

other words, the Court transformed a concept used to describe a state's sovereignty interests *vis-à-vis* other states into a concept used to describe a state's sovereignty interests *vis-à-vis* the federal government.

This doctrinal shift essentially erased any distinction between a state's sovereign interest and its quasi-sovereign interest. Although the Court identified two kinds of "sovereign" interests distinct from a state's quasi-sovereign interests, it did not clearly define them.[203] First, the Court identified the state's sovereign interest in governing its citizens, which implicates its "power to create and enforce a legal code" and which "is regularly at issue in constitutional litigation,"[204] presumably, for example, when a state seeking to enforce its laws must respond to a defendant's constitutional challenge. The second "kind" of sovereign interest is "the demand for recognition from other sovereigns," which often involves interstate border disputes.[205] The Court quoted language from *Pennsylvania Railroad* about the framers' desire to provide states with a peaceful forum in which to settle disputes—language it had previously used to justify the exercise of its original jurisdiction on the basis of a state's *quasi-sovereign* interest in resolving interstate disputes.[206]

This metamorphosis in doctrine makes sense only when considered in tandem with the development of the administrative state in the twentieth century.[207] *Pennsylvania Railroad*'s expansion of a state's quasi-sovereign interest to include its interest in its general economy occurred a decade after the New Deal's expansion of federal authority over economic issues in the wake of the Great Depression.[208] The Supreme Court decided *Puerto Rico* in 1982 after roughly two decades of unprecedented congressional expansion of federal administrative authority over health, safety and environmental issues—the very issues traditionally within the state's police power. The regulatory landscape had changed. States now governed alongside and in cooperation with

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contemporaneous decisions suggest that most courts would not have implied a private right of action even at that time. *See, e.g.*, Lopez v. Arrowhead Ranches, 523 F.2d 924, 926 (9th Cir. 1975) (per curiam) (holding domestic workers did not have private cause of action under federal law for employers' unlawful hiring of foreign workers, which deprived them of employment).

203. *Puerto Rico*, 458 U.S. at 601.

204. *Id.*

205. *Id.*

206. *Id.*

207. *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

208. *See id.* at 1252 (describing the New Deal's belief in governmental intervention in the market as a dramatic break from a previously "constrained view of national power").

federal administrative agencies. They could not competently exercise their police powers—their authority as *parens patriae*—without participating in the modern administrative state.

This regulatory reality permeates the *Puerto Rico* decision. Significantly, the Court concluded by emphasizing the importance of the federal-state relationship contemplated by the underlying statutory scheme: “Indeed, the fact that the Commonwealth participates directly in the operation of the federal employment scheme makes even more compelling its *parens patriae* interest in assuring that the scheme operates to the full benefit of its residents.”[209] The Court did not say why participation in the federal scheme made Puerto Rico’s interest “more compelling,” but Justice Brennan’s concurring opinion, joined by three other justices, contains a clue.

In his concurring opinion, Justice Brennan also emphasized Puerto Rico’s role in implementing the federal law. He described Puerto Rico’s interest as a *sovereign* interest because the alleged violations of federal law “directly interfere with Puerto Rico’s ability to perform the job referral service that it has undertaken as part of its sovereign responsibility to its citizens.”[210] Because states could not regulate public welfare and the economy without cooperating to some extent with the federal government, Justice Brennan’s approach accurately described the interest at issue in the case. Puerto Rico’s interest in the lawful operation of the federal administrative scheme provided a stronger foundation than the doctrine of *parens patriae*, which was rooted in the absolute authority of the king, or the idea of quasi-sovereignty, which was designed with interstate relations in mind. Of course, sovereignty interests tend to be litigated in suits against other sovereigns, making this a less-than-ideal case for such an approach. But *Massachusetts v. EPA* did not present the same problem, and as the following Section illustrates, state-standing doctrine would be much more coherent today if the *Massachusetts* Court had adopted Justice Brennan’s approach.

B. Massachusetts v. EPA*: From Quasi-Sovereignty Back to Sovereignty*

In 1999, various private organizations filed a rulemaking petition with the EPA, requesting that the agency regulate greenhouse gas (GHG) emissions from new motor vehicles under the Clean Air Act (CAA).[211]

209. *Puerto Rico*, 458 U.S. at 610.

210. *Id.* at 611 n.1.

211. Massachusetts v. EPA, 549 U.S. 497, 510 (2007).

Four years later, the EPA denied the petition, concluding that it lacked authority under the CAA to promulgate regulations addressing global climate change and that—even if it did have such authority—it would choose not to do so for a number of reasons.[212] When the petitioners appealed the EPA's denial to the D.C. Circuit, twelve states intervened in support of the petitioners.[213] After the appellate court denied the petition for review, the Supreme Court granted certiorari and, in a five-four opinion, reversed the lower court's decision, holding that the EPA has authority under the CAA to regulate GHG emissions from new motor vehicles and that it had failed to provide reasons for its denial consistent with the statutory text.[214]

Before reaching the merits, however, the Court had to find that one of the petitioners had standing. Writing for the majority, Justice Stevens concluded that Massachusetts had standing. In reaching this conclusion, the fact that Massachusetts is a state appeared to carry particular weight. Justice Stevens emphasized the "considerable relevance" of Massachusetts's status as a "sovereign State," rather than a private litigant, and argued that the Court had long treated states differently (from other litigants) in analyzing Article III jurisdiction.[215] Because Congress had empowered individuals, including states, to challenge the denial of EPA's rulemaking petition *and* because Massachusetts sought to protect "its quasi-sovereign interests," Justice Stevens stressed that it was "entitled to special solicitude in our standing analysis."[216]

For the proposition that states are not "normal litigants," Justice Stevens cited *Georgia v. Tennessee Copper Co.* and its language regarding quasi-sovereign interests "in all the earth and air within [a state's] domain."[217] Because GHG emissions threatened Massachusetts's coastal land with rising sea levels, it bears some resemblance to the interstate public nuisance cases, particularly a case (like *Tennessee Copper*) involving out-of-state emissions that cause in-state air pollution. But Justice Stevens did not depend on this analogy to justify state standing. Nor could he. *Massachusetts* was not an interstate public nuisance case. The state sought regulatory action on the part of the federal government, not a judicial injunction against an out-of-state

212. *Id.* at 511.

213. Brief for Petitioners at 5, *Massachusetts*, 549 U.S. 497 (No. 05-1120). The American Samoa Government and three U.S. cities also intervened. *Id.*

214. *Massachusetts*, 549 U.S. at 532, 535.

215. *Id.* at 518.

216. *Id.* at 520.

217. *Id.* at 518–19.

nuisance.

Interstate air pollution today is extensively regulated under the CAA, a complex federal statute that contemplates an extensive implementation role for state agencies.[218] States have some latitude to enact more stringent standards and to decide how to achieve federal air quality standards, but in some areas (for example, vehicle emissions), federal law preempts state action.[219] To ensure the reduction of GHG emissions from vehicles, Massachusetts needed the federal government to regulate.

Given that the intervenor states exercised regulatory authority over emissions in a cooperative relationship with the federal government, they more closely resembled the position of Puerto Rico in *Puerto Rico v. Alfred Snapp & Son* than Georgia in *Tennessee Copper*. That is, like Puerto Rico's efforts to secure the benefits of federal employment law, they sought to secure the benefits of federal environmental law for their citizens. Not surprisingly, Justice Stevens cited *Puerto Rico* for the proposition that a *parens patriae* suit may be appropriate in cases where a state would exercise its police powers but cannot because they are preempted by the federal government.[220] According to the Court, in addition to its interest in "all the earth and air within its domain," Massachusetts also had a "quasi-sovereign" interest in enforcement of federal law when it preempts state authority.[221] The quasi-sovereignty contemplated by the Court in *Massachusetts* therefore refers (at least in part) to the subordinate status of states to the federal government under the Constitution, and it describes how states exercise a different kind of sovereignty today given the reach of the modern federal administrative state.[222]

Justice Brennan's approach in *Puerto Rico* is therefore apropos. Following his approach, we could say that Massachusetts had a *sovereign* interest in enforcing the CAA because the EPA's inaction hindered its ability to carry out its obligations under the CAA—obligations that the state assumed as part of its "sovereign responsibility" to its citizens.[223] If we take this approach, we no longer

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218. *See, e.g.*, CAA § 110, 42 U.S.C. § 7410 (2012) (providing for state implementation plans).

219. *See id.* § 209(b)(1), 42 U.S.C. § 7543 (preempting state standards absent a federal waiver).

220. *Massachusetts*, 549 U.S. at 519.

221. *Id.*

222. Justice Stevens echoed the historical rationale for the Court's exercise of its original jurisdiction, noting that states relinquished sovereign powers of force and diplomacy in interstate relations when they entered the federal union. *Id.* He then added the surrender of state regulatory power over in-state vehicle emissions in light of federal preemption. *Id.*

223. *Cf.* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 611 n.1 (1982) (Brennan, J., concurring).

need the concept of quasi-sovereignty. In fact, the use of the concept only causes confusion and invites dissent. Indeed, writing in dissent in *Massachusetts*, Chief Justice Roberts identified a potential limitation of quasi-sovereignty and its association with the *parens patriae* suit: if a state as *parens patriae* is suing on behalf of its citizens, it must necessarily show that its citizens have suffered or will suffer some injury.[224] After all, a state suing in a representative capacity is suing first and foremost to vindicate the interests of its citizens.

In other words, to base state standing on quasi-sovereignty implies that a state is seeking access to federal court to vindicate something less or other than its own sovereignty, or right to govern. But in cases involving cooperative administrative schemes like the one in *Massachusetts*, the state seeks to vindicate its own sovereignty interests by challenging federal action (or inaction).[225] The regulatory regime under the CAA includes an implementation role for state governments; indeed, the federal government could not implement the administrative scheme without state cooperation. When states agree to undertake these responsibilities, they do so as sovereign governments seeking to further the general welfare of their citizens.

224. *Massachusetts*, 549 U.S. at 538 (Roberts, J., dissenting) ("Just as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III."). The doctrinal basis for state standing in true *parens patriae* cases is unclear, partly because the Court has failed to distinguish *parens patriae* cases from cases involving governance interests. Some precedent supports Chief Justice Roberts's analogy of state representative standing to associational standing. *See, e.g.*, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 344 (1977) (holding that a state agency representing the state apple industry had standing to sue on behalf of the industry). Like the members of the state agency in *Hunt*, a state attorney general who brings a *parens patriae* suit is elected and paid by the state's citizens. *Id.* at 344–45. In addition, in many *parens patriae* cases (e.g., those involving violations of consumer protection laws), the state attorney general can allege a "financial nexus" between state interests and the collective injuries of its citizens (an indicium of associational standing that resembles a quasi-sovereign interest). *Id.* at 345. Although space constraints prevent further treatment of state *parens patriae* standing in this Article, the topic needs more scholarly and judicial development.

225. Other commentators have interpreted *Massachusetts v. EPA* to support state standing based on the state's sovereign interests in regulating or governing in certain situations. *See, e.g.*, Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1073 (2010) (arguing that "states ought to have greater solicitude to pursue . . . challenges [to federal inaction] where the federal government has also preempted the states' freedom to regulate"); Tyler Welti, Note, Massachusetts v. EPA*'s Regulatory Interest Theory: A Victory for the Climate, Not Public Law Plaintiffs*, 94 VA. L. REV. 1751, 1779 (2008) (arguing that a "state can vindicate public interests where federal inaction (that may amount to an abuse of statutory discretion) impinges on the state's ability to regulate harms that threaten concrete injury such as coastal erosion").

III. LITIGATING GOVERNANCE INTERESTS IN AN ERA OF SHARED GOVERNANCE

Puerto Rico and *Massachusetts* illustrate the problems in applying old doctrines of state standing to litigation of governance interests in the modern administrative state. Because states cannot govern in many areas without confronting federal administrative law, they should be able to challenge federal laws and actions that are part of administrative regimes that contemplate an implementation role for the states. As the historical discussion in Part I demonstrates, this approach follows easily from previous cases involving the litigation of sovereignty interests. States have historically litigated sovereignty, or governance, interests, though—as *Puerto Rico* and *Massachusetts* demonstrate—the modern administrative state has changed the *kind* of governance interests that states seek to litigate. While early cases primarily addressed interstate conflict, contemporary cases frequently involve state-federal conflict arising out of regulatory regimes that contemplate both federal and state participation.

Typically, Congress enlists state assistance in administrative government in one of two ways: it either encourages state participation by offering federal funds in exchange for state cooperation (as it did in the federal employment service at issue in *Puerto Rico*) or conditions non-preemption of state implementation and enforcement authority on a state's agreement to exercise this authority consistent with federal law (as it did under the CAA at issue in *Massachusetts*). This kind of "cooperative" federalism, as it is traditionally called, is pervasive. Most major antipollution statutes, such as the CAA and the Clean Water Act, contemplate substantial state participation, as do other health and safety laws. States also agree to implement scores of federal standards in return for federal funding in critical areas such as education and health care.

When states challenge federal actions (or inaction) under these administrative schemes, they are playing the role of a sovereign state in a post-sovereignty world. That is, they are seeking to vindicate their interest in *shared* governance, the ideal at the heart of cooperative federalism. Having agreed to play an administrative role, they have a direct interest in shaping the policies and actions of the federal agencies charged with ultimate authority under an administrative scheme. Having surrendered lawmaking authority, states have a clear interest—as separately constituted governments—in the implementation of federal law. Moreover, as Seth Davis has argued, given the overlapping nature of modern federal-state regulatory authority, "permitting intergovernmental litigation over institutional interests may be necessary to achieve the competitive checks and balances the Framers envisioned

would follow from a world of dual sovereignty."[226] In other words, state challenges to federal authority in court "may substitute for the structural check of state autonomy that passed away with the death of dual sovereignty."[227]

States also have a direct interest in challenging federal power *before* they agree to play the supporting role contemplated by a new federal statute. In recent years, the Court has not questioned the standing of states to challenge federal laws that seek state cooperation through allegedly coercive means. For example, state standing to challenge the conditioning of Medicaid funding on Medicaid expansion under the Affordable Care Act (ACA) was not controversial.[228] But federal courts struggled when states sought to challenge the ACA's individual mandate as an impermissible exercise of federal power. Under a governance approach to state standing, because the ACA contemplates an implementation role for states,[229] they have a direct interest in resolving constitutional questions ex ante—before they invest time and resources in complying with the new regime.

This Part makes the case for a governance approach by anticipating potential objections and applying the approach to two recent cases. The argument is simple: when states seek to challenge federal laws and actions, they have Article III standing if the federal law at issue contemplates a role for state governments in its implementation. Federal funding conditioned on state assistance in implementing federal law is enough, as is conditional preemption of state authority in a given area. The implementation role need not be substantial, although states will not likely challenge laws that have small impacts (e.g., a law that requires very little regulatory change at the state level). The federal law must do more than grant states civil and criminal enforcement authority (as some consumer protection laws do);[230] it must contemplate that states will *share* in the day-to-day business of regulating by implementing federal policy through state administrative mechanisms and institutions.

This approach is consistent with the historical litigation of governance interests, as described in Part I, while recognizing the dramatically different nature of those interests in the modern administrative state. In addition to reflecting today's regulatory reality, the governance approach

226. Davis, *supra* note 16, at 82–83.

227. *Id*. at 83.

228. Nat'l Fed. of Indep. Bus. v. Sebelius, __ U.S. __, 132 S. Ct. 2566 (2012).

229. 42 U.S.C. § 18031 (2012).

230. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 1042 (2012) (authorizing enforcement suits by state attorneys general and state regulators).

is a better fit with current doctrine. To demonstrate this, the first part of this Section discusses how the approach intersects with the modern injury-in-fact approach to individual standing. The governance approach to state standing does not replace the injury-in-fact inquiry; rather, it simplifies the inquiry by clarifying what a state must show to establish an Article III injury in cases challenging federal power. After demonstrating how the governance approach can be reconciled with current standing doctrine, the second part of this Section explains how the governance approach can help illuminate other threshold questions, such as whether the court has statutory jurisdiction and whether the state plaintiff has a cause of action. The Article concludes with an application of the approach to two recent cases: Virginia's challenge to the ACA and Texas's recent challenge to executive action in the area of immigration.

A. Harm to Governance Interests as Article III Injury

1. The Three-Part Test for Individual Standing

In contemporary standing analyses, the Court routinely requires that a plaintiff meet three requirements in order to establish Article III standing.[231] First, to show an "injury-in-fact," a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent."[232] Second, the plaintiff must establish a causal connection; the alleged injury must be "fairly traceable" to the defendant's conduct.[233] And third, the plaintiff must demonstrate that a favorable court decision is "likely" to redress the injury.[234] Although this three-part test is a fairly recent doctrinal development, it is now well established and almost always applied—even to questions of state standing.

Of course, in many cases involving state governance interests, the Court does not analyze state standing, presumably because the injury to state *sovereignty* is obvious. When, for example, New York challenged a federal law that required the state to either take title to hazardous waste or pass legislation reflecting federal policies, the Court did not pause to consider state standing before deciding the Tenth Amendment

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231. The case often cited as support for a definitive three-step test is *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

232. *Id.* at 559.

233. *Id.*

234. *Id.*

challenge.[235] The injury (infringing on the state's authority) was obvious. It was also "caused" by the federal law and redressable by a Court decision invalidating the law.

Why should cases like *Massachusetts v. EPA* be any different? If the Court had grounded state standing in Massachusetts's governance interests, rather than treating the suit as a *parens patriae* suit, the analysis would have been straightforward: Massachusetts suffered an injury to its sovereignty (i.e., to a governance interest) because the EPA failed to carry out its rulemaking responsibilities under the CAA. As a state with delegated authority under the CAA, it had a "concrete" and legally protected interest in the implementation (and therefore the prerequisite federal rulemaking) of the Act. Once the injury is clear, the other requirements are easily met. The state's inability to implement emissions standards required by the Act was caused by the EPA and redressable by a court decision.

But because the Court essentially treated *Massachusetts* as a *parens patriae* case, the injuries at issue were injuries to Massachusetts's citizens, specifically, citizens with property affected by rising sea levels. To avoid aggregating the injuries of individual citizens,[236] however, the Court focused on the proprietary injury to Massachusetts as a landowner.[237] It then had to grapple with the tenuous causal link between coastal erosion of Massachusetts's land and the EPA's failure to regulate new vehicle GHG emissions and the even more tenuous argument that emissions standards would redress Massachusetts's injury.[238] Chief Justice Roberts pointedly outlined all these weaknesses in his dissenting opinion.[239]

This confusion is avoidable. If we understand state standing to challenge federal administrative action and authority as grounded in a state's interest in governing, the injury is to the state as a sovereign government, not the state as property owner or *parens patriae*. By refusing to issue emissions standards, the federal government hindered the states' sovereign responsibility to implement laws that protect the public health and welfare. As the Court's precedents make clear, a state's constitutional sovereignty gives rise to a duty to be responsive

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

236. The Court did not say it was avoiding this analysis, but it is a reasonable assumption. Under the Court's *parens patriae* precedent, it is not clear how many citizens must be injured and whether the extent of their injuries matters.

237. Massachusetts v. EPA, 549 U.S. 497, 522–23 (2007).

238. *Id.* at 523–26.

239. *Id.* at 540–46.

and accountable to its electorate.[240] In the contemporary administrative state, the idea of sovereignty would mean very little if a state lacked standing to challenge federal action (or inaction) under an administrative scheme that enlists state cooperation. To be responsive and accountable in cooperative administrative governance, states must therefore have a mechanism for challenging federal executive action. Review in the federal courts is the logical answer.

These basic principles also support state standing to challenge ex ante some federal laws as unconstitutional exercises of federal power. The Court has already treated state standing in Tenth Amendment cases like *New York v. United States* as unremarkable.[241] As discussed in Part I, even in *Massachusetts v. Mellon*—the case often cited for the proposition that sovereignty interests are nonjusticiable—the Court arguably decided the state's Tenth Amendment claim on the merits, rather than on what courts would understand to be jurisdictional grounds today.[242] In cases involving Congress's exercise of its Spending Power, the line between the traditional Article III injury analysis and the merits inquiry is impossible to draw because if a court concludes that a state has not alleged an injury-in-fact, it is essentially concluding that the state has not made a showing of impermissible coercion by the federal government.

A Ninth Circuit opinion regarding state standing to challenge federal funding of legal assistance providers illustrates this overlap in Spending Clause cases.[243] Oregon sued the Legal Services Corporation (LSC), alleging that regulatory restrictions on the use of LSC funds violated the Tenth Amendment by infringing on the state's power to regulate law practice and legal services programs.[244] The Ninth Circuit held that Oregon lacked standing to sue because "there [was] no burden or injury placed on Oregon."[245] Private organizations, the legal service providers, were the recipients of the federal funds.[246] Consequently, "[t]he core of the dispute [was] whether Oregon should have the ability to control the conditions surrounding a voluntary grant of federal funds to specifically

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240. *See New York*, 505 U.S. at 168 ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.").

241. *See id.*

242. Massachusetts v. Mellon, 262 U.S. 447, 482 (1923).

243. Oregon v. Legal Servs. Corp., 552 F.3d 965 (9th Cir. 2009).

244. *Id.* at 967.

245. *Id.* at 973.

246. *Id.*

delineated private institutions."[247] The Court concluded that Oregon lacked a "right, express or reserved" to control these conditions and therefore lacked "a judicially cognizable injury."[248] Like the Court in *Mellon*, the Ninth Circuit's conclusion is essentially one on the merits: Oregon failed to state a Tenth Amendment claim of impermissible coercion.

A governance approach to state standing would simplify these cases. To determine whether states alleging an injury to their governance interests have shown an injury-in-fact, courts would ask whether the federal funding scheme contemplates an implementation role for states. In the Oregon case, the answer would be no. Although Oregon may not pass laws that conflict with federal policy if it wishes legal service providers to receive federal funding, this funding does not depend on whether the state participates in the implementation of federal policies. Given the supremacy of federal law, states must often refrain from regulating or regulate in a manner consistent with federal law. This tension is not enough for state standing based on a governance interest. Moreover, the fact that private organizations, rather than state entities, receive the federal funding should not automatically disqualify states under Article III. The critical inquiry is whether the federal law encourages states to aid in its implementation. If it does, states should have standing to litigate whether Congress exceeded its constitutional authority.

The requirement that a state show that the federal law underlying its challenge contemplates a governance role for states ensures that a true Article III case or controversy is before the federal court. When a federal law provides mechanisms for state cooperation, both the federal and state governments have an "actual, as opposed to professed, stake in the outcome," which ensures that judicial decisions are based on concrete interests litigated by adversaries.[249] Indeed, as *Massachusetts v. EPA* illustrates, state-federal conflicts under cooperative regulatory regimes raise concrete, particular questions about the concurrent and overlapping authority of state and federal governments. The fact that the framers

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247. *Id.* at 974.

248. *Id.*

249. Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring)). Language regarding concrete interests and adversarial posture harkens back to the canonical case of *Baker v. Carr*, requiring that parties show a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 369 U.S. 186, 204 (1962).

could not have anticipated the federalism of today cannot mean that the intergovernmental conflicts generated by today's federalism are not Article III cases or controversies.

2. The Bar on Litigating the Generalized Interest in the Proper Administration of Laws

In contemporary standing cases, the Court has grappled with the extent to which Article III permits individual suits based on generalized grievances, that is, grievances widely shared by the general public. At times, the Court has treated this as a prudential, rather than a constitutional, limitation on Article III standing, suggesting it need not bar the suit.[250] In recent cases, the Court has made clear that, as long as an individual meets the injury-in-fact requirement, constitutional standing should not be limited by the fact that many others share the plaintiff's injury.[251] Indeed, the injuries caused by climate change (and other environmental harms) are almost always widely shared, but the Court has accepted that they fall within Article III's case or controversy requirement.[252]

The Court has continued, however, to reject one kind of suit based on a generalized grievance: a suit by a private individual based on the generalized grievance in the executive's administration of the laws.[253] In fact, in a recent decision, the Court emphasized that Article III does not permit "suits 'claiming only harm to [the plaintiff's] and every citizen's interest in proper administration of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large.'"[254] Historically, individuals sought to challenge federal laws and actions on the basis of their standing as taxpayers; they alleged injury to their interest in proper application of laws and expenditures of public funds.[255] The Court routinely dismissed such suits, concerned that they would render Article III's case or controversy

250. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474–75 (1982) (treating "generalized grievances" as a prudential consideration).

251. *See* FEC v. Akins, 524 U.S. 11, 24 (1998) (explaining that a generalized, or widely shared, harm may satisfy Article III's injury requirement if it is concrete rather than abstract and noting, as examples, mass torts and voting rights injuries).

252. *See* Massachusetts v. EPA, 549 U.S. 497, 522 (2007) (discussing harms resulting from climate change).

253. Lujan v. Defs. of Wildlife, 504 U.S. 555, 574 (1992).

254. Lexmark Int'l, Inc. v. Static Control Components, Inc., __ U.S. __, 134 S. Ct. 1377, 1387 n.3 (2014) (quoting *Lujan*, 504 U.S. at 573–74).

255. *See Lujan*, 504 U.S. at 574–76 (discussing cases).

requirement meaningless and threaten the constitutional separation of powers among the three branches.[256]

The Court has elaborated on the separation-of-powers concern in cases brought by states and individuals under "citizen-suit" provisions.[257] In these types of cases, Congress has explicitly authorized suits by private individuals for particular violations of federal law.[258] Many major environmental laws have such provisions, which are designed to further their enforcement (often by nongovernmental organizations suing on behalf of their members).[259] And the Administrative Procedure Act also authorizes individual suits to challenge final federal agency actions when specific statutes do not cover such actions.[260] But as Justice Scalia has emphasized, Congress cannot constitutionally confer on private individuals an *individual* right to sue to enforce *public* rights:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'[261]

In short, statutory authorization to sue is not enough without *individual*

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256. *Id.*

257. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); *Lujan*, 504 U.S. at 576–77. Justice Scalia, in particular, has understood Article III standing in terms of separation of powers. *See, e.g.*, Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, __ U.S. __, 135 S. Ct. 2652, 2695 (2015) (Scalia, J., dissenting) (arguing that Article III standing is grounded in the separation of powers). Historical accounts of the injury requirement suggest that it is grounded in Justice Frankfurter's attempt to limit judicial review of New Deal legislation, rather than in constitutional history and precedent. *See, e.g.*, Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 462 (1996) (arguing that Justice Frankfurter's limits on the judicial power—to traditional private suits for common law injuries—ignored historical English practice and founding-era understandings).

258. *See* cases cited *supra* note 257; Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008) (examining how standing doctrine purports to serve various separation-of-powers "functions" and arguing that the Court's modern standing doctrine does not further these functions).

259. *See, e.g.*, CAA § 304(a), 42 U.S.C. § 7604(a) (2012) (providing a right of action to sue governmental actors and private individuals for violations of act); Clean Water Act (CWA) § 505(a), 33 U.S.C. § 1365(a) (2012) (providing a right of action to sue private and governmental actors for violations of the act). As is frequently the case, these provisions also authorize suits by states by defining the "person" or "citizen" who may sue to include governmental entities. *See* CAA § 302(e), 42 U.S.C. § 7602(e) (defining "person"); CWA § 505(g), 33 U.S.C. § 1365(g) (defining "citizen").

260. 5 U.S.C. §§ 702, 704 (2012).

261. *Lujan*, 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3).

injury.[262]

But this limitation on citizen suits to vindicate public interests makes little sense applied to the states. As Richard Fallon has recently argued, the "Court should make explicit that in some contexts, the standing requirements that apply to private parties do not extend to the government and its officials, and that in other cases the same formally articulated demands require adjustments in light of the government's special status and role."[263] Unlike individuals, states are obligated to represent their electorates' interests. When they challenge federal action or law that contemplates a governance role for states, they are not suing based on a generalized grievance, but are instead seeking to vindicate their concrete interests in governing—either as separate regulatory entities or as cooperative agencies under a federal administrative scheme. If the administrative scheme contemplates a governance role for states in its implementation, states as regulatory participants in the scheme have an interest that individual litigants do not share.

Moreover, assuming that federal law provides a cause of action, state suits seeking to resolve questions of executive power do not present the same separation-of-powers problems.[264] This is so even if a state suit challenging federal executive action is somewhat analogous to suits between federal agencies or officials. Though examples of such cases in the Supreme Court are rare,[265] the Court has not explicitly said that they violate the constitutional separation of powers.[266] In fact, the Court has

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262. As Aziz Huq has argued, the Court's current practice of allowing individuals to sue to vindicate structural constitutional rights, such as federalism, is in tension with the notion that individuals may not enforce *public* rights. Huq, *supra* note 116, at 1473. States, he argues, are the parties that benefit directly and primarily from constitutional principles of federalism. *Id.*

263. Fallon, *supra* note 8, at 1109; *see also Lujan*, 504 U.S. at 578 (Kennedy, J., concurring) ("As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.").

264. While still a circuit judge, Justice Scalia noted that state *parens-patriae* suits challenging federal actions do not necessarily raise separation of powers concerns provided Congress has authorized states to sue. *See* Md. People's Counsel v. FERC, 760 F.2d 318, 322 (D.C. Cir. 1985).

265. *See, e.g.*, United States v. ICC, 337 U.S. 426 (1949); United States v. Nixon, 418 U.S. 683 (1974); *see also* Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1238–42 (2013) (detailing history of intergovernmental litigation in the Supreme Court).

266. *See* Michael Herz, United States v. United States*: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 915 (1991) (arguing that under the model of the "unitary executive," judicial resolution of interagency disputes would violate the separation of powers, but that the unitary executive model is empirically and theoretically false). In a recent case, however, Justice Scalia unequivocally expressed the view that intergovernmental litigation of political authority falls outside Article III. Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, __ U.S. __, 135 S. Ct. 2652, 2694 (2015) (Scalia, J., dissenting).

indicated that Congress may authorize intergovernmental litigation based on conflicting regulatory interests without violating Article III.[267] Although the Court has emphasized that it would be "inappropriate" for it to routinely decide "intrabranch and intraagency policy disputes," it has acknowledged that Congress could in some circumstances authorize intragovernmental litigation consistent with Article III.[268] If it does not violate Article III to authorize litigation within the executive branch, it surely does not violate Article III to authorize litigation between the states and the federal government—even if the states are cooperating with the executive in implementing federal law.[269]

In the end, the notion that states should be able to litigate "public" interests, though private parties may not, should be unremarkable. Although the Court's "special solicitude" for states in *Massachusetts v. EPA* may appear exceptional, the history of state standing demonstrates that they often are treated differently and for good reasons.[270] Like the federal government, state governments have interests different from private litigants. Inherent in any concept of modern sovereignty is the obligation to further the generalized interest in the proper administration of the law. Indeed, a government's historical standing to enforce its own criminal and civil laws in its own courts is premised on this very idea.[271] Moreover, the federal government's standing to challenge state laws on preemption grounds is apparently unremarkable. In 2012, the Court decided whether federal law preempted a set of new immigration laws in Arizona and did so without commenting on the federal government's

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267. Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 133 (1995).

268. *Id.* at 129, 133.

269. This is true, of course, only if Congress and the President can constitutionally delegate authority to implement and enforce federal laws to state governments. Cooperative administrative schemes provide for federal oversight and are likely constitutional. Outright delegation of enforcement authority may, however, raise issues.

270. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 136 (1986) (noting that, unlike a private party, a "[s]tate clearly has a legitimate interest in the continued enforceability of its own statutes"); Diamond v. Charles, 476 U.S. 54, 65 (1986) (holding that private citizen lacked standing to defend constitutionality of state statute because "only the State has . . . [a] 'direct stake' . . . in defending the standards embodied in [its legal] code"); *see also* Davis, *supra* note 16, at 61–62 (arguing that state agencies implementing federal administrative schemes have special expertise and interests that support implied rights of action to enforce federal law when private litigants may not have similar rights of action); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 73 (2011) (noting that "it makes sense to conclude that special protections for the states must develop in the administrative realm if federalism is to have continuing relevance in the world of national administrative governance that increasingly dominates today").

271. Thomas W. Merrill, *Global Warming as Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 299–300 (2005); Woolhandler & Collins, *supra* note 24, at 422.

Article III standing.[272] If the federal government has standing based on its interest in the proper administration of laws, the states should as well.

B. Finding the Appropriate Box: Separating State Standing from Other Threshold Questions

In addition to bringing coherence to the doctrine of state standing to challenge federal law, the governance approach would ensure that other threshold questions are resolved separately. Questions regarding whether a federal court has statutory subject matter jurisdiction and whether a state has a cause of action under federal law are often difficult to resolve. A complicated standing analysis that treats states like private parties increases the likelihood that a court will overlook these important questions or subsume them within the standing analysis. These distinctions are important because, unlike questions of Article III standing, questions regarding statutory jurisdiction and federal causes of action require courts to give effect to Congress's intent. In other words, these are questions ideally resolved via the political process, whereas questions regarding standing are questions of constitutional interpretation ideally resolved by courts. Article III standing is the constitutional minimum, but Congress may generally expand or contract states' access to the courts by passing appropriate legislation. Although a thorough examination of these doctrinal areas is beyond the scope of this Article, the following discussion provides a basic overview of how they differ from the standing analysis and raises questions for further scholarly inquiry.

1. Statutory Subject-Matter Jurisdiction

A state that has Article III standing to sue the federal government based on a governance interest will also have to assert a statutory basis for the federal court's jurisdiction. Because states are not citizens for purposes of diversity jurisdiction, if they are not seeking to invoke the Supreme Court's original jurisdiction, they must bring suit in a federal district court or appellate court pursuant to a congressional grant of federal subject-matter jurisdiction. Often the basis for such jurisdiction

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272. Arizona v. United States, __ U.S. __, 132 S. Ct. 2492 (2012); *see also* Oregon v. Mitchell, 400 U.S. 112, 117 n.1 (1970) (noting that both states and the federal government sought to invoke the Court's original jurisdiction to enjoin the enforcement of conflicting state and federal laws governing voting rights); Pub. Utils. Comm'n of Cal. v. United States, 355 U.S. 534, 539 (1958) (holding that declaratory judgment action brought by the federal government against a state entity was justiciable under Article III).

will be in the district courts pursuant to their general federal question jurisdiction.[273] Congress is free, of course, to expand or limit this jurisdiction in specific statutes. Some federal administrative schemes contain their own jurisdictional provisions. States must, for example, seek review of EPA actions that have a "nationwide scope or effect" under the Clean Air Act only in the D.C. Circuit.[274]

When a state relies on the general grant of federal jurisdiction in 28 U.S.C. § 1331, jurisdiction will depend on whether the case "arises under" the Constitution or other federal law (namely statutes and federal common law).[275] Although § 1331's language closely tracks the jurisdictional language in Article III,[276] the Supreme Court has interpreted the statutory grant differently and much more narrowly than the constitutional grant.[277] While the Constitution may permit federal jurisdiction over cases that simply present federal issues, cases generally "arise under" § 1331 only when federal law provides a cause of action that appears on the plaintiff's well-pleaded complaint.[278] In challenges to administrative action, such as the one in *Massachusetts v. EPA*, states typically bring suit under a statutory provision authorizing individual state and citizen suits.[279] In these cases, whether federal law clearly provides a cause of action is a question of statutory interpretation.

But when states seek a declaration that federal law is unconstitutional (and that state law or authority is therefore not preempted), they may face an additional jurisdictional obstacle. Although federal statutory law provides a *remedy* (the declaratory judgment), the Court has interpreted the relevant statute to provide *only* a remedy.[280] That is, it does not

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273. 28 U.S.C. § 1331 (2012).

274. 42 U.S.C. §§ 7401, 7607(b)(1) (2012).

275. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

276. *Compare id.*, *with* U.S. CONST. art. III, § 2 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . .").

277. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.2.1 (6th ed. 2012) (providing an overview of the differences in Supreme Court interpretations of constitutional and statutory grants of federal question jurisdiction).

278. This generalization regarding federal question jurisdiction oversimplifies what is a complicated and not entirely coherent doctrinal area of law. But because many of the complications arise when a plaintiff files a state law cause of action, they are not relevant to state suits challenging federal authority, which are clearly grounded in federal law. For a more detailed overview, see *id.* § 5.2.

279. *See* cases cited *supra* note 259.

280. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) ("Congress [in the Declaratory Judgment Act] enlarged the range of remedies available in the federal courts but did not extend their jurisdiction.").

confer statutory jurisdiction on a federal court; a party seeking a declaratory judgment must establish a separate basis for jurisdiction. When the basis for jurisdiction is 28 U.S.C. § 1331, a court must decide whether federal law creates the cause of action, raising the difficult question of whether a state has a federal "right" to sue to invalidate federal laws under the Constitution.[281]

The language of the Declaratory Judgment Act arguably ties the existence of a federal right to sue to the existence of an Article III "case or controversy." With some exceptions, the Federal Act authorizes federal courts to grant declaratory relief "[i]n a case of actual controversy within its jurisdiction," even when other relief is available.[282] Courts have therefore analyzed the appropriateness of declaratory relief in constitutional litigation in Article III terms and exercised caution when issues appear hypothetical or abstract.[283] But despite the cautionary language in some cases, the federal courts have exercised jurisdiction over a number of suits seeking declarations regarding the validity of state and federal laws.[284] Moreover, the federal courts have exercised jurisdiction over state-federal litigation involving the constitutional distribution of governmental power.[285] As discussed above, states have sought declaratory judgments that federal law is impermissibly coercive in violation of the Tenth Amendment.[286]

Nevertheless, some Supreme Court precedent suggests that the Court may interpret § 1331 narrowly in a state suit seeking only a declaration that a federal law regulating individuals does not preempt state law.[287] In

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281. *See id.* at 671–72.

282. 28 U.S.C. § 2201(a) (2012).

283. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937) (describing a "justiciable controversy" under the Declaratory Judgment Act as "definite and concrete," as opposed to "hypothetical or abstract").

284. *See generally* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2763 (3d ed. 2015) (summarizing and citing federal suits for declaratory judgments involving public law).

285. *See, e.g.*, FERC v. Mississippi, 456 U.S. 742, 752 (1982) (state suit to declare certain federal laws unconstitutional under the Commerce Clause and the Tenth Amendment).

286. *See, e.g.*, New York v. United States, 505 U.S. 144, 154 (1992) (state suit to declare certain federal laws unconstitutional under the Tenth Amendment and the Guarantee Clause). When the United States is a plaintiff, statutory subject-matter jurisdiction is arguably aided by 28 U.S.C. § 1345, which provides that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States."

287. Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1 (1983); *see also* Kevin C. Walsh, *The Ghost That Slayed the Mandate*, 64 STAN. L. REV. 55, 65 (2012) (arguing that a federal court does not have statutory subject-matter jurisdiction when a state sues to declare federal law unconstitutional unless either party could have brought a nondeclaratory action against the other party).

1983, in *Franchise Tax Board v. Construction Laborers Vacation Trust*,[288] the Court suggested that federal courts should decline to exercise jurisdiction over such a suit unless Congress specifically authorizes it.[289] In doing so, it noted that states do not suffer prejudice because preemption issues may be litigated when individuals subject to federal law sue for injunctive relief, and states may enforce their laws in their own courts where they may also raise preemption questions.[290]

Franchise Tax Board is distinguishable in important respects from state challenges to federal power based on governance interests. First, it was originally brought by a state entity in state court pursuant to state law.[291] The question of federal jurisdiction was prompted only by the defendant's removal of the case to federal court on the basis of a federal preemption defense.[292] The Court's reasoning and holding were therefore informed by principles of comity.[293] Second, with the expansion of the federal administrative state, the need for uniform, ex ante resolution of state-federal conflicts has arguably grown, making the piecemeal resolution of these issues in injunctive suits by individuals less desirable.[294] However these jurisdictional questions are resolved, the critical point is that they need resolution, but are too often obscured by convoluted and unnecessary analyses of Article III standing. The governance approach to state standing would help concentrate judicial analysis where it is needed most.

2. *Federal Causes of Action*

Although the Court often says that whether a federal cause of action exists is not a question of jurisdiction, the two questions often overlap, as the discussion above makes clear. Moreover, particularly in administrative law, certain issues can be jurisdictional in some cases but

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288. Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1 (1983).

289. *Id.* at 21–22.

290. *Id.* at 21.

291. *Id.* at 5–6.

292. *Id.* at 6.

293. *See id.* at 21 n.22 ("[I]t is perhaps appropriate to note that considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it."). A plaintiff's request for a declaration that federal law does not preempt state law clearly appears to arise under federal law. Courts struggle, however, because preemption claims are traditionally raised as defenses, rather than as part of the original complaint. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (noting that "[f]ederal pre-emption is ordinarily a federal defense to the plaintiff's suit").

294. The import of this case is also unclear in light of subsequent cases. *See Metro. Life Ins. Co.*, 481 U.S. at 64 (treating *Franchise Tax Board* as a case about removal jurisdiction).

not in others. For example, if a state seeks review under a specific statutory authorization to sue, like the one in the Clean Air Act, the relevant statutory provision may contain jurisdictional elements.[295] When, however, a state seeks review of an agency action under the general review provisions in the Administrative Procedure Act, subject-matter jurisdiction must be grounded elsewhere (typically in § 1331's general grant of federal question jurisdiction).[296] But even when the questions overlap, courts should take care to analyze them separately. As the above discussion of the Declaratory Judgment Act demonstrates, the availability of a federal remedy does not necessarily mean a federal court has jurisdiction.[297] Similarly, when a federal court has jurisdiction over an *arguable* cause of action "arising under" federal law, it may nevertheless dismiss the case for failure to state a valid claim.

When a state seeks to challenge federal law or action, it must allege a valid cause of action under federal law. State suits against the federal government based on governance interests generally take one of two forms: a suit seeking to invalidate federal law as a violation of the Constitution (e.g., as outside Congress's enumerated powers or in contravention of the Tenth Amendment) or a suit challenging federal agency action (or inaction) pursuant to a statutory provision specifically authorizing individual suits for violations of federal law.

In the first kind of case (state actions challenging federal authority under the Constitution), a court must ask whether the right of action arises under the Constitution or elsewhere. Recently, in *Armstrong v. Exceptional Child Center Inc.*,[298] the Court considered whether an implied right of action exists under the Supremacy Clause.[299] In deciding that such a right does *not* exist, the Supreme Court made clear that plaintiffs could nevertheless seek to enjoin unconstitutional governmental action because the "ability to enjoin unconstitutional actions by state and federal officers" is an inherent power of federal courts of equity.[300] The Court was unanimous on this point; the four

295. *See, e.g.*, Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA, 686 F.3d 803, 808 (D.C. Cir. 2012) (treating lack of final agency decision as jurisdictional under CAA's judicial review provision).

296. *See* Califano v. Sanders, 430 U.S. 99, 107 (1977) (holding that the APA's review provisions do not grant subject-matter jurisdiction).

297. *See supra* Section III.B.1.

298. __U.S. __, 135 S. Ct. 1378 (2015).

299. *Id.*

300. *Id.* at 1384; *see also* Preis, *supra* note 82 (arguing that federal courts have historical power in constitutional cases to imply injunctive relief); John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 1022 (2008) (arguing that *Ex Parte* Young, 209 U.S. 123 (1908), involved a traditional

dissenting justices agreed that the power of "federal courts to enjoin unconstitutional government action is not subject to serious dispute."[301] The Court's decision in *Armstrong* suggests that a state seeking to enjoin the enforcement of federal law need not identify a separate right under the Constitution, federal statutes, or federal common law. Congress may, of course, foreclose suits for injunctive relief for specific violations of federal law.[302]

Whether *Armstrong* suggests that a cause of action for declaratory relief is similarly within the federal courts' equitable authority is not clear. In her dissenting opinion, Justice Sotomayor emphasized that the Court "has thus long entertained suits in which a party seeks prospective equitable protection from an injurious and preempted state law without regard to whether the federal statute at issue itself provided a right to bring an action."[303] In support of this proposition, she cited cases in which plaintiffs sought declaratory relief.[304] The precise origins and nature of declaratory relief are somewhat contested, however.[305] Given that state suits to invalidate federal law under the Constitution involve issues of governmental power likely to be litigated as injunctive suits in equity, federal precedents arguably suggest that declaratory relief is within a federal court's equitable power and that, under the reasoning of *Armstrong*, it is a remedy that does not require an implied constitutional right of action.[306]

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equitable remedy, the anti-suit injunction, and that this type of action arguably allows suits to enforce constitutional provisions which do not alone create causes of action).

301. *Armstrong*, 135 S. Ct. at 1390 (Sotomayor, J., dissenting).

302. *See, e.g.*, *id.* at 1385 (majority opinion) (holding that Medicaid statute precludes private enforcement).

303. *Id.* at 1391 (Sotomayor, J., dissenting).

304. *Id.* (citing, for example, Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), in which plaintiff sought declaration that state law was preempted by federal law).

305. Recognizing that the federal remedy is statutory, but also within the discretion of the court, federal courts have often looked to the nature of the underlying issues in a case to determine whether they would have presented actions in law or equity in the absence of a declaratory remedy. *See, e.g.*, Wallace v. Norman Indus., Inc., 467 F.2d 824, 827 (5th Cir. 1972) ("A declaratory judgment action cannot be termed as either inherently at law or in equity. When classification has been required, courts have examined the basic nature of the issues involved to determine how they would have arisen had Congress not enacted the Declaratory Judgment Act."). In addition, the Supreme Court has characterized a court's resolution of such matters as "equitable in nature." Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952).

306. As John Harrison has noted, traditional suits to enjoin future legal proceedings (in which a plaintiff asserts a defense she would otherwise have in a legal action) resemble declaratory judgment actions: "both are used by potential defendants to become plaintiffs and assert defenses without waiting to be sued." Harrison, *supra* note 300, at 1000. This, he argues, is not a historical accident; the law professor who advocated forcefully for the adoption of declaratory judgment

In the second kind of state challenge, when a state sues under a federal statute, questions analyzed as part of the Article III standing inquiry may be more appropriately characterized as questions regarding whether the plaintiff has a right of action under federal law. For example, in *Lexmark International Inc. v. Static Control Components, Inc.*,[307] the Supreme Court cautioned that a question often characterized as part of the "prudential standing" analysis under Article III is more appropriately analyzed as a matter of statutory interpretation.[308] Courts had analyzed, as a matter of prudential standing, whether a plaintiff who sues under a federal statute falls within the "zone of interests" protected by the statute.[309] The *Lexmark* Court emphasized that the correct inquiry is not one of standing, but "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim"—a question that requires judicial interpretation of the statute.[310]

Lexmark recognizes that statutory challenges sometimes involve questions of statutory interpretation that are more appropriately resolved as such rather than incorporated into the Article III standing analysis. This may be particularly true in the kinds of cases brought by states challenging federal administrative action or inaction as unlawful exercises of authority. These cases are typically brought under statutory provisions conferring *procedural* rights, such as the right to challenge a final agency action regarding a rulemaking or petition for a rulemaking. In these cases, plaintiffs must assert a procedural right of action under the statute. Rather than analyzing whether the plaintiff has a procedural right as a question of Article III injury, courts should analyze this as a question of statutory interpretation. Under a governance approach to state standing, this distinction would be clear. If a state challenges federal action under an administrative statute that contemplates state implementation, it will have standing to bring the suit. But this does not mean that the federal court has subject-matter jurisdiction or that the state has a cause of action.

To illustrate the distinction, consider current state litigation to invalidate court-sanctioned settlement agreements between the U.S. Fish and Wildlife Service (FWS) and conservation groups. Midwestern states are essentially asking a federal court to invalidate agreements in which

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statutes "regarded them as an improved form of the suit to restrain legal proceedings." *Id.*

307. __ U.S. __, 134 S. Ct. 1377 (2014).

308. *Id.* at 1386.

309. *Id.*

310. *Id.* at 1387.

the FWS agreed to specific timelines for deciding whether to list various candidate species under the Endangered Species Act (ESA).[311] The states argue that these agreements prevent the FWS from maintaining a species' classification as "warranted but precluded" by resource limitations—a classification the agency may make in its discretion.[312] They also note that they were not part of the settlement negotiations or otherwise consulted and were thereby "deprived of an opportunity to participate in shaping the substantive policy choices embedded in the FWS's settlements."[313]

The ESA contemplates a shared governance role for states.[314] In shutting states out of the policymaking decisions adopted in the settlements, states have arguably suffered an injury to their governance interests and should therefore be able to establish Article III standing.[315] The problem, however, is that states lack a cause of action. The states essentially claim that the settlements violate the ESA because they prevent the FWS from making a warranted-but-precluded finding for species covered by the settlements.[316] But as the D.C. Circuit has recognized, the ESA does not require a warranted-but-precluded finding and Congress did not provide plaintiffs with "a means to require continued warranted-but-precluded findings."[317] The only right of action under the ESA is an action challenging the agency's final rule listing the species.[318] In short, the state plaintiffs do not have a cause of action. Although courts sometimes couch this analysis in standing doctrine, it is fundamentally a question of whether the statute provides a cause of

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311. *See* Third Amended Complaint for Declaratory and Injunctive Relief, Oklahoma v. Dep't of Interior, No. 1:15-cv-00252-EGS (D.D.C. July 31, 2015).

312. *Id.* at 2.

313. *Id.* at 1.

314. ESA § 6, 16 U.S.C. § 1535(c)–(d) (2012) (authorizing FWS to enter into cooperative agreements with states that have "adequate and active [conservation] programs" and to provide federal funding in conjunction with cooperative agreements).

315. Recently, the D.C. Circuit denied a petition for review of EPA's proposed rules regulating GHG emissions from power plants. *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. 2015). Both private and state plaintiffs brought the suit. *Id.* at 334. The court correctly denied the petition because EPA's rules are not yet final. *Id.* at 333–34. But it also noted that the plaintiffs lacked standing to challenge the settlement agreement establishing a timeline for regulation because they were not injured by a procedural deadline. *Id.* at 336. Although the state plaintiffs clearly lack a statutory right of action to challenge the settlements, their status as states should provide standing to sue based on their shared governance role under the Clean Air Act.

316. *Id.*

317. *In re* Endangered Species Act Section 4 Deadline Litigation—MDL No. 2165, 704 F.3d 972, 978 (D.C. Cir. 2013).

318. *Id.* at 977.

action.

C. *Applying the Governance Approach:* Virginia ex rel. Cuccinelli v. Sebelius *and* Texas v. United States

In the contemporary administrative state, intergovernmental conflict over regulatory authority is likely to increase. Although *most* state-federal regulatory partnerships do not require judicial resolution, the large number of these partnerships ensures that some conflicts regarding regulatory power will require adjudication. Application of an incoherent and flawed doctrine of state standing only threatens to prolong conflict and increase the costs of governing. The governance approach to state standing serves a gatekeeping function; it grants Article III standing to states with direct, concrete injuries to governance interests and denies it to states alleging indirect, insubstantial injuries to other kinds of interests.

Two recent controversies between states and the federal government illustrate this dynamic and are the subject of this Section. In the first case, a challenge by Virginia to the individual mandate under the Affordable Care Act (ACA), the governance approach would confer standing on the state plaintiff, though other threshold questions might prevent the lawsuit.[319] In the second case, a very recent challenge by Texas and other states to a federal immigration policy, the governance approach would not confer standing on the states.[320] In both cases, the governance approach reaches a result different from the federal court's resolution and does so through a much more streamlined, coherent analytical framework than the federal courts currently use.

1. Virginia ex rel. Cuccinelli v. Sebelius

After the ACA passed in 2010, Virginia passed a state law declaring, among other things, that "[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage."[321] The state statute was a clear repudiation of the ACA's "individual mandate," a provision requiring most individuals to purchase health insurance coverage or pay a penalty.[322] Virginia also sued the Secretary of the Department of Health and Human Services, challenging

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319. Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011).

320. Texas v. United States, 787 F.3d 733 (5th Cir. 2015).

321. *Virginia*, 656 F.3d at 267 (quoting VA. CODE. ANN. § 38.2-3434.1:1 (2011)).

322. 26 U.S.C. § 5000A(a)–(b) (2012).

the individual-mandate provision as an unconstitutional exercise of Congress's power to regulate interstate commerce.[323] Virginia prevailed in the lower federal court, but the Fourth Circuit held that Virginia lacked Article III standing to sue.[324]

Virginia argued that it had standing based on injury to its sovereign interest in creating and enforcing a legal code.[325] Indeed, both parties (and the courts) assumed that the state's statutory declaration regarding individual insurance coverage was central to the standing inquiry. Virginia argued that its sovereign interest in passing laws gave it standing to litigate the constitutionality of a federal law preempting state law.[326] The federal government argued that Virginia's statute was merely a declaratory attempt to nullify federal law and that its lawsuit was, in reality, a *parens patriae* suit brought on behalf of its citizens seeking to shield those citizens from the operation of federal law.[327] The Supreme Court has on more than one occasion rejected such a suit.[328]

Focusing on the state statute, the Fourth Circuit reasoned that the "non-binding declaration does not create any genuine conflict with the individual mandate, and thus creates no sovereign interest capable of producing injury-in-fact."[329] Given that the Act was essentially unenforceable, the court characterized Virginia's "real interest" as an interest in litigating a policy preference (against the individual mandate) on behalf of individuals.[330] This, of course, it could not do. The court noted that a contrary ruling would permit a state to "acquire standing to challenge *any* federal law merely by enacting a statute," a result that would allow "each state . . . [to] become a roving constitutional watchdog of sorts."[331] Particularly because the challenged provision applied only to individuals, the court did not think that the state-federal conflict generated by Virginia's declaratory statute was sufficient to "assure that concrete adverseness which sharpens the presentation of

323. *Virginia*, 656 F.3d at 266.

324. *Id.* at 267.

325. Appellee's Opening and Response Brief at 19–20, *Virginia*, 656 F.3d 253 (Nos. 11-1057, 11-1058).

326. *Virginia*, 656 F.3d at 268; *see also* Kenneth T. Cuccinelli et al., *State Sovereign Standing: Often Overlooked, But Not Forgotten*, 64 STAN. L. REV. 89 (2012) (detailing Virginia's arguments for state standing based on sovereignty interests).

327. Brief for Appellant at 24–28, *Virginia*, 656 F.3d 253 (Nos. 11-1057, 11-1058).

328. Massachusetts v. EPA, 549 U.S. 497, 520 n.17 (2007); Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923).

329. *Virginia*, 656 F.3d at 270.

330. *Id.* at 271.

331. *Id.* at 272.

issues."[332]

The court's standing analysis is a reasonable application of the injury-in-fact requirement to a state statute. Surely state statutes purporting to nullify federal law cannot open the federal courthouse doors to state suits. But if Virginia had focused less on its declaratory statute and more on the nature of the ACA and the governance role it contemplates for states, perhaps the outcome would have been different. At the very least, a governance approach to the issue would address the court's concern with opening the floodgates to state litigation of federal statutes. States would have standing only in cases involving a federal administrative scheme that contemplates an implementation role for states.[333]

The ACA contemplates a substantial role for states in its implementation.[334] Even if states may choose *not* to play *any* implementation role (as five states have), Congress drafted the regulatory scheme counting on the fact that at least some states will cooperate with the federal government.[335] And that is precisely what has happened. Although many states have chosen to use the federally facilitated marketplace, a significant subset of these states are running various aspects of their marketplaces or continuing to conduct plan management (review of plans for compliance with marketplace standards).[336] Well over half of all states have passed legislative or regulatory measures designed to implement ACA market reforms.[337] Indeed, because the field of private health insurance has historically

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332. *Id.* (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

333. State standing in cases like *Virginia* resembles third-party standing in that states have standing based on an alleged injury to a governance interest, but are challenging the federal government's power to regulate *individuals*, who are not parties. *Cf.* Craig v. Boren, 429 U.S. 190 (1976) (allowing bartender to challenge a state law permitting the sale of 3.2% beer to women at age eighteen, but barring sale to men until age twenty-one).

334. *See* Brendan S. Maher & Radha A. Pathak, *Enough About the Constitution: How States Can Regulate Health Insurance Under the ACA*, 31 YALE L. & POL'Y REV. 275 (2013) (arguing that ACA gives states broad regulatory flexibility and may even lead to expanded state authority over private health insurance).

335. *See* Gluck, *supra* note 7, at 578 (noting that the states' "leadership role" was critical to the ACA's passage).

336. KATIE KEITH & KEVIN W. LUCIA, THE COMMONWEALTH FUND, IMPLEMENTING THE AFFORDABLE CARE ACT 10 (2014), http://www.commonwealthfund.org/~/media/Files/Publications/Fund%20Report/2014/Jan/1727_Keith_implementing_ACA_state_of_states.pdf [https://perma.cc/4SCT-XUVM]; *see also*, *The Affordable Care Act's Health Insurance Marketplaces by Type*, COMMONWEALTH FUND, http://www.commonwealthfund.org/interactives-and-data/maps-and-data/state-exchange-map [https://perma.cc/9BJT-MUEW] (last visited May 28, 2016) (showing thirteen states with state marketplaces and nineteen states with varying levels of state-federal cooperation in 2015).

337. KEITH & LUCIA, *supra* note 336, at 14.

been regulated by states,[338] the ACA disrupts a great many state laws and regulatory practices and replaces them with a state-federal, shared-governance model.

It is difficult to imagine a litigant with a more concrete interest in litigating the constitutionality of the ACA than a state government considering its regulatory options. Before investing resources in regulatory reform, a state has a concrete interest in litigating the boundaries of state-federal power. If the federal statute seeks to enlist state cooperation in governance, the state has a direct interest in resolving the constitutionality of the federal scheme before deciding whether to cooperate. Should the federal scheme be struck down as unconstitutional after a state agrees to cooperate, the state will incur costs, including lost opportunity costs (that is, costs associated with the time and resources the state could have devoted to other regulatory matters).[339]

Standing based on a governance interest does not therefore turn on whether a state enacts a conflicting law or regulation. It depends on the nature of the federal statute. Because not every federal statute will seek state participation in its implementation, this approach does not turn states into "roving constitutional watchdog[s]."[340] Moreover, because states do not have unlimited resources, they are not likely to sue unless the administrative scheme will have a substantial impact on state regulatory institutions. In short, the approach does not open the floodgates.[341]

That does not mean, of course, that suits like Virginia's will proceed to the merits. As discussed above, Supreme Court decisions interpreting the Declaratory Judgment Act cast some doubt on whether a federal court would have federal subject-matter jurisdiction over a state suit to invalidate a federal law that applies only to individuals.[342] Moreover, even if statutory jurisdiction exists now, Congress could choose to limit

338. *Id.* at 9.

339. *See* Gluck, *supra* note 7, at 590 (noting that ACA "requires elaborate infrastructures to be created and implemented at the state and local levels").

340. Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 272 (4th Cir. 2011).

341. Scholars have raised concerns that state standing to challenge federal power risks turning courts into "councils of revision" pronouncing on abstract questions of state versus federal authority. *See, e.g.*, Vladeck, *supra* note 101, at 872. But under a governance approach to state standing, a true controversy would exist; mere preemption of state law by federal law would be insufficient.

342. *See supra* Section III.B.1; Walsh, *supra* note 287, at 65 (arguing that federal courts did not have federal subject-matter jurisdiction over Virginia's declaratory judgment suit because neither party could have brought a nondeclaratory action).

it. It could, for example, divest the lower federal courts of jurisdiction over state suits challenging a given statute—although its ability to do so will be limited by states' participation in the federal political process and could raise constitutional concerns.[343] A less controversial path would be to limit the time period in which a state may challenge a new regulatory regime, such as the ACA. The critical point is that the political process should determine the states' access to the federal courts, rather than an overly narrow view of Article III standing.[344]

2. Texas v. United States

In 2014, twenty-six states, including Texas, asked a federal court to enjoin a federal immigration policy known as "Deferred Action for Parents of Americans and Lawful Permanent Residents," or "DAPA."[345] The Secretary of Homeland Security established the policy by an executive memorandum that contained guidelines for federal agencies to consider when exercising their prosecutorial discretion to grant deferred action for certain individuals.[346] Deferred action does not grant a legal status, but it does allow an individual to be "lawfully present in the United States" for a period of time, which is subject to agency discretion.[347] The states challenged the Secretary's memorandum as a violation of the Administrative Procedure Act (APA) and the Take Care Clause of the Constitution.[348]

The district court held that Texas had standing to seek a preliminary injunction based on the economic costs of issuing driver's licenses to individuals "lawfully present" as a result of DAPA deferred action.[349] In deciding whether to stay the district court's preliminary injunction

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343. Suits between a state and the federal government are within the Supreme Court's original jurisdiction. Congress has specified that the Court has original, but not exclusive, jurisdiction over such suits. 28 U.S.C. § 1251 (2012). Although Congress may decide whether the United States consents to be sued, Congress may violate the Constitution by eliminating all federal court jurisdiction (including the Court's original jurisdiction) if the federal government has consented (e.g., under the APA) and a federal right of action exists. *See* California v. Arizona, 440 U.S. 59 (1979) (questioning whether Congress could eliminate the Court's original jurisdiction over controversies between states and the federal government).

344. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

345. Texas v. United States, 787 F.3d 733, 743 (5th Cir. 2015).

346. *Id.* at 744.

347. *Id.*

348. *Id.* at 743.

349. *Id.* at 746.

pending appeal, a divided panel of the Fifth Circuit agreed with the court's standing analysis.[350] The two-judge majority reasoned that even though Texas "could avoid financial injury by raising its application fees to cover the full cost of issuing and administering a license," it had established an Article III injury because "Texas's forced choice between incurring costs and changing its fee structure is itself an injury."[351] The majority clearly characterized this injury as an injury to Texas's "sovereign interest" in creating and enforcing laws.[352]

Subsequently, in considering the government's appeal of the preliminary injunction, a divided panel of the Fifth Circuit again agreed that Texas had standing.[353] The majority began its analysis by emphasizing that the state plaintiffs were entitled to "special solicitude" in the standing inquiry under *Massachusetts v. EPA*.[354] This special treatment was justified because the federal policy subjected the states to "substantial pressure" to change their laws and the states' surrender of control over immigration matters to the federal government implicated sovereignty interests.[355] The appellate panel affirmed the district court's grant of a preliminary injunction,[356] and the Supreme Court agreed to review the case this term.[357] Standing is one of the issues before the Court.[358]

With this case, the Court has an opportunity to clarify precisely when and why state plaintiffs are entitled to "special solicitude" for purposes of Article III standing. In doing so, the Court should also make clear the shortcomings of the traditional injury-in-fact analysis in state challenges to federal law. Just as *Virginia v. Sebelius* illustrates how a traditional injury-in-fact analysis can incorrectly bar state standing, *Texas v. United States* illustrates how a traditional injury-in-fact analysis can incorrectly grant state standing to challenge federal policy. As the federal government has argued, the plaintiffs' standing analysis arguably

350. *Id.* The panel ultimately denied the federal government's motion to stay the district court's preliminary injunction of DAPA. *Id.* at 769.

351. *Id.* at 749.

352. *Id.*

353. Texas v. United States, 809 F.3d 134, 162 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016).

354. *Id.* at 151.

355. *Id.* at 154–55.

356. *Id.* at 188.

357. United States v. Texas, 136 S. Ct. 906 (2016).

358. *See* Petition for a Writ of Certiorari, *Texas*, 136 S. Ct. 906 (No. 15-674), 2015 WL 7308179.

supports state standing to challenge virtually any federal law or action.[359] All a state would need to show is that it must either incur costs (however small) or change its laws as a result of a federal policy. And the costs need not be directly connected to the federal action challenged. But if this were truly enough for state standing, states would have standing to challenge virtually any federal law or policy based on indirect impacts to the states' economies. There would be no meaningful limit.

Application of the governance approach to state standing solves this problem. The DAPA memorandum at issue in *Texas* was an exercise of federal executive authority under the Immigration and Nationality Act (INA), a federal statute that does not contemplate an implementation role for state governments.[360] In fact, immigration statutes even limit states' enforcement authority.[361] Because federal immigration law does not contemplate shared governance through state implementation, states do not have a governance interest that supports Article III standing. A state could not therefore establish standing based on a sovereignty interest.[362]

A governance-interest analysis simplifies the threshold question of standing in a case like *Texas v. United States* and makes it less susceptible to judicial manipulation. As one of the dissenting circuit judges emphasized, governmental officials and state governments are deeply divided over DAPA; fifteen states supported the federal government's position in the case.[363] Judges have also used standing doctrine to reach conflicting results regarding similar immigration policies. A month before the first appellate decision in *Texas*, a different panel of the Fifth Circuit held that the indirect economic impacts of a similar deferred-action program were insufficient to support state standing.[364] Understanding state sovereignty in terms of governance

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359. *See* Supplemental Brief for Appellants at 9, Texas v. United States, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238) (arguing that the majority's approach would allow state standing anytime a state changes its law to conform to federal law—for example, by adopting an IRS definition or a health and safety standard).

360. 8 U.S.C. §§ 1101–1107 (2012).

361. 8 U.S.C. § 1252c (limiting detention authority to "certain illegal aliens").

362. Congress could attempt to give states standing by authorizing state challenges to federal actions under the INA, but it is not clear that Congress could confer Article III standing on a state simply by providing a statutory right of action. The Supreme Court's recent analysis in *Spokeo, Inc. v. Robins* suggests that a statutory right of action would be insufficient without a "concrete and particularized" injury. 136 S. Ct. 1540, 1548 (2016). The Court emphasized, however, that an injury need not be tangible to be concrete. *Id.* at 1549. Injury to a state's governance interest could therefore satisfy the concreteness requirement.

363. *Texas*, 787 F.3d at 784 (Higginson, J., dissenting).

364. Crane v. Johnson, 783 F.3d 244, 252 (5th Cir. 2015).

interests easily resolves the standing inquiry and helps ensure that political debates play out in the political branches of government.

CONCLUSION

We live in a world of shared governance, a world in which the supremacy of federal law depends on state cooperation in its implementation, and the efficacy of state regulation depends on federal support and action. The federal administrative state has expanded in an attempt to solve complex economic and social problems that traverse state and even national boundaries. But particularly in the health, safety, and environmental arenas, federal standards would mean very little in the absence of state cooperation. Without the assistance of state administrative agencies and mechanisms, the federal government would be unable to implement these protections in every state or would implement them in a way that fails to account for important local differences. In this "post-sovereignty" world, we need a doctrine of state standing that recognizes the interests of states as co-regulators under some federal laws.

The governance approach to state standing recognizes this regulatory reality. It allows states to challenge federal laws and actions when the underlying federal law contemplates state assistance in its implementation. When states share in the day-to-day business of regulating by implementing federal policy, they have a concrete governance interest in litigating the boundaries of state-federal authority and in challenging federal actions that affect states as regulatory partners. Massachusetts had such an interest in challenging the EPA's decision not to regulate GHG emissions under the Clean Air Act. And because the Affordable Care Act contemplates state implementation of market reforms and exchanges, Virginia had a governance interest in challenging the Act as an unconstitutional exercise of federal power. When federal law preempts state law, state standing should not turn on whether the state can allege a traditional injury-in-fact. Indeed, as *Texas v. United States* demonstrates, a state can almost always show that federal law has *some* effect on state laws or expenditures. But indirect injuries should not be enough. The governance approach to state standing would ensure that states have a direct interest in resolving questions of intergovernmental authority. It would also help clarify state standing doctrine, making it less susceptible to judicial manipulation and facilitating the resolution of other threshold questions.