

STATES' RIGHTS AND STATE STANDING

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*To allow the states to litigate in this fashion . . . would be a fundamental denial of perhaps the most innovating principle of the Constitution: the principle that the federal government is a sovereign coexisting in the same territory with the states and acting, not through them, like some international organization, but directly upon the citizenry, which is its own as well as theirs.*¹

I. INTRODUCTION

Writing for the 1966 volume of the *Supreme Court Review*, Professor Alex Bickel was hardly bashful in his criticism of the Supreme Court's disposition of three high-profile cases from the preceding Term, each of which had raised fundamental constitutional questions of first impression about the newly enacted Voting Rights Act of 1965.² Although his objections to the Court's decisions in *Harper v. Virginia Board of Elections*³ and *Katzenbach*

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1. Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89 (1966).

2. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 (2006)). See generally Bickel, *supra* note 1. As Bickel put it, "[v]ery few statutes can ever have been drafted with a wariest eye to the prospect of litigation, or a keener intention to ward it off as long as possible, than the Voting Rights Act." Bickel, *supra* note 1, at 79. Indeed, as Bickel continued, "[i]t was enacted . . . as a substitute for litigation, which had proved a sadly inadequate engine of reform." *Id.*

3. 383 U.S. 663, 670 (1966) (holding that Virginia's poll tax violates the Fourteenth

*v. Morgan*⁴ went to the merits,⁵ his real frustration with Chief Justice Warren's opinion for the Court in *South Carolina v. Katzenbach*, which upheld several of the Voting Rights Act's central provisions as valid exercises of Congress's power to enforce the Fifteenth Amendment,⁶ was that it reached the merits in the first place.⁷

Bickel's encomium that the Justices should rely on justiciability doctrines as a means of avoiding difficult constitutional questions on the merits was by then well known.⁸ And in *South Carolina*, Bickel simply couldn't understand the theory pursuant to which a state could have standing as a plaintiff to challenge the constitutionality of an act of Congress.⁹ After all, if states were generally entitled to sue on behalf of their citizens to challenge the constitutionality of federal regulation, not only would the Court be turning its back on a venerable line of precedent dating back at least to *Massachusetts v. Mellon* in 1923,¹⁰ but in doing so, the Justices would risk—in Bickel's view—opening the floodgates.¹¹ As he explained,

the nature of the federal union, the power and function of Congress and the President, and the power and function of the judiciary all would be radically altered if states could come into the original ju-

Amendment).

4. 384 U.S. 641, 643, 658 (1966) (upholding section 4(e) of the Voting Rights Act as a valid exercise of Congress's power to enforce the Fourteenth Amendment).

5. Bickel, *supra* note 1, at 95, 100 (discussing Bickel's merit-based objections to *Harper v. Virginia Board of Elections* and *Katzenbach v. Morgan*).

6. See 383 U.S. 301, 323–37 (1966); see also U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce [Section 1 of the Fifteenth Amendment] by appropriate legislation.”).

7. See Bickel, *supra* note 1, at 80–93.

8. See, e.g., Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40–79 (1961) (describing instances where the Supreme Court has declined to exercise jurisdiction because of standing and case and controversy); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (2d ed. 1986) (determining that the Supreme Court should only render final judgments and avoid those opinions which would be susceptible to administrative revision).

9. See Bickel, *supra* note 1, at 86–88.

10. 262 U.S. 447, 488–89 (1923) (stating that the Supreme Court only decides judicial controversies brought by a party who “must be able to show not only that a statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally”).

11. See Bickel, *supra* note 1, at 88–90.

risdiction at will to litigate the constitutional validity of national law applicable within their territories.¹²

Lest the point be missed, Bickel elaborated that “[i]t would make a mockery . . . of the constitutional requirement of case or controversy . . . to countenance automatic litigation—and automatic it would surely become—by states situated no differently than was South Carolina in this instance.”¹³

Indeed, that South Carolina was granted leave to file an original bill of complaint in the Supreme Court made even less sense to Bickel, given that the federal government had simultaneously sought to bring its *own* original action against Alabama, Mississippi, and Louisiana in which similar issues would have been raised, a suit that necessarily presented far fewer jurisdictional difficulties.¹⁴ In Bickel’s view, if the Justices’ true goal was to reach the merits, they could easily have done so by granting leave to file to the federal government, thereby avoiding the need to pervert standing doctrine to decide *South Carolina*.¹⁵ Instead, on the same day that the Justices granted leave to file to South Carolina (over three dissents), they denied leave to the federal government,¹⁶ and thereby chose “what was jurisdictionally by far the weaker of the two cases offered.”¹⁷ Because the Court ultimately reached the merits in *South Carolina*, Bickel predicted trouble down the road, anticipating that, “[t]ime and again, precisely like a council of revision, the Court would be pronouncing the abstraction that some law generally like the one before it would or would not generally be constitutional in the generality of its applications.”¹⁸

With nearly a half-century of hindsight, it seems clear that Bickel’s dystopian vision never materialized. Although first-year constitutional law students learn about *Oregon v. Mitchell*,¹⁹

12. *Id.* at 88–89.

13. *Id.* at 89–90.

14. *See id.* at 83–84. Perhaps for strategic reasons, Attorney General Katzenbach decided not to object to the Court’s jurisdiction to entertain South Carolina’s action. *See id.* at 85–86 & n.25.

15. *See Bickel, supra* note 1, at 83–86 & n.25.

16. *Compare* *South Carolina v. Katzenbach*, 382 U.S. 898, 898 (1965) (mem.), *with* *United States v. Alabama*, 382 U.S. 897 (1965) (mem.). Justices Black, Harlan, and Stewart would have denied South Carolina’s motion for leave to file. *South Carolina*, 382 U.S. at 898.

17. Bickel, *supra* note 1, at 86.

18. *Id.* at 90.

19. 400 U.S. 112 (1970) (striking down part of the Voting Rights Act Amendments of

South Dakota v. Dole,²⁰ *New York v. United States*,²¹ and other cases in which states appeared able to proceed as plaintiffs in challenges to the constitutionality of federal statutes,²² these cases have been the exceptions that prove the rule—that, notwithstanding *South Carolina, Mellon* is still good law; states still *do not* generally have standing to challenge the constitutionality of federal regulation on behalf of their citizens; and, more generally, the floodgates have not opened.

In this symposium essay, I use Virginia's challenge to the constitutionality of the minimum essential coverage provision of the Patient Protection and Affordable Care Act of 2010 ("ACA")²³ to explain this apparent lacuna. Indeed, my thesis is that, for a deceptively simple reason (and one by which the Supreme Court has consistently abided), Bickel's critique of *South Carolina* was right in theory but wrong in practice: although states may not generally challenge the constitutionality of federal regulation on behalf of their citizens, there are a handful of constitutional provisions under which the federal government operates on the states *qua* states, and not merely as a proxy for their citizens. However one describes the states' "interests" in such cases, those circumstances are qualitatively different from cases in which the states are merely aggregating their citizens' objections to federal legislation. Thus, when a state truly is the federal stakeholder against the federal government, state standing is not just appropriate, but necessary; thanks to the Court's modern standing jurisprudence, there may be cases in which no private party would otherwise be able to maintain the same lawsuit.²⁴ In contrast, when the state possesses no federal interest distinct from its citizens, allowing

1970 as exceeding Congress's power to enforce the Fourteenth and Fifteenth Amendments).

20. 483 U.S. 203 (1987) (upholding as a valid exercise of Congress's Spending Clause power a federal statute that conditioned states' receipt of certain federal highway funds on adoption of a minimum drinking age).

21. 505 U.S. 144 (1992) (striking down part of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the ground that it commandeered state legislative policy in violation of the Tenth Amendment).

22. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 517–19 (2006).

23. Pub. L. No. 111-148, § 1501, 124 Stat. 119, 244 (codified as amended at 26 U.S.C. § 5000A) (Supp. IV 2010)).

24. Cf. *Bond v. United States*, 564 U.S. ___, ___, 131 S. Ct. 2355, 2360 (2011) (holding that individual defendants in criminal proceedings are entitled to challenge the validity of a federal statute on Tenth Amendment grounds); *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 143–44 (1939) (holding that private plaintiffs lack standing to challenge federal regulation on Tenth Amendment grounds).

state standing in suits against the federal government would implicate all of the concerns Bickel cogently articulated in 1966.²⁵

So understood, the Fourth Circuit's rejection of Virginia's standing to challenge the constitutionality of the ACA in *Virginia ex rel. Cuccinelli v. Sebelius*²⁶ is not just faithful to precedent, but consistent with precisely this distinction. Whatever else one may think about Congress's power to require private citizens to purchase health insurance, it is difficult to see the argument that the ACA interferes with a federal interest specifically possessed by the states *qua* states.²⁷ To be sure, Virginia attempted to manufacture such a claim by enacting a state law that expressly conflicted with the ACA.²⁸ But if Bickel's thesis is correct, preemption of a state's law by the contested federal law cannot of itself provide the basis for state standing against the federal government—or else we very well might see the “mockery” of which Bickel warned.²⁹

Stepping back from the politics of the moment, though, this thesis would suggest that, Bickel's objections notwithstanding, the Supreme Court's decision in *South Carolina* was also correct. The Court there reached the merits of South Carolina's claim that Congress had exceeded its authority under the Fifteenth Amendment—a provision that only applies to, and only empowers Congress directly to act upon, states.³⁰ In contrast, when it came to South Carolina's *other* constitutional challenges to the Voting Rights Act, Chief Justice Warren concluded that

25. See Bickel, *supra* note 1, at 85–87.

26. 656 F.3d 253, 269 (4th Cir. 2011), *petition for cert. filed*, ___ S. Ct. ___ (U.S. Sept. 30, 2011) (No. 11-420).

27. States might have a separate Tenth Amendment challenge to part of the Medicaid provisions of the ACA, but Virginia sought only to challenge the minimum essential coverage provision—which imposes no obligation whatsoever on states. See *id.* at 266–67.

28. Compare Virginia Health Care Freedom Act, VA. CODE ANN. § 38.2–3430.1:1 (Cum. Supp. 2011) (providing with exceptions not relevant here that “[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage”), with Pub. L. No. 111-148, § 1501, 124 Stat. 119, 244 (codified as amended at 26 U.S.C. § 5000A (Supp. IV 2010)) (requiring individuals to maintain minimum insurance coverage).

29. Bickel, *supra* note 1, at 89–90. That is to say, although preemption by the objectionable federal policy might “injure” the state for Article III purposes, the state must still be seeking to enforce a substantive federal right in order to get around *Mellon*. Cf. *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242–44 (10th Cir. 2008).

30. See *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966). By definition, only “state action” can violate Section 1 of the Fifteenth Amendment. See *Terry v. Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J.).

[t]he word “person” in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court. Likewise, courts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt. Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen.³¹

South Carolina thereby only reinforces the conclusion that states may not seek to enforce constitutional interests against the federal government which they don’t themselves possess.

Ultimately, this essay concludes that state standing in suits against the federal government depends on the *literal* scope of states’ “rights.” And for perhaps the very same reasons why Bickel criticized *South Carolina*, the Supreme Court has been quite careful to police the distinction between cases in which the state is suing to enforce *its* federal interests (like *South Carolina*), and those—like *Virginia*—in which it is not.³² Put another way, notwithstanding the absence of careful explication of this idea in the Court’s jurisprudence, it is nevertheless ubiquitous.

To make this argument, Part II offers a capsule summary of the Supreme Court’s background jurisprudence with respect to state standing. In Part III, I turn specifically to the cases in which the Court has allowed states to proceed as plaintiffs against the federal government, many of which include little if any discussion of the state’s standing. As Part III suggests, in each of these cases, there is a clear and concrete *federal* interest possessed specifically by the state that the state plaintiff sought to vindicate. Finally, Part IV turns to *Virginia*, and explains why no such interest arises in the context of the ACA, notwithstanding the district court’s conclusion to the contrary. As Part IV concludes, were Virginia to have standing to challenge the ACA, then we might indeed realize the parade of horrors against which Bickel railed.

31. *South Carolina*, 383 U.S. at 323–24 (citations omitted).

32. Compare *South Carolina*, 383 U.S. at 307–08, with *Virginia ex rel. Cuccinelli*, 656 F.3d at 269.

II. A BRIEF HISTORY OF STATE STANDING

There is perhaps no better scholarly work on the history of the Supreme Court's approach to state standing than an eponymous 1995 *Virginia Law Review* article coauthored by Ann Woolhandler and Michael Collins.³³ Indeed, anyone who finds this subject of more than passing interest would do well to start with their 134-page masterwork on the subject, which surveys both the history of and competing theories animating the Supreme Court's approach in *all* suits brought by states, not just those against the federal government.³⁴ But whereas Woolhandler and Collins were interested in the full universe of state standing issues (against a multitude of potential defendants),³⁵ my focus here is somewhat more discrete: The question implicated in *Virginia* is whether a state has standing *as a state* to challenge the constitutionality of a federal statute on the ground that the federal statute preempts a contrary state law.³⁶ As the following discussion of the Supreme Court's state standing jurisprudence suggests, that question should not have been too difficult to answer in the abstract.

A. *Parens Patriae*, *Federal Defendants*, and the “Mellon” Rule

The fountainhead case in this field is the Supreme Court's 1922 decision in *Massachusetts v. Mellon*.³⁷ Like its companion case, *Frothingham v. Mellon*, *Massachusetts v. Mellon* involved a challenge to the constitutionality of the Sheppard-Towner (or Maternity) Act of 1921, which provided matching federal funds for private programs designed “to reduce maternal and infant mortality.”³⁸ In *Frothingham*, the Court rejected the claim that a private plaintiff had standing to challenge the federal Spending Clause statute merely because she was a taxpayer;³⁹ in *Mellon*, an

33. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995).

34. *See generally id.*

35. *See id.* at 392–96.

36. *See Virginia ex rel. Cuccinelli*, 656 F.3d at 269, 271–72.

37. 262 U.S. 447 (1923).

38. *Id.* at 479 (citing Sheppard-Towner (or Maternity) Act of 1921, ch. 135, 42 Stat. 224 (repealed 1927)).

39. *See* 262 U.S. at 486–89. *Frothingham* was decided together with *Mellon*, *see id.* at 478, and rejected a taxpayer's standing to bring the same challenge. *Id.* at 486–89; *see Arizona Christian Sch. Tuition Org. v. Winn*, ___ U.S. ___, ___, 131 S. Ct. 1436, 1442–43 (2011) (discussing *Frothingham* and the evolution of the Court's taxpayer standing jurisprudence).

action brought in the Supreme Court's original jurisdiction, the Justices confronted the separate claim that Massachusetts had standing to proceed as *parens patriae*—that is, as the effective parent of its citizenry.⁴⁰ Writing for a unanimous Court, Justice Sutherland disagreed:

It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.⁴¹

In other words, where suits challenging federal laws are concerned, *Massachusetts v. Mellon* held that it is the federal government, and not the states, that is entitled to act as *parens patriae*.⁴²

To be sure, the *parens patriae* rule that Justice Sutherland articulated did not spring from whole cloth in *Mellon*.⁴³ Rather, as Professors Woolhandler and Collins have explained, the origins of the rule for which *Massachusetts v. Mellon* came to stand can easily be found in nineteenth-century doctrine, in which “states could not (in federal court) ordinarily litigate against the federal government or other states conflicting claims to regulate, nor could they seek to enforce their own legislation or to vindicate their extra statutory interests in protecting their citizenry.”⁴⁴

Whatever its origins, *Massachusetts v. Mellon* was hardly alone in this regard. Indeed, the *U.S. Reports* are replete with contemporaneous decisions in which the Court routinely rejected comparable claims to state standing. Thus, in *Texas v. ICC*, Texas sought to challenge the constitutionality of key provisions of the

40. *Mellon*, 262 U.S. at 485–86.

41. *Id.* (citation omitted).

42. *See id.*; *see also* Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 839 (2009) (discussing the holding in *Mellon*).

43. *See* Woolhandler & Collins, *supra* note 33, at 392–93; *supra* notes 40–42 and accompanying text.

44. Woolhandler & Collins, *supra* note 33, at 393, 410–19, 426–28 & n.144 & 149, 431–34.

Transportation Act of 1920 on the ground that they exceeded Congress's powers to regulate interstate commerce.⁴⁵ But the Court unanimously ruled against the state's standing to proceed, at least without a more obvious injury to Texas's sovereign interests.⁴⁶

And comparable claims were made—and rejected—in *Florida v. Mellon*⁴⁷ and *New Jersey v. Sargent*.⁴⁸ In the former case, Florida sought to enjoin the Secretary of the Treasury from collecting certain taxes imposed by section 301 of the Revenue Act of 1926 on the ground that the taxes exceeded Congress's powers under Article I, Section 8.⁴⁹ The Justices ruled against Florida's standing, citing *Massachusetts v. Mellon* for the proposition that “there is no substance in the contention that the state has sustained, or is immediately in danger of sustaining, any *direct* injury as the result of the enforcement of the act in question.”⁵⁰ *Sargent*, like *Texas v. ICC* before it, held that challenges to the scope of federal regulation under the Commerce Clause were not properly brought by states absent some showing that some unique state interest was implicated.⁵¹

But perhaps the Court's strongest affirmation of the bar on state standing as *parens patriae* came in a case in which the Justices *allowed* the state to proceed—*Georgia v. Pennsylvania Railroad Co.*, decided in 1945.⁵² There, Georgia invoked the Court's original jurisdiction for the purpose of bringing a federal antitrust claim against twenty private railroad companies.⁵³ In explaining why Georgia had standing to proceed, Justice Douglas—writing for a 5-4 majority—accepted that “Georgia may maintain this suit as *parens patriae* acting on behalf of her citizens though here, as in *Georgia v. Tennessee Copper Co.*, we treat the injury to the

45. 285 U.S. 158, 159, 162–64 (1922) (citing Transportation Act of 1920, ch. 91, 41 Stat. 456, 469, 474 (repealed 1926)).

46. *See id.* at 162–64.

47. 273 U.S. 12 (1927).

48. 269 U.S. 328 (1926).

49. *See Mellon*, 273 U.S. at 15–16 (citing Revenue Act of 1926, ch. 27, 44 Stat. 9 (codified at 26 U.S.C. 1939 (1926))).

50. *Id.* at 16, 18.

51. *See Sargent*, 269 U.S. at 334–40; *Texas*, 258 U.S. at 62, 64 (holding that the state of Texas did not have standing to challenge a federal statute).

52. 324 U.S. 439, 450 (1945).

53. *Id.* at 443.

State as proprietor merely as a ‘makeweight.’⁵⁴ This was not inconsistent with *Massachusetts v. Mellon* because, as he explained,

this [is not] a situation where the United States rather than Georgia stands as *parens patriae* to the citizens of Georgia. This is not a suit like those in *Massachusetts v. Mellon*, and *Florida v. Mellon*, where a State sought to protect her citizens from the operation of federal statutes.⁵⁵

Indeed, the critical points in *Georgia* were that (1) the state was not suing the federal government; and (2) it was affirmatively seeking to enforce federal law, rather than challenge it.⁵⁶ Thus, *Georgia* appeared only to reinforce *Massachusetts v. Mellon*’s categorical bar on state suits as *parens patriae* against the federal government—the idea that a state has no sovereign interest in protecting its citizens *from* the operation of federal law.⁵⁷

At the same time, *Georgia* also suggested that states might sometimes have “quasi-sovereign” interests “in all the earth and air within its domain.”⁵⁸ Thus, whereas *Georgia* reinforced a state’s sovereign interest in *enforcing* the federal rights of its citizens, it also opened the door to additional interests that might suffice in future cases to create state standing—at least against *non-federal* defendants.

B. Snapp and “Quasi-Sovereign” Interests

The Court’s most detailed discussion of the various state interests that might support its standing came some thirty-five years later in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*.⁵⁹ In *Snapp*, Puerto Rico sued a group of Virginia apple growers, claiming that the defendants had violated federal law by refusing

54. *Id.* at 450–52 (citation omitted).

55. *Id.* at 446–47 (citation omitted).

56. *See id.*

57. *See id.* (“The enforcement of the criminal sanctions of these acts has been entrusted exclusively to the federal government. But when it came to other sanctions Congress followed a different course and authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.” (citation omitted)); *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923).

58. *See* 324 U.S. at 447–48 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (internal quotation marks omitted)).

59. 458 U.S. 592 (1982).

to honor a federal statutory preference for U.S. workers (including Puerto Rican citizens) over temporary foreign workers.⁶⁰ Assuming for the sake of argument that Puerto Rico was a “state,” the Court unanimously sustained its standing.⁶¹ As Justice White explained for the majority, “[a] State does not have standing as *parens patriae* to bring an action against the Federal Government. Here, however, the Commonwealth is seeking to secure the federally created interests of its residents against private defendants.”⁶²

Before reaching this conclusion, though, the Court devoted a fair amount of time to articulating the myriad of interests states might have as plaintiffs.⁶³ As Justice White wrote, “if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine.”⁶⁴ To have *parens patriae* standing, then, “the State must assert an injury to what has been characterized as a ‘quasi-sovereign’ interest.”⁶⁵ Because, as White conceded, this formulation “is a judicial construct that does not lend itself to a simple or exact definition,” the Court concluded that “[i]ts nature is perhaps best understood by comparing it to other kinds of interests that a State may pursue and then by examining those interests that have historically been found to fall within this category.”⁶⁶

The list the Court then expounded included two “easily identified” sovereign interests: “[T]he exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal; [and] second, the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders.”⁶⁷ The Court also identified two kinds of “nonsovereign interests” that might give rise to standing: proprie-

60. *See id.* at 594–99.

61. *See id.* at 608 n.15 (“[W]e agree with the lower courts and the parties that the Commonwealth of Puerto Rico is similarly situated to a State in this respect: [i]t has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State.”).

62. *Id.* at 610 n.16 (citations omitted). Justice White seemed to find it relevant that “the Secretary of Labor has represented that he has no objection to Puerto Rico’s standing as *parens patriae* under these circumstances.” *Id.*

63. *Id.* at 607–08.

64. *Id.* at 600.

65. *Id.* at 600–01.

66. *Id.*

67. *Id.* at 601.

tary interests and private interests pursued by the state as a nominal party.⁶⁸ In contrast to these categories, “quasi-sovereign interests . . . consist of a set of interests that the State has in the well-being of its populace.”⁶⁹ As Justice White conceded,

[f]ormulated so broadly, the concept risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant. The vagueness of this concept can only be filled in by turning to individual cases.⁷⁰

Thus, after surveying a number of prior cases, Justice White distilled them into two general categories: “First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”⁷¹

Snapp’s summary of state interests is useful, but comes with a critical caveat: all of the interests *Snapp* identified were in suits against *non-federal* defendants. The Court nowhere seemed to suggest that anything other than a direct injury to the state *as such* would support standing to sue the federal government.

To tie things together, consider the Court’s most recent foray into state standing: its 2007 decision in *Massachusetts v. EPA*.⁷² There, the Court concluded that *Mellon* did not foreclose Massachusetts’s standing to challenge the failure of the Environmental Protection Agency to conduct rulemaking to regulate greenhouse gas emissions by motor vehicles.⁷³ This was so, Justice Stevens reasoned, because of the “critical difference between allowing a State ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a State to assert *its* rights under federal law (which it has standing to do).”⁷⁴ Because *Mellon* did not apply, the majority turned to ordinary Ar-

68. *Id.* at 601–02.

69. *Id.* at 602.

70. *Id.*

71. *Id.* at 607.

72. 549 U.S. 497 (2007).

73. *Id.* at 505, 519–20 & n.17 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 484–85 (1923)).

74. *Id.* at 519–20 & n.17 (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945)) (emphasis added) (citing *Mellon*, 262 U.S. at 485); *see also id.* at 520 n.17 (“Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens; it rather seeks to assert its rights under the Act.”).

ticle III analysis—relying on the conclusion that rising sea levels would directly injure Massachusetts's proprietary interests as a coastal property owner.⁷⁵ In light of that conclusion, the majority held that Massachusetts had Article III standing to proceed, and reached the merits.⁷⁶

I do not mean to oversimplify the point (or the case law). For present purposes, it suffices to note that the Court has held fast to the *parens patriae* rule in suits by states against the federal government, and has recognized limited exceptions based entirely on the argument that, in particular cases, the plaintiff state possesses unique interests as a matter of *federal* law.⁷⁷ States are free to sue the federal government (or federal officers) to enforce *their* federal rights, but not to enforce the federal rights of their citizens—or to protect their citizens from the operation of federal laws.⁷⁸ With that understanding in mind, Part III turns to the cases where, without detailed discussion of *Mellon*, the Court has nevertheless allowed states to proceed as plaintiffs against the federal government.

III. THE SUPREME COURT'S QUIETER STATE STANDING CASES

Those who argue in support of broad theories of state standing typically invoke in support the handful of noteworthy Supreme Court cases prominently featuring states as plaintiffs in constitutional challenges to federal regulation.⁷⁹ But as this Part will demonstrate, upon closer examination, each of the cases that tend to be featured in such discussions reveal a federal constitutional interest specifically possessed by the plaintiff state *as such*.

75. *See id.* at 520 n.17, 521–26; RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 264–65 (6th ed. 2009).

76. *Massachusetts*, 549 U.S. at 526–27. Writing for the dissenters, Chief Justice Roberts disagreed on both counts—i.e., that *Mellon* didn't bar standing, and that Massachusetts could otherwise satisfy the Article III test. *See id.* at 536–47.

77. *See id.* at 520 n.17; *see also* text accompanying notes 35–76.

78. *See Massachusetts*, 262 U.S. at 485–86 (1923).

79. *See, e.g.*, Kenneth T. Cuccinelli, II, et al., *State Sovereign Standing: Often Overlooked, But Not Forgotten*, 64 STAN. L. REV. 89, 108–10 (2012) (citing *Bond v. United States*, ___ U.S. ___, ___, 1318 S. Ct. 2355, 2366 (2011); *Diamond v. Charles*, 476 U.S. 54, 65 (1986); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); *Oregon v. Mitchell*, 400 U.S. 112, 117 & n.1 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966)).

A. South Carolina and Mitchell: *Voting Rights and Election Control*

As noted above, the Supreme Court in *South Carolina v. Katzenbach* only reached on the merits South Carolina's argument that the Voting Rights Act of 1965 exceeded Congress's constitutional authority under Section 2 of the Fifteenth Amendment.⁸⁰ Such claims seem to fit comfortably within the distinction suggested above because the Fifteenth Amendment has been held only to reach state action, and so only in the most exceptional case could the federal government, through the Fifteenth Amendment, intrude on the rights of private citizens.⁸¹ Thus, Chief Justice Warren drew a sharp distinction between South Carolina's Fifteenth Amendment argument and its claims based on the Due Process Clause of the Fifth Amendment, the Bill of Attainder Clause of Article I, and separation of powers.⁸² In his words, a state does not "have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen."⁸³

This distinction returned to the forefront four years later, when the Supreme Court in *Oregon v. Mitchell* considered the constitutionality of various provisions of the Voting Rights Act Amendments of 1970.⁸⁴ Among other things, the Act lowered the voting age in all U.S. elections to eighteen;⁸⁵ suspended all literacy tests for five years;⁸⁶ and abolished residency requirements in presidential elections.⁸⁷ In *Mitchell*, the Court consolidated four different suits: one each by Oregon and Texas challenging Congress's power to fix an eighteen-year-old minimum voting age; and two brought by the United States against Arizona and Idaho, respec-

80. 383 U.S. 301, 323–24 (1966); *see supra* notes 15–18 and accompanying text.

81. *See* United States v. Cruikshank, 92 U.S. 542, 555–56 (1875); United States v. Reese, 92 U.S. 214, 217–18 (1875); *supra* Part II.A–B; *see also* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2347–60 (2003) (summarizing the ongoing debate over the *Cruikshank* and *Reese* decisions).

82. *South Carolina*, 383 U.S. at 323–24.

83. *Id.* at 324.

84. 400 U.S. 112, 117 (1970) (discussing Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006))).

85. § 301, 84 Stat. at 318; *Mitchell*, 400 U.S. at 117.

86. § 201, 84 Stat. at 315; *Mitchell*, 400 U.S. at 117.

87. § 202, 84 Stat. at 316–17; *Mitchell*, 400 U.S. at 117.

tively, each of which sought to adjudicate the validity of the eighteen-year-old voting age, along with the literacy test ban (in Arizona) and the abolition of residency requirements (in Idaho).⁸⁸

Because of the latter two suits, “[n]o question has been raised concerning the standing of the parties or the jurisdiction of this Court.”⁸⁹ Nevertheless, Justice Black (who announced the judgment of the Court) went out of his way to emphasize the extent to which the Constitution—and not just the Fourteenth and Fifteenth Amendments—divided authority over elections between the state and federal governments.⁹⁰ In federal elections, “the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them.”⁹¹ And in state and local elections, “the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States.”⁹² Underlying this discussion was a key insight—that the Constitution confers upon the states *themselves* a uniquely federal interest in supervising state and local elections.⁹³ Whether or not that interest barred Congress from imposing supervening qualifications, it certainly sufficed to empower states to *challenge* legislation that did so. After all, what *private* party would have standing to challenge the nationwide lowering of the voting age?

88. See *Mitchell*, 400 U.S. at 117 n.1 (citations omitted).

89. *Id.*

90. *Id.* at 123–26. On the only issue that truly divided the Justices—whether Congress had the constitutional authority by statute to lower the voting age in all U.S. elections to eighteen—the Court famously fractured, and Black’s solo opinion controlled. See *id.* at 117–18. Justices Douglas, Brennan, White, and Marshall thought the answer was yes while Chief Justice Burger and Justices Harlan, Stewart, and Blackmun thought the answer was no. See *id.* Justice Black split the difference, voting with Douglas, Brennan, White, and Marshall in favor of Congress’s power to lower the voting age in *federal* elections, but with Chief Justice Burger and Justices Harlan, Stewart, and Blackmun against Congress’s power to so provide in *state* and *local* elections. See *id.* The latter holding was subsequently overturned by the Twenty-Sixth Amendment. See U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

91. *Mitchell*, 400 U.S. at 123.

92. *Id.* at 125.

93. See *id.*

Thus, although *Mitchell* did not turn on state standing, Justice Black's discussion helps to drive home Chief Justice Warren's holding four years earlier in *South Carolina*: states are the relevant stakeholders when it comes to constitutional challenges to the congressional imposition of federal voting rights.⁹⁴ Although there may be circumstances in which federal law also creates *other* stakeholders, such as local governments and municipalities,⁹⁵ allowing states to sue the federal government in such circumstances is not just appropriate, but in most cases necessary.⁹⁶

B. *South Carolina v. Regan: Taxing and the Tenth Amendment*

Chronologically (and, as we shall see, analytically) the next Supreme Court case often invoked as supporting broad theories of state standing is *South Carolina v. Regan*,⁹⁷ in which South Carolina sought to challenge a federal statute that purported to eliminate the income tax exemption for the interest earned on certain classes of state-issued bonds.⁹⁸ South Carolina invoked the Court's original jurisdiction, and sought leave to challenge the constitutionality of the statute under the Tenth Amendment and the doctrine of intergovernmental tax immunity.⁹⁹

94. Compare *id.* at 123–25, with *South Carolina v. Katzenbach*, 383 U.S. 301, 307–08, 335 (1966).

95. See, e.g., *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, ___, 129 S. Ct. 2504, 2513–17 (2009).

96. See *Woolhandler & Collins*, *supra* note 33, at 492 (citing U.S. CONST. art. 1, § 2) (“Presumably the state sought to litigate its own liberty interest in setting voter qualifications, as provided by specific provisions of the Constitution that expressly contemplate state power to set such qualifications. . .”).

97. E.g., *Petition for Writ of Certiorari at 8, Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (No. 11-420) (citing *South Carolina v. Regan*, 465 U.S. 367, 378 (1984)).

98. *Regan*, 465 U.S. at 370–71; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 310(b)(1), 96 Stat. 324, 595 (1982) (repealed 1986). The practical effect of the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”) would have been, as South Carolina argued, “to require [states] to issue [their] obligations in registered form,” thereby “destroy[ing the states’] freedom to issue obligations in the form that [they] choose[.]” *Regan*, 465 U.S. at 371–72 (citing Voting Rights Act Amendment § 310(b)(1), 96 Stat. at 595).

99. *Regan*, 465 U.S. at 370.

The Court voted 8-1 to grant leave to file.¹⁰⁰ And although the crux of the Justices' analysis focused on analyzing the applicability *vel non* of the Tax Anti-Injunction Act,¹⁰¹ both Justice Brennan's majority opinion and Justice O'Connor's concurrence seized on South Carolina's unique interests in the suit.¹⁰² Writing for the majority, Justice Brennan emphasized that, although TEFRA could negatively impact South Carolina, the state had no alternative means of vindicating its interests—including via private suit by a third party.¹⁰³ Thus, the Tax Anti-Injunction Act should not apply:

First, instances in which a third party may raise the constitutional rights of another are the exception rather than the rule. More important, to make use of this remedy the State "must first be able to find [an individual] willing to subject himself to the rigors of litigation against the Service, and then must rely on [him] to present the relevant arguments on [its] behalf." Because it is by no means certain that the State would be able to convince a taxpayer to raise *its* claims, reliance on the remedy suggested by the Secretary would create the risk that the Anti-Injunction Act would entirely deprive the State of any opportunity to obtain review of *its* claims.¹⁰⁴

As such, South Carolina should be able to proceed in order to vindicate whatever rights it might possess as a state under the Tenth Amendment and the doctrine of intergovernmental tax immunity.¹⁰⁵ And although Justice O'Connor disagreed with some of Justice Brennan's analysis of the Tax Anti-Injunction Act, she agreed with the bottom line for largely the same reason, highlighting "a State *qua* State's Tenth and Sixteenth Amendment tax claims" as a basis for invoking the constitutional avoidance canon in interpreting the Tax Anti-Injunction Act not to apply.¹⁰⁶ As for whether the Court should exercise its discretion to deny leave to file, her answer turned on South Carolina's unique interests:

100. *Id.* Justice Stevens dissented in part, concluding that, even if the Tax Anti-Injunction Act did not apply, the Court should deny leave to file as an exercise of discretion, given that South Carolina's claims were ultimately meritless. *See id.* at 403 (Stevens, J., concurring in part and dissenting in part).

101. *See id.* at 372–82 (majority opinion) (citing 26 U.S.C. § 7421 (1982)).

102. *See id.* at 378–80; *id.* at 401–02 (O'Connor, J., concurring).

103. *Id.* at 378–81 (majority opinion).

104. *Id.* (alterations in original) (emphases added) (citations omitted) (footnote call number omitted) (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 747 n.21 (1974)).

105. *Id.* at 370, 380–82.

106. *Id.* at 384–85, 394–95, 398, 402–03 (O'Connor, J., concurring).

[T]he State *qua* State has demonstrated that it has no adequate alternative forum in which to raise its unique Tenth and Sixteenth Amendment claims. If the State issues bearer bonds and urges its purchasers to contest the legality of § 103(j)(1), it will suffer irreparable injury. The purchasers will inevitably demand higher interest rates as compensation for bearing the risk of future potential federal taxes. Conversely, if the State forsakes bearer bonds in favor of registered ones, it will bear the increased expense that issuers of registered bonds incur, and it will be unable ever to contest the constitutionality of § 103(j)(1). In short, the State will suffer irreparable injury if the Court does not assume original jurisdiction.¹⁰⁷

Because only a state could have affirmative claims in such cases under the Tenth and Sixteenth Amendments, it made sense to allow South Carolina to proceed.¹⁰⁸

C. *South Dakota v. Dole: Coercion and the Spending Clause*

Similar logic can be found in the Court's next implicit foray into state standing—its decision three years later in *South Dakota v. Dole*, in which it upheld the constitutionality of a federal statute that conditioned states' receipt of federal highway funds on their adoption of a minimum drinking age of twenty-one.¹⁰⁹ South Dakota's constitutional challenge to the statute raised two claims: that the Act exceeded Congress's power to spend for the general welfare, and that the Act violated the Twenty-First Amendment,¹¹⁰ which "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."¹¹¹

No one appears to have challenged South Dakota's standing to raise such claims—and for good reason.¹¹² To whatever extent the Twenty-First Amendment confers upon the states the power to set a minimum drinking age (a point that the *South Dakota* Court

107. *Id.* at 401–02 (citation omitted).

108. *Id.* at 401–02. Justice O'Connor thus drew a sharp contrast with cases in which "the original party does not present a clear and convincing case that the tax at issue will impair its ability to structure integral operations of its government *and* that irreparable injury is likely to occur absent review in the original jurisdiction." *Id.* at 402.

109. 483 U.S. 203, 205–06, 210–12 (1987) (discussing 23 U.S.C. § 158 (Supp. IV 1987)).

110. *Id.* at 205, 207; *see* U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

111. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

112. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 205–06 (1987).

did not specifically address),¹¹³ that is clearly an interest the states possesses *as* states—and therefore the appropriate basis for challenging a federal enactment. Similarly, whatever else may be said about third-party enforcement of Spending Clause statutes, a claim that the spending condition is unduly coercive of the recipient of the federal funds seems most clearly to rest *with* the recipient of the federal funds, even if, as in *South Dakota*, it is possible to identify non-state parties who also suffer injury as a result of the federal statute.¹¹⁴ Indeed, although Chief Justice Rehnquist rejected South Dakota's arguments on the merits, his opinion specifically turned on the conclusion that “the enactment of [higher drinking age] laws remains the prerogative of the States not merely in theory, but in fact.”¹¹⁵ If that were no longer true, a state may well have a case—not because Congress had exceeded its Article I powers, but because it violated a specific and unique constitutional interest on the state's part.

D. *New York v. United States: Anticommandeering*

That specific and unique interest was given fuller articulation five years later in *New York v. United States*, in which the Court struck down the “take-title” provision of the Low-Level Radioactive Waste Policy Amendments of 1985 on the ground that it unconstitutionally “commandeer[ed]” the legislative powers of the states by requiring states to “take title” to certain radioactive waste as a sanction for failing to otherwise provide for the disposal thereof in violation of the Tenth Amendment.¹¹⁶ As Justice O'Connor explained for the 6-3 majority,

[B]ecause an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be be-

113. *Id.* at 206 (“[W]e need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages.”).

114. For example, a twenty-year-old who sought legally to purchase alcohol in South Dakota would presumably be able to satisfy Article III standing requirements in a suit challenging the constitutionality of § 158. See U.S. CONST. art. III, § 2; 23 U.S.C. § 158 (Supp. IV 1987); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (stating the elements for Article III standing).

115. *South Dakota*, 483 U.S. at 203, 206, 211–12.

116. 505 U.S. 144, 149, 175–77 (1992) (citing Low-Level Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021e (1988)); see U.S. CONST. amend. X.

yond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all.¹¹⁷

Tellingly, Justice O'Connor's analysis thereby suggested that the flaw in the "take-title" provision was not that it exceeded Congress's regulatory power in the abstract, but that it unconstitutionally "commandeered" state policy.¹¹⁸ As she wrote,

where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.¹¹⁹

Whatever else may be said about this passage, it clearly turns on the identification of an interest uniquely possessed by states, as opposed to by private parties. Although Justice O'Connor elsewhere suggested that

it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment,

her analysis at least somewhat belies that observation.¹²⁰ Whatever their textual source, it is simply beyond dispute that states

117. *New York*, 505 U.S. at 176.

118. *Id.* at 175–76.

119. *Id.* at 168–69.

120. *Id.* at 159, 168–69, 175–76, 187–88.

possess the federalism interests that produced the constraints on federal power identified in *New York* as states—and not merely as *parens patriae* of their citizens.¹²¹ Otherwise, *New York* would have necessarily overruled *Mellon* and its progeny—and sub silentio, at that. That is to say, the anticommandeering rule for which *New York* has since come to stand reflects a unique interest against federal commandeering of state policy that is possessed by the states as such, and not a more general interest in keeping Congress within the bounds of its regulatory powers. Although individuals negatively affected by unconstitutional federal commandeering would also likely have standing to challenge such legislation, it is the *state's* constitutional interests that such a suit would necessarily seek to vindicate.¹²²

IV. VIRGINIA'S STANDING TO CHALLENGE THE ACA

With the analysis provided in Part II and Part III in hand, we come to the present dispute over the constitutionality of the ACA—and to the Commonwealth of Virginia's standing to raise that argument in federal court. All along, Virginia has disavowed any *general* interest that suffices to endow it with standing to proceed.¹²³ Instead, Virginia's argument for standing turns entirely on the Virginia Health Care Freedom Act ("VHCFA"), which was signed into law on March 24, 2010 (the day after President Obama signed the ACA into law) and provides that

[n]o resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding.¹²⁴

121. *See id.*

122. *Cf. Craig v. Boren*, 429 U.S. 190, 193–97 (1976) (discussing the principles governing *jus tertii* standing).

123. *See Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011).

124. VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011). *Compare* Press Release, Governor of Virginia's Office, Governor McDonnell Signs Virginia Health Care Freedom Act Legislation (Mar. 24, 2010), <http://www.governor.virginia.gov/news/viewRelease.cfm?id=88> (announcing Governor McDonnell's signing of the VHCFA), *with* Peter Nicholas & Christi Parsons, *Healthcare Overhaul: Bill's Passage Is Just the First Battle in a Long War; Democrats Turn Their Efforts to Winning over a Skeptical Public and Moving on to Other Policy*

Because no state law at the time required individuals to otherwise possess health insurance, the net effect of the VHCFA was to do nothing other than create a conflict with the federal ACA, which required Virginians to do exactly what the VHCFA purported to exempt them from doing. Thus, Virginia based its standing to challenge the ACA on the extent to which, if valid, the ACA would preempt the VHCFA.¹²⁵

A. *The Litigation*

Before filing its decision invalidating the ACA on the merits,¹²⁶ the district court filed a separate opinion agreeing with Virginia that the VHCFA sufficed to create standing.¹²⁷ As Judge Hudson summarized the issue,

[t]he Commonwealth argues that it is not prosecuting this case in a *parens patriae*, or quasi-sovereign capacity. In the immediate case, the Commonwealth is exercising a core sovereign power because the effect of the federal enactment is to require Virginia to yield under the Supremacy Clause. Unlike *Mellon*, irrespective of its underlying legislative intent, the Virginia statute is directly in conflict with Section 1501 of the Patient Protection and Affordable Care Act.¹²⁸

As for whether such a conflict was of itself dispositive, Judge Hudson turned to the Tenth Circuit's "[c]losely analogous" decision in *Wyoming ex rel. Crank v. United States*, which allowed a state to pursue declaratory and injunctive relief against a federal administrative decision that "a Wyoming statute purportedly establishing a procedure to expunge domestic violence misdemeanor convictions, in order to restore lost firearms rights, would not have the intended effect under federal law."¹²⁹ Because the Tenth Circuit there held that "[f]ederal regulatory action that preempts state law creates a sufficient injury-in-fact," the district court fol-

Goals, L.A. TIMES, Mar. 23, 2010, at A1 (describing President Obama's signing of the ACA).

125. *Virginia ex rel. Cuccinelli*, 656 F.3d at 268; see also Cuccinelli et al., *supra* note 79, at 91–94.

126. See *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010).

127. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 608 (E.D. Va. 2010) (citing *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008)).

128. *Id.* at 603; see also *id.* at 605–06 ("The mere existence of the lawfully enacted statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it.").

129. *Id.* at 606–07 (citing *Wyoming*, 539 F.3d at 1236).

lowed suit and held that the ACA's putative preemption of the VHCFA sufficed to confer standing upon Virginia to challenge the ACA.¹³⁰

On appeal, the Fourth Circuit Court of Appeals vacated the district court's judgment.¹³¹ As Judge Motz noted for the unanimous three-judge panel,

the question presented here is whether the purported conflict between the individual mandate and the VHCFA actually inflicts a sovereign injury on Virginia. If it does, then Virginia may well possess standing to challenge the individual mandate. But if the VHCFA serves merely as a smokescreen for Virginia's attempted vindication of its *citizens'* interests, then settled precedent bars this action.¹³²

Turning to that issue, Judge Motz seized on the fact that, "in each case relied on by Virginia, in which a state was found to possess sovereign standing, the state statute at issue regulated behavior or provided for the administration of a state program."¹³³ In contrast, "the VHCFA regulates nothing and provides for the administration of no state program. Instead, it simply purports to immunize Virginia citizens from federal law. In doing so, the VHCFA reflects no exercise of 'sovereign power,' for Virginia lacks the sovereign authority to nullify federal law."¹³⁴ Thus, as Judge Motz concluded,

[t]he presence of the VHCFA neither lessens the threat to federalism posed by this sort of lawsuit nor provides Virginia any countervailing interest in asserting the rights of its citizens. After all, the action of a state legislature cannot render an improper state *parens patriae* lawsuit less invasive of federal sovereignty. Nor does a state acquire some special stake in the relationship between its citizens and the federal government merely by memorializing its litigation position in a statute. To the contrary, the VHCFA, because it is not even hypothetically enforceable against the federal government, raises only "abstract questions of political power, of sovereignty, of government."

130. *Id.* at 606–07 (quoting *Wyoming*, 539 F.3d at 1242).

131. *Virginia ex rel. Cucinelli v. Sebelius*, 702 F. Supp. 2d 598, 601 (E.D. Va. 2010), *vacated* 656 F.3d 253, 273 (4th Cir. 2011).

132. *Id.* at 269.

133. *Id.*

134. *Id.* at 270; *see also id.* ("Moreover, the individual mandate does not affect Virginia's ability to enforce the VHCFA. Rather, the Constitution itself withholds from Virginia the power to enforce the VHCFA against the federal government." (citing *Ohio v. Thomas*, 173 U.S. 276, 283 (1899))).

The Constitution does not permit a federal court to answer such questions.¹³⁵

Otherwise, as the panel concluded, “a state could acquire standing to challenge *any* federal law merely by enacting a statute—even an utterly unenforceable one—purporting to prohibit the application of the federal law,”¹³⁶ and could thereby become “a roving constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state’s power to litigate in federal court.”¹³⁷ Because such a result would “contravene[] settled jurisdictional constraints,” the Court of Appeals rejected it.¹³⁸

Virginia subsequently petitioned for certiorari.¹³⁹ Although the Court has since decided to hear a full panoply of questions related to the constitutionality of the ACA, it has done so in the context of cases including at least some *non*-state plaintiffs (in which the state standing issue is not squarely presented), and has taken no action whatsoever on Virginia’s petition.¹⁴⁰ Thus, however the ACA ultimately fares in the Supreme Court, it seems safe to say that the Fourth Circuit will have the last word—at least for now—on whether a state has standing to challenge it.

B. *Analysis*

Situated against the discussion provided in Parts II and III of this essay, it seems clear that the Fourth Circuit had the better of the standing analyses. First, preemption, of and by itself, cannot create a sufficient interest on the state’s part to get around

135. *Id.* at 271 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923)) (citations omitted).

136. *Id.* Presumably, such standing would enable a state not merely to challenge the *constitutionality* of a federal statute, but also its *applicability*, especially if an otherwise valid federal law might not in fact preempt the state law invoked as the basis for standing. Indeed, it is difficult to understand how Virginia’s standing theory would distinguish between the two cases—preemption either *is* sufficient to support standing to challenge a federal statute or it isn’t; the basis for the challenge should be irrelevant.

137. *Id.* at 272.

138. *Id.*

139. *Id.* at 253, *petition for cert. filed*, ___ U.S. ___ (Sept. 30, 2011) (No. 11-420).

140. *See, e.g., Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1243–44 (11th Cir. 2011) (“Because it is beyond dispute that at least one plaintiff has standing to raise each claim here . . . this case is justiciable, and we are permitted, indeed we are obliged, to address the merits of each.”), *cert. granted*, 565 U.S. ___, 132 S. Ct. 604 (Nov. 14, 2011) (No. 11-398).

Mellon.¹⁴¹ *Wyoming*, the Tenth Circuit decision on which the *Virginia* district court rested its analysis, is not to the contrary.¹⁴² There, as was true in *Massachusetts v. EPA*,¹⁴³ *Wyoming's* suit was specifically authorized by (and brought pursuant to) the Administrative Procedure Act.¹⁴⁴ The issue before the Tenth Circuit was only whether the Bureau of Alcohol, Tobacco, and Firearms had acted arbitrarily and capriciously in interpreting a federal statute;¹⁴⁵ like *Massachusetts* before it, *Wyoming* was asserting *its* statutory rights under federal law.¹⁴⁶ The same can be said about the two circuit decisions on which the *Wyoming* court rested—both involved situations in which states sued agencies for their failure to *comply* with federal statutes.¹⁴⁷

To be sure, this distinction—between challenges to the federal government's failure to comply with a federal statute and a challenge to the federal government's purported failure to comply with the Constitution—may seem semantic. But behind this initial distinction is a far deeper one: the distinction between cases in which states are suing to vindicate *their* rights and those in which they are suing to vindicate the rights of their citizens. Indeed, although the Fourth Circuit seized on the difference between prior cases where states were seeking to protect active regulatory programs and the VHCFA, which “regulates nothing and provides for the administration of no state program,”¹⁴⁸ the far-more-convincing distinction is between cases in which states were suing to enforce an interest that they possessed *as* states

141. See *Virginia ex rel. Cuccinelli*, 656 F.3d at 268–69; *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923) (holding that states may not bring suits against the federal government as *parens patriae*).

142. See *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241–42 (10th Cir. 2008) (discussing the relationship between preemption and state standing); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 606–07 (E.D. Va. 2010) (adopting the Tenth Circuit's reasoning in *Wyoming*).

143. See 549 U.S. 497, 514 & n.16 (2007) (citing 42 U.S.C. § 7607(b)(1) (2006)) (discussing *Massachusetts's* use of statutory agency review to bring suit against an EPA order).

144. See *Wyoming*, 539 F.3d at 1242 & n.6 (citing Administrative Procedure Act § 704, 5 U.S.C. § 704 (2006)).

145. See *id.* at 1244.

146. See *supra* notes 43–44 and accompanying text.

147. See *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 441–44 (D.C. Cir. 1989) (“Congress has expressly contemplated that States may be heard to complain of injury inflicted by the Orders.”); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 231–33 (6th Cir. 1985) (“The threatened injury to a State's enforcement of its safety laws is within the zone of interests of the Administrative Procedure Act and the Hazardous Materials Transportation Act.”).

148. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269–70 (4th Cir. 2011).

and those in which states were bringing the exact same suit that one of their citizens could have brought.

That is to say, although the Fourth Circuit reached the right result (and, given their discussion of the implications of an alternative outcome,¹⁴⁹ for the right reasons), the analysis might have been even more convincing had it highlighted one devastatingly simple fact: there is no federal statute or constitutional provision that in any way creates or otherwise recognizes a distinct injury that Virginia will suffer *as a state* as a result of the ACA's minimum essential coverage provision. Without such a unique interest, none of the cases in which states have been allowed to proceed are apposite. The Fourth Circuit may not have provided the most convincing analysis, but its result seems entirely unassailable.

Nevertheless, in an article published in the *Stanford Law Review*, Virginia Attorney General Ken Cuccinelli, joined by the Commonwealth's Solicitor General and Deputy Attorney General, argued not only that the Fourth Circuit had erred, but that the conception of state standing summarized in this essay was deeply flawed.¹⁵⁰ For example, as they explained, "the Supreme Court's decision that South Carolina had standing to defend its election laws against alleged overreaching by the federal government makes [such reasoning] to the contrary inconsistent with binding precedent, at best, and irrelevant, at worst."¹⁵¹ As in their briefs, though, the Commonwealth's attorneys miss the point, for they fail to appreciate that what they describe as "sovereign" standing requires more than merely a preempted *state* law—and always has. Even a casual survey of the cases described above underscores this conclusion: state standing against the federal government requires a unique *federal* constitutional interest on the states' part, and it would necessarily be bootstrapping to conclude that such an interest can be manufactured solely by state law.

149. *See id.* at 272.

150. *See Cuccinelli et al., supra* note 79, at 15–16.

151. *Id.* at 121–22; *see also id.* at 123 ("[T]he Supreme Court recognizes state sovereign standing."). The authors similarly attack reliance on Professor Bickel's work to support these arguments, even though, as explained above, I think Bickel is absolutely right in theory, and wrong only in how he applied that theory to *South Carolina*. It is a logical non sequitur that misapplication of a principle to one specific case undermines the principle in the abstract.

Indeed, and tellingly, nowhere in the Commonwealth's extensive briefing nor in the *Stanford Law Review* article can any mention be found of the distinction between the nature of the state's federal constitutional interest in the relevant cases, even though it is axiomatic that state law could not transgress Article III's standing requirements any more than a federal statute could.¹⁵² No matter how many different ways the VHCFA is framed as creating a "sovereign" interest, such an interest must necessarily come from federal—rather than state—law for *Mellon* to make any sense.

C. *Implications: The Perils of Broad State Standing*

To be sure, there is an easy and obvious temptation to dismiss arguments for and against Virginia's standing to challenge the constitutionality of the ACA's minimum essential coverage provision as nothing more than result-oriented logic. After all, many of those who have argued against Virginia's standing to challenge the ACA are more typically aligned with views in *favor* of both (1) a fairly liberal interpretation of Article III standing doctrine; and (2) the constitutionality of the minimum essential coverage provision. At the same time, many of those who have argued just as forcefully in favor of the Commonwealth's right to proceed on its own behalf in federal court are more frequently affiliated with views cutting *against* both (1) broad conceptions of standing doctrine; and (2) the constitutionality of the minimum essential coverage provision. I imagine that it is exceedingly difficult to find anyone who believes either that Virginia has standing and should lose on the merits or that it does not have standing but should otherwise prevail—although that observation may simply be repeating a far more general (and results-oriented) critique of the Supreme Court's standing jurisprudence.

For present purposes, I fall into the former camp. And yet, my goal in this symposium essay has not been to recapitulate the specific arguments against Virginia's standing to challenge the minimum essential coverage provision; in my view, Judge Motz's doctrinal analysis speaks for itself. Instead, my aim has been to situate the ACA litigation within the more general discussion of

152. Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (holding that Congress cannot confer standing in excess of Article III).

the circumstances in which states should be allowed to challenge the constitutionality of federal legislation *as* sovereigns. In other words, whereas my view is that the Fourth Circuit correctly applied existing law to the question of Virginia's standing, what was missing from the court of appeals' opinion—and what I have hoped to contribute in this essay—is the normative explanation for why state standing in such circumstances *should* be disfavored, regardless of the politics of the moment or the role of *stare decisis*.

To be sure, Judge Motz hints at this toward the end of her opinion for the Court of Appeals, especially in her discussion of the “roving constitutional watchdog” that states could become under Virginia's standing theory.¹⁵³ But the real normative case against broad state standing has three elements—two of which can fairly be traced to Professor Bickel,¹⁵⁴ and one of which cannot.

First, allowing state standing to challenge the constitutionality (and perhaps even mere applicability) of a wide range of new federal legislation would create a very real risk of converting the federal courts into councils of revision. If an alleged conflict between state and federal law itself sufficed to sidestep *Mellon* and otherwise satisfy the injury-in-fact prong of standing analysis, there would be no way of ensuring that the challenged federal law *actually* injured a specific party; the existence of standing would be governed simply by the abstract—and in many cases hypothetical—conflict between state and federal law. Whatever else may be said about the ideological divisions behind the Supreme Court's Article III standing jurisprudence, the Justices invariably have common cause when it comes to the patent inconsistency between such an open-ended approach to standing and the intended constitutional role of the federal courts.¹⁵⁵

153. *Virginia ex rel. Cuccinelli*, 656 F.3d at 272.

154. *See* Bickel, *supra* note 1, at 85–88, 92–93 (discussing South Carolina's lack of standing and state passing affirmative legislation to avoid compliance with federal law).

155. *See, e.g.,* *Raines v. Byrd*, 521 U.S. 811, 826–28 (1997) (“There would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime. But it is obviously not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III courts” (citations omitted)).

Second, and related, state laws like Virginia Health Care Freeman Act are more than just ordinary legislation. Consider, for example, Idaho's Health Freedom Act:

The power to require or regulate a person's choice in the mode of securing health care services, or to impose a penalty related thereto, is not found in the Constitution of the United States of America, and is therefore a power reserved to the people pursuant to the Ninth Amendment, and to the several states pursuant to the Tenth Amendment. The state of Idaho hereby exercises its sovereign power to declare the public policy of the state of Idaho regarding the right of all persons residing in the state of Idaho in choosing the mode of securing health care services free from the imposition of penalties, or the threat thereof, by the federal government of the United States of America relating thereto.¹⁵⁶

Rather than providing affirmative state policies, these laws are better seen as attempts at *de facto* nullification, since they purport to exempt state residents from having to comply with federal laws.¹⁵⁷ Because it is axiomatic that the Supremacy Clause forbids state nullification of federal legislation,¹⁵⁸ it appears that the only purpose such laws serve is to invite the same result, albeit via judicial invalidation rather than outright nullification. To allow standing based on such laws then is to not only ignore the deeper principles of judicial restraint on which *Mellon* and its progeny rest, but also to take up these states' invitation.

Third, although Bickel never suggested this point, Professors Woolhandler and Collins have suggested that "expansive state standing has a serious potential to undermine rather than complement individual standing in constitutional cases."¹⁵⁹ This is true, they argue, because expansive state standing would prioritize claims by states over those of individuals and because of the

156. IDAHO CODE ANN. § 39-9003(1) (West, Westlaw through 2011 chs. 1–335).

157. See THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY 122–23 (2010)) (quoting IDAHO CODE ANN. § 39-9003(1) (West, Westlaw through 2011 chs. 1–335) (holding Idaho's law out as a model for future state efforts to nullify objectionable federal legislation).

158. See, e.g., *Mayo v. United States*, 319 U.S. 441, 445 (1943) (describing the "corollary" of the Supremacy Clause to be that "the activities of the Federal Government are free from regulation by any state" (citations omitted)).

159. Woolhandler & Collins, *supra* note 33, at 396; see also *id.* at 504 ("[I]ncreased state standing could potentially undermine individual standing to litigate individual and structural constitutional guaranties." (citation omitted)).

likelihood that it would be “majority reinforcing,” placing into tension “[t]he freedom of government” and “the freedom from government.”¹⁶⁰

Allowing states to sue in virtually any instance of conflict with federal law would thereby short-circuit the principal means through which majorities have traditionally exercised control over the scope of federal power—at the ballot box—and come at the indirect but potentially unavoidable expense of those constituencies who historically have been left to the courts to vindicate their rights. Thus, whatever else one might think of the Supreme Court’s standing jurisprudence, its existing doctrine concerning the standing of states as sovereigns may in fact reflect—and protect—some of the most fundamental principles of American constitutional law.

V. CONCLUSION

Writing for a unanimous panel of the D.C. Circuit in 1985, then-Judge Scalia considered the distinct question of whether Congress has the power to override the *Mellon* rule and confer upon states the power to bring *parens patriae* suits against the federal government—that is, whether *Mellon* is a prudential limit on standing or a constitutional one.¹⁶¹ Although the Court of Appeals held that Congress *could* confer standing in at least some cases, Judge Scalia emphasized that the court’s holding was a “narrow” one.¹⁶² As he explained,

[e]ven assuming that the separation of powers constitutes the only bar, permitting some state actions on traditional *parens patriae* grounds might conceivably implicate separation-of-powers concerns; and statutory alteration of the traditional *parens patriae* criteria might well do so. But at least where the state meets those traditional criteria; where the citizen interests represented are concrete interests which the citizens would have standing to protect in the courts themselves; and where the subject of challenge is Executive compliance with statutory requirements in a field where the federal government and the states have long shared regulatory responsibility;

160. *Id.* at 482–86.

161. *Maryland People’s Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985).

162. *Id.* at 322.

we have no doubt that congressional elimination of the rule of *Massachusetts v. Mellon* is effective.¹⁶³

In one sense, this discussion dovetails with the analysis at the heart of this essay; where Congress empowers states to sue to vindicate their citizens' rights, it is arguably investing the states with a uniquely federal interest that states may in turn seek to enforce in the federal courts. But the suggestion that the separation of powers might bar Congress from so providing in at least some cases goes one step further, and suggests that there is far more to the *Mellon* rule than a mere prudential limitation on the exercise of federal judicial power.¹⁶⁴ I dare say that Professor Bickel would concur.

163. *Id.* (citations omitted) (footnote call number omitted).

164. *See also, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (explaining why Congress cannot confer standing in excess of Article III); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983) (offering a more general version of this argument).