

# WHEN CAN A STATE SUE THE UNITED STATES?

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*State suits against the federal government are on the rise. From Massachusetts' challenge to federal environmental policy, to Oregon's confrontation over physician-assisted suicide, to Texas's suit over the Obama administration's immigration program, States increasingly go to court to express their disagreement with federal policy. This Article offers a new theory of state standing that seeks to explain when a State may sue the United States. I argue that States have broad standing to sue the federal government to protect state law. Accordingly, a State may challenge federal statutes or regulations that preempt, or otherwise undermine the continued enforceability of, state law. But, contrary to many scholars and jurists, I contend that States do not have a special interest in overseeing the manner in which federal agencies implement federal law. The Supreme Court was therefore wrong to suggest that States deserve "special solicitude" in the standing analysis when they seek to ensure that the federal executive abides by congressional mandates. States have special standing to protect federalism principles, not the constitutional separation of powers.*

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INTRODUCTION

State suits against the federal government are on the rise. States have objected to federal policy on immigration,<sup>1</sup> the environment,<sup>2</sup> and health insurance,<sup>3</sup> among other areas.<sup>4</sup> Al-

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<sup>1</sup> See, e.g., *Texas v. United States*, 787 F.3d 733, 743, 748–54 (5th Cir. 2015) (upholding state standing to challenge the federal executive’s Deferred Action for Parents of Americans and Lawful Permanent Residents program); *Crane v. Johnson*, 783 F.3d 244, 247, 252 (5th Cir. 2015) (denying Mississippi standing to challenge the federal executive’s Deferred Action for Childhood Arrivals program); see also *Texas v. United States*, 106 F.3d 661, 664 & n.2 (5th Cir. 1997) (“assum[ing], without deciding, that the plaintiffs have standing” to challenge the federal executive’s alleged “fail[ure] to control illegal immigration”); *California v. United States*, 104 F.3d 1086, 1089–90 (9th Cir. 1997) (failing to comment on California’s standing in a similar suit); *New Jersey v. United States*, 91 F.3d 463, 465–66 (3d Cir. 1996) (failing to comment on New Jersey’s standing in a similar suit).

<sup>2</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 505–06 (2007) (upholding state standing in a suit challenging the EPA’s failure to regulate motor vehicle emissions); *Texas v. EPA*, 726 F.3d 180, 198–99 (D.C. Cir. 2013) (denying standing when States objected to the EPA’s regulation of greenhouse gas emissions); *Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1130 (11th Cir. 2005) (upholding Alabama and Florida’s standing “to ensure the [federal executive’s] compliance with federal law” because the agency’s decision could “adversely impact the environment and economy” of the States).

<sup>3</sup> See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 266 (4th Cir. 2011) (denying state standing in a constitutional challenge to the Affordable Care Act’s individual mandate provision, although noting that the district court found standing).

<sup>4</sup> See, e.g., *Wyoming v. U.S. Dep’t of Interior*, 674 F.3d 1220, 1223–24, 1238 (10th Cir. 2012) (denying state standing to challenge federal regulations governing snowmobile use); *Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp.

though some of these lawsuits challenge the constitutionality of federal legislation, state officials often—and, it seems, increasingly—take aim at the manner in which federal agencies administer (or fail to administer) federal statutes.<sup>5</sup> The Supreme Court signaled its endorsement of such lawsuits in *Massachusetts v. EPA*.<sup>6</sup> The Court upheld the State's standing to challenge the EPA's failure to regulate greenhouse gas emissions, declaring that Massachusetts was "entitled to special solicitude in our standing analysis."<sup>7</sup> As scholars have observed, the decision in *Massachusetts* suggests that "states should be accorded special access to federal court in order to challenge federal agency action."<sup>8</sup> That is, "states have a special role in monitoring and improving" federal agencies' implementation of federal law.<sup>9</sup>

Many scholars have welcomed these state-led lawsuits as a crucial new check on the administrative state.<sup>10</sup> Accordingly,

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2d 237, 239–42, 244–48 (D. Conn. 2005) (upholding state standing to challenge, only on Tenth Amendment grounds, a federal statute and regulations governing the fishing industry); *Kansas ex rel. Hayden v. United States*, 748 F. Supp. 797, 798–99, 801–02 (D. Kan. 1990) (upholding standing where State alleged that the Federal Emergency Management Agency had improperly failed to declare a particular region a "major disaster").

<sup>5</sup> See *supra* notes 1–4; see also Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 533 (1994) ("[I]n recent years states have increasingly asked federal judges to compel the federal government to enforce its laws and regulatory standards."); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273, 287 (2007) (finding an increase in such suits beginning in the 1990s).

<sup>6</sup> 549 U.S. 497 (2007).

<sup>7</sup> *Id.* at 519–21. Some scholars predicted that the decision would "encourage states and state AGs to file suits against the federal government." *E.g.*, 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, 1780 (2008).

<sup>8</sup> Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 67–68 (2011); see also Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 494–95 (2012) (noting that *Massachusetts* "may suggest a broad role for states in challenging federal executive action—and federal executive inaction," although expressing uncertainty about the decision's long-term impact); Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN. ST. L. REV. 1, 73–74 (2007) ("This 'special solicitude' rule gives states a favored status when bringing suits against federal administrative agencies.").

<sup>9</sup> Metzger, *supra* note 8, at 67.

<sup>10</sup> See, e.g., Mank, *supra* note 7, at 1771–72 ("agree[ing] with the *Massachusetts* majority that states" may bring suit "if the federal government has allegedly failed to perform a statutory or constitutional duty"); Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 276 (2009) (arguing that broad state standing "does no more than ensure that executive discretion is confined within the boundaries of the Constitution and federal law"); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1073–74 (2010) (argu-

commentators have urged the judiciary to grant States “special” standing to challenge federal agency action (and inaction).<sup>11</sup> Although the reaction in the lower courts has been mixed,<sup>12</sup> recent events suggest the long-term significance of the Court’s standing analysis in *Massachusetts v. EPA*. In 2014, Texas and twenty-five other States challenged the Obama administration’s “deferred action” program, which allows certain undocumented immigrants with close ties to the United States to remain in the country.<sup>13</sup> The States argued that the federal executive violated its duty to properly enforce federal immigration law. In upholding state standing, the Fifth Circuit Court of Appeals underscored that Texas “is entitled to the same ‘special solicitude’ as was Massachusetts.”<sup>14</sup>

I seek to challenge this concept of “special” state standing to police the federal administrative state.<sup>15</sup> I argue that States

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ing that States are entitled to “special solicitude” to challenge an agency’s failure to regulate when state law is preempted); Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 834 (2009) (asserting that States should have standing to object to the executive’s implementation of federal law, even when private parties do not); Sara Zdeb, Note, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059, 1079 (2008) (advocating state suits to challenge “an agency’s failure to enforce the law”). Notably, Gillian Metzger’s endorsement is more qualified. See Metzger, *supra* note 8, at 67–75 (exploring the possibility that States may be effective monitors of federal agencies, but suggesting that Congress should decide whether States ought to play such a special role).

<sup>11</sup> See sources cited *supra* note 10. Even before *Massachusetts v. EPA*, many commentators urged courts to grant States broad standing to challenge federal agency action. See, e.g., Case Comment, *Federal Jurisdiction: State Parens Patriae Standing in Suits Against Federal Agencies*, 61 MINN. L. REV. 691, 702 (1977) (arguing that States can help ensure that a federal agency “act[s] in conformity with its statutory authority”); Gary Igal Strausberg, *The Standing of a State as Parens Patriae to Sue the Federal Government*, 35 FED. B.J. 1, 20 (1976) (same); see also Comment, *State Standing To Challenge Federal Administrative Action: A Re-Examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069, 1090–92 (1977) (advocating state standing to “seek review of federal agency action allegedly inconsistent with a federal statute” because of the States’ role in implementing administrative programs).

<sup>12</sup> See cases cited *supra* notes 1–4.

<sup>13</sup> *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015).

<sup>14</sup> *Id.* at 752. I discuss below Texas’s argument that it has standing to protect its state driver’s license regime. See Part II.A.3 (discussing the case and urging that Texas’s suit is not aimed at redressing this alleged injury). Notably, the *Texas* case was pending before the Supreme Court when this Article went to print.

<sup>15</sup> Notably, I focus here on “special” state standing—that is, instances when a State may bring suit, even when a private party could not. I do not question that a State has standing to bring suit (against the federal government or another defendant) when it asserts a concrete injury in fact that would be sufficient for a private party. Thus, for example, if the Supreme Court in *Massachusetts v. EPA* had concluded that either a State or a private party with substantial coastal property could challenge the EPA’s failure to regulate motor vehicle emissions, then that

are entitled to “special solicitude” in the standing analysis in only one context: when they seek to enforce or defend state law. I further contend that States may assert that sovereign interest against the federal government; thus, States have broad standing to challenge federal statutes and regulations that preempt, or otherwise undermine the continued enforceability of, state law. But States do *not* have a special interest in the manner in which the federal executive enforces *federal* law.<sup>16</sup>

This state-law focused conception of state standing accords with the constitutional design. As Ernest Young and other federalism scholars have observed, “virtually all the values that federalism is supposed to promote . . . turn on the capacity of the states to exercise self-government.”<sup>17</sup> States therefore should have standing to challenge federal action that preempts, or otherwise undermines the enforceability of, state law—and thereby hinders the capacity of States to exercise self-government. By contrast, it is hard to see how States have a special interest—over and above that of private parties, localities, or even Congress itself—in the federal executive’s compliance with federal statutes. In sum, I argue that States have broad standing to protect *federalism* principles, not the constitutional separation of powers.<sup>18</sup>

Moreover, articulating a limiting principle for special state standing also serves Article III values. Standing doctrine is designed in part to identify when litigants have an interest that merits judicial resolution, while leaving many other matters to the political process.<sup>19</sup> As the judiciary has long recognized, state governments *must* have the authority to enforce and to protect the continued enforceability of their laws in court; ab-

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case would not be an example of “special” state standing. However, the Court’s reasoning, combined with the Justices’ comments during oral argument, strongly suggest that the Court would not have granted standing to such a private party. See *infra* notes 173–175 and accompanying text.

<sup>16</sup> My focus here is on state standing to challenge the federal government’s implementation of federal law. I therefore do not address the important, but separate, question of the standing of state institutions to challenge state law—the issue in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). See *id.* at 2658–59, 2665–66 (holding that the state legislature had standing to challenge a state initiative permitting an independent commission to draw electoral districts).

<sup>17</sup> Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 4 (2004); see *infra* notes 156–160 and accompanying text.

<sup>18</sup> Notably, I do not assert that a State has standing to challenge *any* federal action that arguably undermines federalism, such as a statute that may exceed federal power. Instead, my contention is that state standing to preserve state law helps to serve core federalism principles. See *infra* Part I.D.

<sup>19</sup> See *infra* notes 153–155, 170–172 and accompanying text.

sent such a power, States could not enforce many laws at all.<sup>20</sup> This longstanding rule helps to justify broad state standing to protect state law, including (as I argue below) in suits against the federal government.<sup>21</sup> By contrast, a more expansive definition of special state standing might threaten to erode the limits on the Article III judicial power—by enabling every dispute between a State and the federal government to wind up in court.<sup>22</sup>

My primary goal is to show that this state-law focused approach to state standing better accords with both precedent and constitutional principle.<sup>23</sup> But I also believe that this theory has other strong normative underpinnings. Recent political science and legal scholarship suggests that state attorneys general, who are elected in most states, have strong political and institutional incentives to respect state constituent preferences.<sup>24</sup> Thus, it is perhaps no surprise that the Massachusetts attorney general attacked the executive's non-enforcement of federal environmental law, while Texas officials took aim at the executive's immigration program. The institutional design and political incentives of state attorneys general seem to make them well-suited to represent state interests, including the interest in protecting state law against federal interference.<sup>25</sup> But these features provide no basis for presuming that state attorneys general should have a special role in protecting the *national* interest in executive compliance with federal law.

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<sup>20</sup> See *infra* Part I.A–C.

<sup>21</sup> See *infra* Part I.B–C.

<sup>22</sup> I recognize that standing doctrine is a deeply contested area of jurisprudence. See *infra* note 154 (citing some of the scholarly critiques of standing doctrine). For purposes of this analysis, I assume that the Constitution does place limits on the types of “injuries” that can be adjudicated in federal court. Given that assumption, I seek here to identify a limiting principle for “special” state standing (that is, the standing that States enjoy over and above that of private parties). I believe that the principle offered here makes the most sense of precedent as well as federalism and Article III values.

<sup>23</sup> I do not seek here to demonstrate that the original meaning of Article III either clearly compels, or forecloses, this argument about state standing. As described below, due to restrictions on federal jurisdiction, States *could not* bring suit in lower federal courts until 1875; they were confined to the Supreme Court's original jurisdiction (which the Court has long read more narrowly than the text of Article III might allow). See *infra* notes 61, 89, 110 and accompanying text. Accordingly, I believe it is hard to make definitive claims about the original meaning of Article III in the context of state standing. Instead, I seek to provide the best account of our state standing precedents, as shaped by history and constitutional principle.

<sup>24</sup> See *infra* notes 216–219 and accompanying text.

<sup>25</sup> See *infra* Part II.B.

This analysis has important implications for both current litigation and legal scholarship. First, I challenge the commentary and case law that endorse special state standing to police the administrative state.<sup>26</sup> States have no special interest in the federal executive's enforcement of federal law. Second, I also seek to push against a very different strain in the state standing literature. Prominent scholars—first, Alexander Bickel and, more recently, Ann Woolhandler and Michael Collins—have argued against *any* state sovereign standing to sue the federal government.<sup>27</sup> I argue, by contrast, that States may bring suit against the federal government to protect the continued enforceability of state law.

The analysis proceeds as follows. Part I argues that States have broad standing to protect state law from federal interference. However, as both Part I and Part II emphasize, States may challenge only federal statutes or regulations that preempt, or otherwise undermine the enforceability of, state law and may seek redress only for that harm. States have no special standing to ensure that federal agencies properly implement federal law. Part II further asserts that this approach to state standing is supported by functional considerations, given the institutional design and incentives of the office of state attorney general.

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<sup>26</sup> See *supra* notes 10–11, 14 and accompanying text.

<sup>27</sup> See Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 85–90 (arguing that broad state standing “would make a mockery . . . of the constitutional requirement of case or controversy”); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 396–97 (1995) (recommending that the judiciary “limit states’ pursuit of their sovereignty interests in the federal courts”); see also Stephen I. Vladeck, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845, 849–50 (2012) (contending that States may sue the federal government only to protect their own “federal interests”—rights conferred by the Constitution or federal law—and not to challenge federal preemption). Notably, Professor Bickel suggested that States lack Article III standing to sue the federal government to protect state law. Professor Woolhandler’s recent work suggests that she does not believe such suits are barred by Article III but instead that courts should refuse to permit such actions, absent congressional authorization. Compare Bickel, *supra*, at 89–90 (suggesting that States lack Article III standing in this context), with Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 236 (2014) (arguing that state sovereign actions require congressional authorization). I also dispute Professor Woolhandler’s assertion about the need for congressional authorization. See *infra* notes 167–169 and accompanying text. I do not, however, contend that States have special standing to “articulate and defend individual rights.” *Contra* Timothy Sandefur, *State Standing to Challenge Ultra Vires Federal Action: The Health Care Cases and Beyond*, 23 U. FLA. J.L. & PUB. POL’Y 311, 313 (2012).

## I

## THE SCOPE OF STATE STANDING

Article III provides that the federal “judicial Power shall extend to [certain] Cases . . . [and] Controversies” involving both the United States and the States.<sup>28</sup> But the constitutional text is noticeably silent about what types of “cases” and “controversies” governments may bring—that is, about the scope of governmental standing. As scholars have begun to recognize, other constitutional principles and provisions help inform the meaning of Article III “cases” and “controversies” in this context.<sup>29</sup>

One of those background principles is the concept that a sovereign government must have standing to enforce and defend its laws in court. Indeed, this principle is so uncontroversial that the Supreme Court rarely considers the standing of the state or federal government to pursue those sovereign interests. Standing issues tend to arise only when, for example, the government *declines* to defend its laws,<sup>30</sup> or (relatedly) private parties seek to enforce or defend laws on the government’s

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<sup>28</sup> See U.S. CONST. art. III, § 2, cl. 1–2.

<sup>29</sup> See, e.g., Seth Davis, *Standing Doctrine’s State Action Problem*, 91 NOTRE DAME L. REV. 585, 589 (2015) (arguing that due process and separation of powers principles inform standing doctrine); Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1314–16 (2014) [hereinafter Grove, *Standing Outside*] (arguing that Article II and Article I help define the scope and limits of executive and legislative standing to represent the United States); Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 627–28 (2014) (arguing that structural principles, particularly bicameralism and the separation of law enactment from law implementation, “help explain why the House and the Senate have standing to enforce committee subpoenas but lack standing to defend federal laws”); see also Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 296–306 (2011) (arguing that state enforcement of federal criminal law would raise Article II questions under the Take Care and Appointments Clauses as well as standing questions). Scholars have further argued that these broader structural considerations inform the scope of private party standing. See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 790–92 (2009); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2256 (1999). Some of the early state standing cases discussed here may also have been influenced by assumptions about the scope of the federal judiciary’s equitable powers. See *infra* Part I.B; see also Kristin Collins, *Article III, Social Movements, and the Making of the Modern Federal Courts 5* (draft on file with author) (discussing how many early twentieth-century observers asserted that the federal courts’ equitable powers were an integral part of the Article III judicial power).

<sup>30</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013). Courts have also considered the standing of the federal executive when it has filed suit to protect the rights of private parties. See, e.g., *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980) (holding that “the United States may not



behalf.<sup>31</sup> Accordingly, in sharp contrast to private parties,<sup>32</sup> governments may invoke federal jurisdiction to enforce or to protect the continued enforceability of their laws, absent any showing of concrete injury.<sup>33</sup>

To the extent that scholars have commented upon government standing, they have generally emphasized its breadth—that is, how governments may invoke federal jurisdiction when private parties cannot.<sup>34</sup> But I argue that, at least with respect to state governments,<sup>35</sup> this background principle of sovereignty not only broadens but also helps define the limits of state standing. States have a special capacity to invoke federal jurisdiction *only* to enforce, or to protect the continued enforceability of, state law.

### A. The States' Special Standing

Although federal and state governments often enforce and defend their laws in their own court systems, States must at times pursue these interests in federal court.<sup>36</sup> I begin here

sue [a local police department] to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority").

<sup>31</sup> See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000) (holding that a private *qui tam* relator had “representational standing” to enforce the False Claims Act on behalf of the United States); *infra* notes 49–53 and accompanying text.

<sup>32</sup> To establish standing, a private party must demonstrate a concrete injury that was caused by the defendant and that can be redressed by the requested relief. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). A private party cannot sue simply to enforce federal law. See *FEC v. Akins*, 524 U.S. 11, 23–24 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992).

<sup>33</sup> See *infra* Part I.A.; see also *In re Debs*, 158 U.S. 564, 584 (1895) (the federal government’s “obligation[ ] . . . to promote the interest of all, and to prevent the wrongdoing of one . . . , is often of itself sufficient to give it a standing in court”).

<sup>34</sup> See, e.g., Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 667 (2006) (“In suits by the government, courts characteristically make no inquiry into injury.”); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 627 (2005) (“Federal courts regularly adjudicate government enforcement actions that would lack ‘injury in fact’ if brought by private plaintiffs.”).

<sup>35</sup> In earlier work, I examined the limits on the power of the federal executive branch and Congress to bring suit in federal court. See *Grove*, *Standing Outside*, *supra* note 29.

<sup>36</sup> Beginning in 1815, Congress allowed federal revenue officers to remove state court actions, including criminal prosecutions, to federal court. See *Tennessee v. Davis*, 100 U.S. 257, 267–69, 271 (1879) (holding that Congress had properly authorized removal of a state court criminal prosecution for murder, even if it required a federal court to “administer[ ] the State’s criminal law”). In the post-Civil War era, Congress also authorized private individuals to remove state court actions, if they could show that the state courts would not protect their civil rights. See *Georgia v. Rachel*, 384 U.S. 780, 794–805 (1966); see also *Virginia v. Rives*, 100 U.S. 313, 323–24 (1879) (concluding that removal of a murder prose-

with a relatively uncontroversial context: cases in which States assert their interest in state law in suits against private parties. I argue that the litigation between States and private parties suggests both the breadth and the boundaries of special state standing—boundaries that also apply in litigation against the United States.

A State must often defend its laws in federal court against constitutional challenge.<sup>37</sup> The State need not, of course, demonstrate standing when a private party invokes federal jurisdiction by bringing suit. But the State must have standing to appeal.<sup>38</sup> *Roberts v. U.S. Jaycees*<sup>39</sup> offers an illustration. The case arose out of a determination by a Minnesota state agency that the Jaycees, a private social club, had violated state antidiscrimination law by excluding women.<sup>40</sup> The Jaycees brought suit in federal district court, seeking a declaration that the State's effort to force them to accept female members violated their First Amendment right to freedom of association.<sup>41</sup> When the Jaycees prevailed in the lower court, no one doubted the State's standing to appeal to defend its law against that constitutional challenge.<sup>42</sup>

*Maine v. Taylor*<sup>43</sup> even more clearly illustrates the breadth of state standing to defend state law. The case arose out of a criminal prosecution brought by the federal government. Federal officials charged the defendant with violating a federal statute that prohibited, among other things, the importation of fish

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cution was improper under the statute); *Collins & Nash*, *supra* note 29, at 278–84 (discussing the removal statutes). Notably, the Supreme Court has not doubted state standing to appeal cases removed under these provisions—even when the State's only interest was the enforcement of state criminal law. *See, e.g., Georgia*, 384 U.S. at 792–93, 805–06 (ruling on the merits of the State's appeal and concluding that removal was proper).

<sup>37</sup> *See, e.g., Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (seeking review of a decision striking down an application of the State's specialty license program on First Amendment grounds); *Florida v. Powell*, 559 U.S. 50, 55–56 (2010) (seeking review of a decision setting aside a robbery conviction on Fifth Amendment grounds); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (noting that a State's sovereign interests are “regularly at issue in constitutional litigation”).

<sup>38</sup> *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (“[S]tanding ‘must be met by persons seeking appellate review . . . .’” (quoting *Arizona for Official English v. Arizona*, 520 U.S. 43, 64 (1997))); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“The party invoking federal jurisdiction bears the burden of establishing” standing).

<sup>39</sup> 468 U.S. 609 (1984).

<sup>40</sup> *See id.* at 612–16.

<sup>41</sup> *See id.* at 615–16.

<sup>42</sup> The Court ultimately upheld the application of the state antidiscrimination law to the Jaycees. *See id.* at 623, 631.

<sup>43</sup> 477 U.S. 131 (1986).

or wildlife “in violation of any law or regulation of any State.”<sup>44</sup> The defendant argued that the state law at issue in his case (a Maine statute governing the importation of live baitfish) was unconstitutional, and Maine intervened to defend its law.<sup>45</sup> When a lower federal court held the state law invalid (and, thus, an improper basis for the federal prosecution), the federal government did not seek further review; only Maine took the case to the Supreme Court.<sup>46</sup> The criminal defendant objected that Maine lacked “standing to appeal the reversal of a federal conviction.”<sup>47</sup> The Court acknowledged that a State may not have a “legally cognizable interest in the prosecutorial decisions of the Federal Government” but nevertheless upheld state standing, declaring that “a State clearly has a legitimate interest in the continued enforceability of its own statutes.”<sup>48</sup>

In sharp contrast, the Supreme Court has made clear that private parties generally *lack* standing to protect the “continued enforceability” of state law, absent a showing of concrete injury.<sup>49</sup> For example, in *Diamond v. Charles*, the Court held that a private individual, who strongly opposed abortion, lacked standing to defend a restrictive Illinois abortion statute, after state officials declined to do so.<sup>50</sup> “Because the State alone is entitled to create a legal code, only the State has . . . [a] ‘direct stake’” in defending its law.<sup>51</sup> Likewise, in *Hollingsworth v. Perry*, the Court rejected private party standing to defend a state law banning same-sex marriage.<sup>52</sup> The Court declared that the private actors’ “only interest was to vindicate the constitutional validity of a generally applicable California law. . . .

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<sup>44</sup> *Id.* at 132–33 (quoting 16 U.S.C. § 3372(a)(2)(A) (2012)).

<sup>45</sup> *See id.* at 133 (noting that the criminal defendant argued that the state law violated the Dormant Commerce Clause); *see also* 28 U.S.C. § 2403(b) (2012) (permitting a State to intervene to defend the constitutionality of its statutes).

<sup>46</sup> *See Maine*, 477 U.S. at 133, 136–37.

<sup>47</sup> *Id.* at 133, 136.

<sup>48</sup> *Id.* at 137.

<sup>49</sup> In *Hollingsworth v. Perry*, the Court left open the possibility that private parties could be appointed as “agents” of the State, but indicated that there are significant restrictions on a State’s capacity to appoint private agents. *See* 133 S. Ct. at 2665–67 (2013).

<sup>50</sup> *See* 476 U.S. 54, 64–67 (1986).

<sup>51</sup> *Id.* at 65 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)); *see also id.* at 62 (“Had the State of Illinois . . . sought review . . . , the ‘case’ or ‘controversy’ requirement would have been met, for a State has standing to defend the constitutionality of its statute.”).

<sup>52</sup> *See* 133 S. Ct. at 2662–68.

[S]uch a ‘generalized grievance’—no matter how sincere—is insufficient to confer standing” on private parties.<sup>53</sup>

These cases leave little doubt that the judiciary has long accorded States “special solicitude” in the standing analysis, particularly as compared to private parties. A State may enforce or defend state law, absent any showing of concrete injury. But these precedents do not suggest that States have unlimited power to invoke federal jurisdiction. A State has special standing to assert its interest in enforcing, and protecting the continued enforceability of, its *own state law*. It follows that States can invoke federal jurisdiction only to prevent and to seek redress for harms to that sovereign interest.<sup>54</sup>

Accordingly, Minnesota could appeal and defend its law in the *Jaycees* case—both to stop the Jaycees from violating its civil rights law and to ensure the continued enforceability of its law against similar groups. But Minnesota could not bring suit against the Jaycees for, say, violating Wisconsin civil rights laws. Nor could Minnesota object if Wisconsin enforced (or declined to enforce) its own civil rights laws against the Jaycees. “Because the State alone is entitled to create a legal code, only the State has . . . [a] ‘direct stake’” in enforcing or defending its law.<sup>55</sup>

Likewise, in *Maine v. Taylor*, the Supreme Court did *not* conclude that Maine had standing to assert the federal government’s interest in prosecuting the criminal defendant. The Court instead upheld Maine’s standing to protect the “continued enforceability” of its own state law.<sup>56</sup> The State had standing to seek redress only for the violation of its own sovereign interests, not those of the federal government.

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<sup>53</sup> *Id.* at 2656; *cf. id.* at 2664 (“No one doubts that a State has a cognizable interest ‘in the continued enforceability’ of its laws . . . .” (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986))).

<sup>54</sup> Accordingly, the “special” standing of state governments may be understood in terms similar to the traditional injury, causation, and redressability test for private parties. State standing differs from that of private parties principally at the injury prong: a State need not show a concrete “injury-in-fact” but instead suffers a judicially cognizable injury—and can bring suit or appeal—when its state law is violated or declared invalid (and thus no longer enforceable). But the State is still confined to redressing *that injury* by bringing an enforcement action against an alleged violator or appealing a lower court ruling that declares its law invalid.

<sup>55</sup> *Diamond*, 476 U.S. at 65 (quoting *Sierra Club*, 405 U.S. at 740).

<sup>56</sup> *See Maine v. Taylor*, 477 U.S. 131, 137 (1986).

## B. State Standing Against the United States: Historical Background

States have standing to protect the continued enforceability of state law—not only in suits against private parties but also against the United States. Notably, the key precedents supporting this point have been largely overlooked in the state standing literature.<sup>57</sup> Instead, scholars are far more familiar with an important limitation on state standing to sue the United States. In *Massachusetts v. Mellon*,<sup>58</sup> the Supreme Court announced that a State cannot bring an action against the federal government as *parens patriae*—that is, as the representative of private citizens to enforce their federal rights. “In that field,” the Court declared, “it is the United States, and not the State, which represents [private citizens] as *parens patriae*.”<sup>59</sup> Whatever the scope of that prohibition,<sup>60</sup> the precedents (including *Mellon* itself) make clear that this rule does not cast doubt on state standing to ensure the continued enforceability of state law.

These precedents, however, also underscore the boundaries of such state standing. States may challenge only federal statutes or regulations that preempt, or otherwise undermine the continued enforceability of, state law. And States may seek

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<sup>57</sup> That is true, despite the fact that early twentieth-century commentators discussed these cases as standing cases. See sources cited *infra* note 101. I have found no modern references to *Colorado v. Toll*, 268 U.S. 228 (1925). And although *Missouri v. Holland*, 252 U.S. 416 (1920), is well-known as a treaty power case, see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005), it has often been overlooked (or misread) in the state standing literature. Some legal commentators have (incorrectly) treated the case as one recognizing state standing to assert proprietary rights. See, e.g., Bickel, *supra* note 27, at 88 & n.34; Kenneth T. Cuccinelli, II et al., *State Sovereign Standing: Often Overlooked, but Not Forgotten*, 64 STAN. L. REV. 89, 103 n.72 (2012), and some commentators appear to have overlooked the case entirely, see, e.g., Vladeck, *supra* note 27, at 851 (failing to mention *Missouri* in a careful piece analyzing state standing to “challenge the constitutionality of a federal statute” on preemption grounds); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051 (2011) (failing to mention *Missouri*).

<sup>58</sup> 262 U.S. 447 (1923).

<sup>59</sup> *Id.* at 485–86; see also *Florida v. Mellon*, 273 U.S. 12, 18 (1927) (citing *Massachusetts v. Mellon* in a decision denying state standing in a *parens patriae* action against the federal government).

<sup>60</sup> See Woolhandler, *supra* note 27, at 225–26 & 225 n.88 (noting the debate over this issue). For present purposes, I assume that the bar on state *parens patriae* suits against the federal government is a constitutional rule (although I acknowledge that is a contestable assumption). My goal is to show that, even if one makes this assumption, there is still a strong case for state standing to protect state law from federal interference. See also *infra* notes 150–152, 165–166 and accompanying text (distinguishing *parens patriae* suits from state suits to protect state law).

redress only for that harm—by requesting that the preemption be lifted, so that the State may once again enforce its law as it sees fit.

### 1. *State Standing in the Lower Courts*

The Supreme Court has long recognized the authority of States to sue the federal government to protect state law—at least when the action was commenced in lower federal court.<sup>61</sup> (I discuss below the more nuanced history of the Court’s original jurisdiction.<sup>62</sup>) In *Missouri v. Holland*,<sup>63</sup> for example, the State challenged on Tenth Amendment grounds the federal Migratory Bird Treaty Act, which prohibited the hunting of certain wild birds.<sup>64</sup> Missouri alleged that it could bring the suit for two separate reasons. First, the State had long regulated the hunting of wild birds, and the new federal statute “directly . . . conflict[ed]” with its more permissive state laws.<sup>65</sup> Accordingly, the federal statute “infringe[d] upon [the State’s] sovereign right . . . to control and regulate the taking, killing and use of wild game within its borders.”<sup>66</sup> Second, the State alleged (apparently, for the first time in the Supreme Court) its “ownership” of

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<sup>61</sup> Notably, this history of state standing in the lower federal courts does not date back to the Founding. The lower federal courts lacked jurisdiction over state-initiated suits until 1875, *see infra* note 89, and state suits against the federal government do not appear to have become common until the early twentieth century. Nevertheless, during that era, the Court does not appear to have seriously questioned state standing to protect state law in the lower federal courts, despite the fact that the Court was quite hostile to such state standing in its nineteenth-century original jurisdiction cases. *See infra* note 89 (discussing original jurisdiction cases like *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 50, 76–77 (1867)). Indeed, the Court permitted many suits in which the State challenged federal preemption without discussing standing. *See, e.g.,* *Alabama v. United States*, 325 U.S. 535, 536–37 (1945) (deciding on the merits a suit by States challenging an Interstate Commerce Commission order that would preempt intrastate railroad rates); *North Carolina v. United States*, 325 U.S. 507, 508–09, 519–20 (1945) (deciding on the merits a state suit against an ICC order that would preempt intrastate railroad rates); *Transit Commission v. United States*, 284 U.S. 360, 367–68 (1932) (rejecting as “without merit” a state suit alleging that an Interstate Commerce Commission order constituted an “unconstitutional invasion of the state’s sovereignty”); *New York v. United States*, 257 U.S. 591, 597–602 (1922) (deciding on the merits New York’s suit against the Interstate Commerce Commission challenging a federal order that preempted state rules governing intrastate railroad rates).

<sup>62</sup> *See infra* Part I.B.2.

<sup>63</sup> 252 U.S. 416 (1920).

<sup>64</sup> *See* Migratory Bird Treaty Act, ch. 128, 40 Stat. 755–57 (1918) (codified as amended at 17 U.S.C. §§ 703–12 (2012)); *Missouri*, 252 U.S. at 430–31.

<sup>65</sup> *See* Missouri’s Motion to Advance at 2–4, *Missouri*, 252 U.S. 416 (No. 609).

<sup>66</sup> *Id.* at 2.

all the wild game in its territory and that the federal law interfered with this “property right.”<sup>67</sup>

The Supreme Court, in an opinion by Justice Holmes, held that Missouri could bring the suit. Notably, although the Court recognized that the State “allege[d] a pecuniary interest, as owner of the wild birds within its borders,”<sup>68</sup> the Court did not uphold state standing on this ground. The Court held instead that Missouri’s bill in equity was “a reasonable and proper means to assert the alleged quasi sovereign rights of a State.”<sup>69</sup>

It is important to understand what Justice Holmes meant by the State’s “quasi sovereign rights.” Today, jurists and scholars often associate the term with *parens patriae* standing, the authority of a State to bring suit on behalf of private citizens, largely because that is how the Supreme Court used the term in a 1982 case.<sup>70</sup> But Justice Holmes was using the term “quasi-sovereign” in a very different sense—to refer to the State’s sovereign interest in the continued enforceability of state law.<sup>71</sup> Indeed, that was the injury claimed by Missouri. The State alleged that the Migratory Bird Treaty Act preempted state law and thereby “infringe[d] upon [its] sovereign right” to regulate hunting “within its borders.”<sup>72</sup> Other passages of the opinion confirm that the Court was focused on this interest. Justice Holmes observed: “To put the claim of the State upon

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<sup>67</sup> I have canvassed the filings in the case. The State did not clearly raise a property interest until the Supreme Court. See Brief of Appellant at 2, 13–14, *Missouri*, 252 U.S. 416 (No. 609).

<sup>68</sup> *Missouri*, 252 U.S. at 431.

<sup>69</sup> *Id.*; see also *id.* at 431 (“The ground of the bill [in equity] is that . . . the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes.”). As noted above, these early state standing precedents may have been influenced in part by assumptions about the scope of the federal judiciary’s equitable powers. See *supra* note 29. A full examination of the possible relationship between state standing and federal equity is beyond the scope of this Article. But I am grateful to John Harrison for pointing out this potential link.

<sup>70</sup> See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982) (“Quasi-sovereign interests . . . are not sovereign interests, [or] proprietary interests . . . . They consist of a set of interests that the State has in the well-being of its populace.”); see also Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 303–04 (2005) (noting the Court’s use of the term *parens patriae* to refer to the State’s “‘quasi-sovereign’ interests” (quoting *Alfred L. Snapp*, 458 U.S. at 601–02)). Notably, courts and commentators also at times use the term *parens patriae* to refer to a State’s sovereign interest in enforcing its laws; yet they still differentiate “sovereign” from “quasi-sovereign” interests. See Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863–71 (2000).

<sup>71</sup> See *Alfred L. Snapp*, 458 U.S. at 601.

<sup>72</sup> Missouri’s Motion to Advance at 2, *Missouri*, 252 U.S. 416 (No. 609).

title is to lean upon a slender reed.”<sup>73</sup> Instead, the State’s claim was that “but for the treaty the State would be free to regulate this subject itself.”<sup>74</sup> (The Court, however, upheld the federal statute as a lawful exercise of the treaty power.<sup>75</sup>)

At the time that Justice Holmes wrote, it would not have seemed odd for the Court to use the term “quasi-sovereign” to refer to Missouri’s “sovereign” interest in state law. During that era, “quasi-sovereign” was often used to refer to the fact that a State’s “sovereignty” was limited and could be overridden by the federal government.<sup>76</sup> That is, States were not fully sovereign; they were only quasi-sovereign. But States had standing to protect their “quasi-sovereign” interest in the continued enforceability of state law.

A few years later (and, notably, after *Massachusetts v. Mellon*), the Court reaffirmed this doctrine of “quasi-sovereign” standing to sue the United States. In *Colorado v. Toll*, the State challenged a regulation issued by the Director of the National Park Service to govern “chauffeur services” in Rocky Mountain National Park (that is, businesses that transported tourists around the park).<sup>77</sup> The State alleged that the federal regulations, as applied, conflicted with—and thus preempted—a state law governing the chauffeur industry.<sup>78</sup> The federal government responded that the State could not bring the suit, because the State was not itself engaged in the chauffeur in-

<sup>73</sup> *Missouri*, 252 U.S. at 434.

<sup>74</sup> *Id.*

<sup>75</sup> *See id.* at 434–35.

<sup>76</sup> *See* *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (describing the States as “quasi-sovereignities bound together in the Union”). Indeed, some early commentators described *Missouri v. Holland* (and the case discussed below, *Colorado v. Toll*) as involving “sovereign interests.” *See* Note, *The Legal Interest Necessary to Challenge a Federal Appropriation*, 24 VA. L. REV. 777, 780 n.16 (1938). *See also* Lauren Benton, *From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900*, 26 L. & HIST. REV. 595, 596 (2008) (reporting that, during the late-nineteenth century, “[i]nternational lawyers used [the term quasi-sovereignty] to refer to the status of sub-polities within empire-states”); Arthur W. Machen, Jr., *The Strange Case of Florida v. Mellon*, 13 CORNELL L.Q. 351, 357 & n.9 (1928) (characterizing the Supreme Court’s use of the term “quasi-sovereign” as another, somewhat less respectful, way of describing “sovereign” interests).

<sup>77</sup> *See* 268 U.S. 228, 229 (1925).

<sup>78</sup> *See* Bill in Equity—Complaint at 7–8, Transcript of Record, *Colorado*, 268 U.S. 228 (No. 234). Colorado claimed that, while the State had been generous in issuing licenses, the relevant federal official (Roger Toll) had granted a monopoly to one tourism company. *See* Brief in Behalf of Appellant at 7–9, *Colorado*, 268 U.S. 228 (No. 234); *see also id.* at 10–11 (challenging the regulations as unauthorized by Congress or, in the alternative, challenging the statute on Tenth Amendment grounds, to the extent it authorized the regulations).



dustry; the State's "only claim" was that the federal regulations "exclude [the State] from control" over a private industry.<sup>79</sup>

The Supreme Court, however, again in an opinion by Justice Holmes, permitted Colorado to bring the suit. Citing *Missouri v. Holland*, the Court stated that "[t]he object of the bill is to restrain [a federal executive official] from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy . . . ."<sup>80</sup> The Court then ruled in favor of Colorado on the merits.<sup>81</sup>

This concept of sovereign (or "quasi-sovereign") state standing resonates in many ways with more recent state suits against the federal government, which the Supreme Court adjudicated without discussing standing. In *South Dakota v. Dole*, the State challenged a federal statute that required States to raise the minimum drinking age to twenty-one, or else risk losing federal highway funds.<sup>82</sup> *New York v. United States* involved a federal law that directed the State either to regulate the disposal of hazardous waste according to federal instructions or to "take title" to the waste.<sup>83</sup> In each case, one of the State's principal concerns was that the federal government was forcing changes to—and, thus, undermining the continued enforceability of—state law.<sup>84</sup>

By comparison, however, the state standing recognized by the Supreme Court in these early preemption cases was indeed "special." As the federal government emphasized in *Missouri v. Holland* and *Colorado v. Toll*, neither State was the object of the federal law at issue; the Migratory Bird Treaty Act and the federal chauffeur regulations applied to private parties.<sup>85</sup> Ac-

<sup>79</sup> Brief for Appellee at 9–10, 14, *Colorado*, 268 U.S. 228 (No. 234).

<sup>80</sup> *Colorado*, 268 U.S. at 230.

<sup>81</sup> *See id.* at 230–32. The problem was, apparently, that the federal executive had sought to regulate chauffeur services on lands that, although within the park, were owned by private parties; the relevant federal statutes had indicated that only the State should regulate chauffeur services on private lands. *See* Warren H. Pillsbury, *Law Applicable to National Parks and Other Federal Reservations Within a State*, 22 CAL. L. REV. 152, 157 (1934).

<sup>82</sup> 483 U.S. 203, 205–06, 211–12 (1987) (upholding the statute as a proper exercise of the federal spending power).

<sup>83</sup> 505 U.S. 144, 149, 152–54, 174–77 (1992) (striking down the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the ground that Congress had improperly commandeered a State to enact state law).

<sup>84</sup> *See id.* at 174–75; *South Dakota*, 483 U.S. at 209–10.

<sup>85</sup> *See* Brief for Appellee at 6, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609) ("The Government insists, strenuously . . . that a state cannot become a litigant merely for the purpose of challenging the constitutionality of a [federal]

cordingly, the States' *only* interest was ensuring the continued enforceability of state law; that is, the State sought to regulate the private parties itself. By contrast, in *South Dakota* and *New York*, each State also had a more "common law" interest—a pecuniary interest in federal funds or a property interest in not owning hazardous waste.

These early cases did not, however, authorize unlimited state standing to sue the federal government. Each State had standing only to challenge the federal action that undermined the enforcement of state law and to seek redress for that harm. Accordingly, Missouri sought to enjoin enforcement of the Migratory Bird Treaty Act "within its borders" so that the State could once again regulate the hunting of wild game.<sup>86</sup> Likewise, Colorado sought to regain control over the chauffeur industry within the State.<sup>87</sup> Neither State had standing, simply because it disagreed with the federal law at issue or believed the law exceeded congressional or executive power. Nor could the State contest the implementation of federal law outside its borders. As in *Maine v. Taylor* and *Roberts v. U.S. Jaycees*, each State had special standing only to protect the continued enforceability of its own state law.

## 2. *The Supreme Court's Original Jurisdiction*

Scholars have often pointed to cases arising under the Supreme Court's original jurisdiction to emphasize the limits of state standing.<sup>88</sup> It is true that the Court has been reluctant to hear original disputes seeking to enforce or to protect the continued enforceability of state law; the Court was particularly hostile to such claims in the nineteenth century.<sup>89</sup> But the

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criminal law" that applies to private parties); Brief for Appellee at 14, *Colorado*, 268 U.S. 228 (No. 234) (arguing that the State lacked standing because "only those affected by [the chauffeur regulations] are entitled to object to them").

<sup>86</sup> Missouri's Amended Bill of Complaint at 2, Transcript of Record, *Missouri*, 252 U.S. 416 (No. 609).

<sup>87</sup> Brief for Appellant at 5, *Colorado*, 268 U.S. 228 (No. 234).

<sup>88</sup> See *Woolhandler & Collins*, *supra* note 27, at 392–93, 410–19, 427–28, 431–33; see also *Vladeck*, *supra* note 27, at 851–54 (discussing original jurisdiction actions to support limitations on state standing).

<sup>89</sup> See, e.g., *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 286–87, 299–300 (1888) (declining to exercise original jurisdiction over the State's effort to collect on a state court judgment against an out-of-state company because it was effectively an effort to enforce the State's "penal laws"); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 50, 76–77 (1867) (declining to hear Georgia's constitutional challenge to the Reconstruction Acts because the suit "call[ed] for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character"). These limitations on the Supreme Court's original jurisdiction considerably impacted the States' capacity to invoke federal jurisdiction

Court's original cases do not undermine state standing to assert such interests in federal district court, or on appeal to the Supreme Court. Moreover, there is some indication that a State may (at times) bring an original action against the United States to protect the continued enforceability of state law.

In the early twentieth century, the Supreme Court began to relax the restrictions on original state suits seeking to enforce state law. For example, in *Georgia v. Tennessee Copper Co.*, the Court permitted the State to bring a public nuisance action against two Tennessee-based companies that were emitting noxious gases into northern Georgia.<sup>90</sup> As the State emphasized, it could not sue the companies in its own state courts to abate the nuisance because the state courts lacked personal jurisdiction over them.<sup>91</sup> Accordingly, Georgia filed the original action to protect “her sovereignty and her enforcement of her laws.”<sup>92</sup> The Supreme Court, in an opinion by Justice Holmes, allowed Georgia to bring the action to redress the “injury to [the State] in its capacity of quasi-sovereign.”<sup>93</sup>

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throughout much of the nineteenth century. Under the Judiciary Act of 1789, the Supreme Court had appellate jurisdiction only over state court cases denying federal rights; accordingly, if a state court struck down a state law as unconstitutional, the State could not appeal. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86. Congress changed this rule in 1914. See Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790 (permitting the Court to hear, at least on certiorari, any federal question case from state court). Lower federal court jurisdiction was also fairly narrow until 1875; the Judiciary Act of 1789 did not confer jurisdiction on those courts to hear suits brought by States. See Judiciary Act of 1789, ch. 20, § 11–13, 1 Stat. 73, 78–81.

<sup>90</sup> See 206 U.S. 230, 236 (1907).

<sup>91</sup> See Original Bill of Complainant at 14, Transcript of Record, *Georgia*, 206 U.S. 230 (No. 5, Original) (noting that the State could not exercise personal jurisdiction over persons or property outside its territory).

<sup>92</sup> *Georgia*, 206 U.S. at 231 (argument for the State of Georgia); see also *id.* at 231–32 (“The maintenance of a public nuisance is a crime by common law and by the statute law of both Tennessee and Georgia. The offender is in the State of Tennessee. The criminal act, so far as Georgia is concerned, is within the State of Georgia.”).

<sup>93</sup> *Id.* at 237. The Court’s analysis indicates that it viewed the State’s interest much like the “quasi-sovereign” interests in *Missouri v. Holland* and *Colorado v. Toll*. Indeed, that was the interest asserted by Georgia—an interest in enforcing state law. See *supra* note 92 and accompanying text. Justice Holmes emphasized that, if the companies had been based in Georgia, the State could have exercised its police powers to prohibit the nuisance. *Georgia*, 206 U.S. at 237 (asserting that, as a quasi-sovereign, the State “has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air”). But the State could not enforce its laws against out-of-state companies, so it had to protect its “quasi-sovereign” rights through an original action. *Id.* (to protect the States’ “remaining quasi-sovereign interests . . . the alternative to force is a suit in this court”).

It remained to be seen, however, whether a State could bring an original action against the federal government to protect its interest in state law.<sup>94</sup> Notably, the Supreme Court left open that possibility in *Massachusetts v. Mellon*, even as it rejected state standing in the case. *Massachusetts* involved a constitutional challenge to the Sheppard-Towner Act, also known as the “Maternity Act,” which offered federal funds to States that established programs for reducing maternal and infant mortality.<sup>95</sup> *Massachusetts* refused to accept the funds and filed suit, arguing that the Act violated the Tenth Amendment.<sup>96</sup> Separate from its claim for *parens patriae* standing (on behalf of its citizens), the State alleged that it could bring suit because the Act invaded its own “sovereign rights” by “impos[ing] an illegal option either to yield to the Federal Government a part of the powers reserved to it by the Tenth Amendment or to lose its share of the public moneys.”<sup>97</sup>

The Supreme Court held that this claim of “sovereign injury” was insufficient. “[T]he powers of the State are not invaded,” the Court reasoned, because “the statute imposes no obligation but simply extends an option which the state is free to accept or reject.”<sup>98</sup> The Court distinguished *Missouri v. Holland* by observing that, in that case, “as asserted, there *was* an invasion . . . of the quasi-sovereign right of the State to regulate the taking of wild game within its borders.”<sup>99</sup> *Missouri* had argued that the Migratory Bird Treaty Act preempted—and thereby rendered unenforceable—its state hunting laws. By

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<sup>94</sup> The Court rejected a few challenges, without foreclosing the possibility that a State could bring an original action asserting sovereign interests against the federal government. See *New Jersey v. Sargent*, 269 U.S. 328, 338–40 (1926) (finding the constitutional challenge too speculative); *Texas v. Interstate Commerce Comm’n*, 258 U.S. 158, 162–65 (1922) (dismissing the State’s constitutional challenge as too abstract and rejecting challenges to executive action for failure to join indispensable parties or because the suit should have been brought in federal district court).

<sup>95</sup> See Sheppard-Towner Act, ch. 135, 42 Stat. 224, 224–26 (Nov. 23, 1921); *Massachusetts v. Mellon*, 262 U.S. 447, 478–80 (1923).

<sup>96</sup> See *Massachusetts*, 262 U.S. at 478–80. Harriett Frothingham, a Massachusetts resident, separately challenged the law; the Court held that she lacked standing to sue as a federal taxpayer. See *id.* at 478–79, 486–88.

<sup>97</sup> Brief for Plaintiff on Motion to Dismiss at 46–47, 51–52, *Massachusetts*, 262 U.S. 447 (No. 24, Original) (“[T]he Commonwealth is interested in maintaining the suit in two ways: first, directly, because its sovereign rights have been invaded . . . , and, secondly, as the representative of its citizens . . .”). The State’s *parens patriae* claim was an (indirect) assertion of federal taxpayer standing—that the “property rights” of its citizens would be “impaired” if they had to pay federal taxes to support an unconstitutional statute. See *id.* at 56–58.

<sup>98</sup> *Massachusetts*, 262 U.S. at 480.

<sup>99</sup> *Id.* at 481–82 (emphasis added).

contrast, when Massachusetts declined the federal funds offered under the Maternity Act, the State ensured that it would not have to modify any state law. Accordingly, Massachusetts' suit did not involve "quasi-sovereign rights actually invaded or threatened."<sup>100</sup>

In the wake of *Massachusetts v. Mellon*, many early commentators asserted that although a State could not bring a *parens patriae* action against the federal government, it could sue to protect its own sovereign (or "quasi-sovereign") interests.<sup>101</sup> Some scholars further claimed that States could bring such challenges in the Supreme Court as an original matter.<sup>102</sup> The Court, for its part, seemed to implicitly authorize such standing in *South Carolina v. Katzenbach* and *Oregon v. Mitchell*, when it permitted States to file original actions challenging the constitutionality of the federal Voting Rights Act.<sup>103</sup> Notably, the Act required States with a long history of discrimination to overhaul their state election laws.<sup>104</sup>

In the first challenge, South Carolina argued that it brought suit to protect its sovereign interest in regulating the electoral process.<sup>105</sup> Invoking *Missouri v. Holland*, *Colorado v. Toll*, and *Georgia v. Tennessee Copper Co.*, South Carolina insisted that, much like the States in those cases, it had standing

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<sup>100</sup> *Id.* at 484–85. Once the Court rejected this argument, it was left with Massachusetts' final contention that its "sovereign rights [were] infringed" by the very existence of the cooperative federalism scheme created by the Maternity Act. See Brief for Plaintiff on Motion to Dismiss at 47, *Massachusetts*, 262 U.S. 447 (No. 24, Original) (alleging that the Act created "an alien form of government" that was "neither federal nor state"). The Supreme Court held that the State lacked standing simply to raise "the naked contention that Congress . . . usurped the reserved powers of the several States by the mere enactment of the statute." *Massachusetts*, 262 U.S. at 483. The State's final contention explains much of the "political question" language in the Court's opinion, including the comment that the Court was "called upon to adjudicate, . . . not [as in *Missouri v. Holland*] quasi-sovereign rights actually invaded or threatened, but abstract questions of political power." *Id.* at 484–85.

<sup>101</sup> See Maurice S. Culp, *Methods of Attacking Unconstitutional Legislation*, 22 VA. L. REV. 723, 732 & nn.58–59 (1936); *The Legal Interest Necessary to Challenge a Federal Appropriation*, *supra* note 76, at 780 & n.16 (1938); Note, *Standing of a State to Attack the Constitutionality of Legislation and Activities of the Federal Government*, 56 HARV. L. REV. 800, 803–04 (1943).

<sup>102</sup> See Culp, *supra* note 101, at 732 n.58.

<sup>103</sup> See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (deciding challenge to the Voting Rights Act of 1970); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (deciding challenge to the original 1965 Act).

<sup>104</sup> See *South Carolina*, 383 U.S. at 315–17.

<sup>105</sup> See Motion for Leave to File Complaint at 3–6, *South Carolina*, 383 U.S. 301 (No. 22, Original) (urging that the Act "arbitrarily, unconstitutionally and unlawfully . . . attempts to restrict and prohibit the Plaintiff's right to exercise her sovereign power to prescribe fair and reasonable qualifications for registration of her electorate and the conduct of her elections, federal, state or local . . .").

in its “quasi-Sovereign capacity . . . to prevent the unconstitutional interference with [its] exclusive responsibilities” over election qualifications and procedures.<sup>106</sup> That is, the State sought to preserve the continued enforceability of its existing state election laws. South Carolina separately alleged standing as *parens patriae* of its citizens.<sup>107</sup>

The Supreme Court, relying on *Massachusetts v. Mellon*, swiftly rejected the *parens patriae* theory.<sup>108</sup> But the Court decided the rest of the claims on the merits—implicitly accepting South Carolina’s sovereign standing theory. The Court held that all of the State’s challenges to the Voting Rights Act were without merit.<sup>109</sup>

Admittedly, these precedents do not demonstrate that the Supreme Court will regularly allow States to file original actions to preserve the continued enforceability of state law; as other scholars have observed, the Court is cautious about opening its doors to any original suit.<sup>110</sup> The important point for my purposes is that these precedents do not undermine such state standing as a matter of Article III. Indeed, *Massachusetts v. Mellon* assumed the validity of the “quasi-sovereign” standing theory in *Missouri v. Holland*.

### C. State Standing Against the United States: Modern Cases

This background on state standing has important implications for the modern era. In recent years, States have increasingly brought suit to challenge federal administrative action.<sup>111</sup>

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<sup>106</sup> Brief for the Plaintiff at 46–47, *South Carolina*, 383 U.S. 301 (No. 22, Original).

<sup>107</sup> South Carolina asserted that, as *parens patriae*, the State could protect its citizens from the “dilution” of their votes—apparently because the Voting Rights Act would ensure that more individuals could vote. *See id.* at 44–45.

<sup>108</sup> *See South Carolina*, 383 U.S. at 324 (holding that the State lacked “standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen”).

<sup>109</sup> *See id.* at 308, 323–34, 337 (quickly rejecting the State’s claim that it had rights protected by the Due Process or Bill of Attainder Clauses and upholding the Act as a proper exercise of congressional power under Section 2 of the Fifteenth Amendment). In *Oregon v. Mitchell*, the Supreme Court made no finding as to standing but simply stated that “[n]o question has been raised concerning the standing of the parties or the jurisdiction of this Court.” 400 U.S. 112, 117 n.1 (1970).

<sup>110</sup> For an important analysis (and critique) of the Court’s narrow reading of its original jurisdiction, see James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 560–61 (1994).

<sup>111</sup> *See supra* notes 1–5 and accompanying text. That may be in part because of the Supreme Court’s broad view of congressional power. Since the New Deal, the Court has been disinclined to police the constitutional boundaries of “state”

Drawing on the precedents discussed in the previous sections, I argue that States have broad standing to protect state law from interference by federal agencies. Outside this context, however (as discussed below in Part II), States lack special standing to challenge federal agencies' implementation of federal law.

### 1. State Standing to Sue Federal Agencies

A few cases will help illustrate the scope of state standing under the theory presented here. *Gonzales v. Oregon* involved Oregon's Death with Dignity Act, which authorizes physician-assisted suicide.<sup>112</sup> Under the Oregon law, physicians may prescribe lethal doses of certain drugs to terminally ill patients who request the medication.<sup>113</sup> All such medications are subject to the federal Controlled Substances Act.<sup>114</sup> The dispute arose when then-Attorney General John Ashcroft declared that "assisting suicide is not a 'legitimate medical purpose'" and warned that any doctor who dispensed medication under the Oregon law would violate the Controlled Substances Act and thereby risk losing his license to prescribe *any* medication.<sup>115</sup>

Oregon filed suit, alleging that the Attorney General's directive exceeded his authority under the Controlled Substances Act.<sup>116</sup> Several private parties, including a physician, a pharmacist, and some terminally ill patients later intervened as additional plaintiffs.<sup>117</sup> Although neither the Supreme Court nor the court of appeals discussed state standing,<sup>118</sup> the federal district court specifically held that Oregon could bring the

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and "federal" power. See ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 37–45 (2009); Ernest A. Young, "The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 254 (noting the demise of "the old regime of 'dual federalism'"). There are, of course, still some constitutional challenges, such as Virginia's suit over the Affordable Care Act. See *infra* notes 136–137 and accompanying text. But the heart of state standing issues in the modern era will likely involve suits against federal agencies.

<sup>112</sup> See OR. REV. STAT. §§ 127.800–.867 (2013); *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006).

<sup>113</sup> See OR. REV. STAT. §§ 127.810, 127.820 (2013) (requiring, *inter alia*, that the patient's decision be voluntary and that two physicians confirm the diagnosis of a terminal illness).

<sup>114</sup> See 21 U.S.C. §§ 801–903 (2012); *Gonzales*, 546 U.S. at 249.

<sup>115</sup> Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,608 (Nov. 9, 2001) (citing 21 C.F.R. § 1306.04 (2001)) (emphasizing that the policy would require changes to the enforcement practices of the Drug Enforcement Administration only in Oregon).

<sup>116</sup> See *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1079–80 (D. Or. 2002).

<sup>117</sup> See *id.* at 1084.

<sup>118</sup> The Supreme Court did not discuss the standing of any plaintiff. The court of appeals found that the intervening health care practitioners had standing and

suit. Observing that the directive “essentially nullified” the Death with Dignity Act, the court found that “Oregon has alleged and proved a sufficient injury to its sovereign and legitimate interest in the continued enforceability of its own statutes.”<sup>119</sup> (The Supreme Court later held on the merits that the Attorney General had exceeded his authority.<sup>120</sup>)

*Wyoming v. United States* involved a state law that enabled individuals to get misdemeanor convictions expunged, so that they could once again purchase firearms.<sup>121</sup> Soon after the enactment of the law, however, the federal Bureau of Alcohol, Tobacco, and Firearms (ATF) notified Wyoming that, in the federal agency’s view, the state law procedures were not sufficient to qualify as an “expungement” under federal law.<sup>122</sup> Accordingly, individuals who took advantage of the state law would still be subject to prosecution under federal law for unlawful possession of a firearm.<sup>123</sup> When Wyoming brought suit, the court of appeals upheld state standing to challenge federal administrative action that “undermine[d the State’s] ability to enforce its legal code.”<sup>124</sup> (The court of appeals, however, ultimately ruled in favor of the federal government on the merits.<sup>125</sup>)

Both *Oregon* and *Wyoming* involved what I have referred to as special state standing. As in *Colorado v. Toll*, the federal administrative actions at issue applied only to private parties, not the State. Thus, as the federal government pointed out (in opposing state standing), Attorney General Ashcroft’s directive did not “impose any obligation upon the State of Oregon or prevent the State itself from taking any action.”<sup>126</sup> Instead, the directive threatened physicians who assisted suicide with the

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did not comment on the standing of other plaintiffs. See *Oregon v. Ashcroft*, 368 F.3d 1118, 1121 & n.2 (9th Cir. 2004).

<sup>119</sup> *Oregon*, 192 F. Supp. 2d at 1079, 1087. The district court did not consider the standing of any intervening plaintiff. See *id.*

<sup>120</sup> *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006).

<sup>121</sup> 539 F.3d 1236, 1239–40 (10th Cir. 2008). Although federal law generally prohibits individuals with certain misdemeanor convictions from obtaining a gun license, this prohibition does not apply if the conviction has been expunged. See 18 U.S.C. §§ 922(d)(9), 921(a)(33) (2012).

<sup>122</sup> *Wyoming*, 539 F.3d at 1240.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1241–42.

<sup>125</sup> *Id.* at 1249.

<sup>126</sup> Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction & Memorandum in Support of Motion to Dismiss Oregon for Lack of Standing at 11, *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077 (D. Or. 2002) (No. CV 01-1647-JO).



loss of their federal license to dispense medication.<sup>127</sup> Likewise, in *Wyoming*, the ATF's interpretation of federal law threatened only private individuals with criminal prosecution.<sup>128</sup> Accordingly, the State's only interest in each case was to protect its state law from federal interference; that is, the State sought to regulate the private parties itself. But I assert that such an interest should generally be sufficient for standing purposes—as it was in the Supreme Court's early preemption cases.<sup>129</sup>

Notably, the state standing theory presented here also applies in the context of at least some cooperative federalism programs. Under such programs, the federal government enlists States in the implementation of a federal statute, such as Medicaid or the Clean Air Act.<sup>130</sup> But it is important to keep in mind that, within these cooperative programs, States do not act simply as lower-level federal bureaucrats.<sup>131</sup> Instead, States often participate by enacting *state law*—state statutes or regulations that adhere to certain federal guidelines.<sup>132</sup>

I assert that States should have standing to protect these state laws against interference by federal agencies.<sup>133</sup> For ex-

<sup>127</sup> See *id.* at 13 (emphasizing that the directive at most “limit[ed] the activities of physicians and pharmacists” in Oregon).

<sup>128</sup> See *supra* notes 121–123 and accompanying text.

<sup>129</sup> I articulate below an important qualification: A State has special standing to protect only those laws that can be deemed regulatory. See *infra* Part I.C.2.

<sup>130</sup> See 42 U.S.C. § 1396 (2012) (Medicaid); 42 U.S.C. §§ 7409–7410 (2012) (Clean Air Act).

<sup>131</sup> The anti-commandeering doctrine underscores this point. In contrast to federal agencies, Congress may not “commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” *New York v. United States*, 505 U.S. 144, 176 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981)). Congress must instead induce the States’ cooperation through conditional spending, as with Medicaid, see 42 U.S.C.A. § 1396c (2012); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433 (2004), or conditional preemption, as with the Clean Air Act, see 42 U.S.C. §§ 7409–7410 (2012).

<sup>132</sup> There are, of course, assorted “cooperative federalism” schemes—not all of which may involve the creation of state law to implement federal statutes. For an important discussion of the complexity, see generally Abbe R. Gluck, *Intratutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 537, 564–74 (2011) (highlighting how “every branch of state government is squarely in the midst of creating, implementing, and interpreting federal statutory law”). A complete treatment of all this variation, and its implications for state standing, is beyond the scope of this Article. I seek here only to show that precedent and constitutional principle strongly support “special” state standing to protect any state laws created in the context of these programs.

<sup>133</sup> See, e.g., *West Virginia v. EPA*, 362 F.3d 861, 864–65, 868 (D.C. Cir. 2004) (upholding state standing to challenge EPA regulations that would require two States to revise their state implementation plans under the Clean Air Act).

ample, in *Florida v. Weinberger*, the State challenged a federal regulation that would require it to modify part of its state Medicaid plan by reconstituting its state licensing board for nursing homes.<sup>134</sup> The State had standing to challenge a federal regulation that “set a collision course with Florida law.”<sup>135</sup>

## 2. *Is Any State Law Sufficient?*

The cases discussed thus far each involved state standing to protect a state regulatory program. Thus, in *Missouri v. Holland*, the State had a program in place to control the hunting of wild game, while in *Colorado v. Toll*, the State regulated the licensing of chauffeurs. In each case, the Supreme Court upheld state standing to challenge federal statutes or regulations that would preempt—and thereby eliminate—the State’s authority to regulate private parties (hunters and would-be chauffeurs, respectively). Likewise, in *Gonzales v. Oregon* and *Wyoming v. United States*, each State sought to preserve a regulatory program—state-defined circumstances under which physicians could assist suicide, or individuals could obtain expungement of a prior conviction.

Not all state laws, however, regulate the citizenry. Some state laws may instead declare that private citizens are, or should be, exempt from regulation by the state or federal government. A recent example may be Virginia’s response to the Affordable Care Act, which declared that “[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage.”<sup>136</sup> Virginia relied on this provision when it brought suit against the federal government to challenge the Affordable Care Act’s individual mandate

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<sup>134</sup> 492 F.2d 488, 490 (5th Cir. 1974).

<sup>135</sup> *Id.* at 493–94.

<sup>136</sup> Va. Code Ann. § 38.2-3430.1:1 (West 2015); see Crocker, *supra* note 57, at 2089 (noting that the Virginia Health Care Freedom Act was “a direct response to the individual mandate component of” the Affordable Care Act). The Virginia law contained a few narrow exceptions—to clarify that college students could be required by their institutions to purchase health insurance upon enrollment, and that noncustodial parents could be required to purchase health insurance for their children. See Va. Code Ann. § 38.2-3430.1:1; Richmond Sunlight: Virginia’s General Assembly: Senate Video, <https://www.richmondsunlight.com/minutes/senate/2010/03/04/> [https://perma.cc/REJ9-CJ5M] (March 4, 2010: Min. 32:00) (statement of Sen. Quayle) (explaining that the exceptions were designed to “ensure that dead-beat parents” would not use the state law as a “shield” against child support orders, and also to ensure that colleges and universities could continue to require health insurance).

provision; the State claimed that it had standing because of the conflict between federal and state law.<sup>137</sup>

I argue, however, that to the extent a state law merely declares that private citizens are *not* subject to legal requirements, and does not seek to regulate private citizens, that is not sufficient for standing purposes. Importantly, as I have suggested, special state standing against the federal government is an extension of its “special” standing against private parties.<sup>138</sup> Such special standing most reasonably applies only to regulatory, not declaratory, state laws.

To understand this point, it is important to consider the rationale for special government standing against private parties. As discussed, the judiciary has long accepted that the federal or state government may bring suit to enforce its laws against a private party, absent any showing of concrete injury.<sup>139</sup> The judiciary’s longstanding acceptance of such governmental standing makes a great deal of sense. A government generally cannot, consistent with the requirements of due process, simply impose criminal or civil penalties on private parties; there must be judicial review (at least after the fact).<sup>140</sup> Accordingly, absent special standing to enforce its laws in court, the government could not implement many laws at all.<sup>141</sup>

As I have argued elsewhere, a government’s defense of its laws is part and parcel of those enforcement efforts.<sup>142</sup> In order

<sup>137</sup> See Appellee’s Opening and Response Brief at 10, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058) (“Whenever a State has its code of laws brought into question by federal action, such that it will have to give way under the Supremacy Clause if the federal enactment is valid, the State has suffered a sovereign injury and has standing to challenge the constitutionality of the federal enactment.”). The district court upheld state standing on this basis, but the court of appeals reversed. See *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 266–67, 270–71 (4th Cir. 2011) (concluding that a “non-binding declaration” was not sufficient for standing purposes, although noting that the district court found standing).

<sup>138</sup> See *supra* Parts I.A., I.B.

<sup>139</sup> See *supra* notes 28–33 and accompanying text.

<sup>140</sup> See U.S. CONST. amend. V, XIV, § 1.

<sup>141</sup> Cf. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) (noting that the government must rely on the courts “for the enforcement of coercive sanctions”). Notably, a State must rely on the judicial system to preserve the boundaries of a regulatory program that permits some conduct and prohibits other conduct (as most regulatory schemes do). Thus, Missouri would have resorted to court to prosecute those who hunted without a permit or hunted during the wrong seasons. Likewise, Oregon must rely on the courts to pursue any doctor who assists suicide without complying with the requirements of the Death with Dignity Act.

<sup>142</sup> See Grove, *Standing Outside*, *supra* note 29, at 1329–30, 1359–60.

to ensure that it can continue to enforce its laws against alleged violators, the government must be prepared to defend those laws against constitutional (or other) challenges. That is why, as the Supreme Court declared in *Maine v. Taylor*, a State clearly has standing to protect the “continued enforceability of its own statutes.”<sup>143</sup> Notably, in *Maine*, the Court recognized the State’s long-term interest in the continued enforceability of its law; the federal government, not the State, brought the criminal prosecution in that case.<sup>144</sup> But the Court recognized that the State had standing to appeal the lower court decision striking down the state law—in order to preserve the State’s authority to regulate private parties in the future.

The State enjoys this same special standing against the federal government. When a federal statute or administrative action purports to preempt a state law, that decision has an impact much like a judicial decision striking down the state law on constitutional grounds; the State is hindered in the enforcement of its law against future private parties. The State therefore should have standing to bring suit against the federal government to protect its long-term interest in the continued enforceability of its laws—just as in *Maine v. Taylor*.

By contrast, the State does not have the same interest in a law that merely declares private parties to be exempt from legal requirements. A State need not enforce such a law through the federal or state court system; nor is any private party likely to challenge a “declaratory” law.<sup>145</sup> In short, a State need not have standing—against a private party or the federal government—to protect the “continued enforceability” of a law that will never be enforced.

Although the line between “regulatory” state laws and “declaratory” state laws may be difficult to discern at times, this line maps onto a distinction that the Supreme Court has drawn in the antitrust context.<sup>146</sup> In *Parker v. Brown*, the Court held that state laws authorizing anticompetitive conduct by private

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<sup>143</sup> 477 U.S. 131, 137 (1986).

<sup>144</sup> See *supra* notes 43–48 and accompanying text.

<sup>145</sup> In federal court, a private party would lack standing to challenge a law that exempted her from a legal requirement because she would suffer no injury in fact. Nor could third parties easily establish standing to object to the government’s failure to regulate someone else. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (emphasizing the difficulty of establishing standing “[w]hen . . . a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else”).

<sup>146</sup> I am grateful to Henry Monaghan for suggesting this analogy.

parties may be exempt from the Sherman Antitrust Act.<sup>147</sup> But, the Court emphasized, a State may “not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.”<sup>148</sup> The State must *regulate* its citizens, not declare their actions to be exempt from federal law.<sup>149</sup>

Moreover, this distinction between “regulatory” and “declaratory” state laws is also consistent with a line drawn by the Supreme Court in its state standing precedents. In *Massachusetts v. Mellon*, the Court found that a State lacks standing to sue the federal government simply to protect individuals “from the operation” of federal law;<sup>150</sup> it follows that a State cannot simply declare its citizens to be exempt from federal standards. Instead, the “quasi-sovereign rights” of the State to regulate its citizens must be “actually invaded or threatened.”<sup>151</sup> That is why, as the Court in *Massachusetts* emphasized, the State had standing in *Missouri v. Holland*; in the latter case, “as asserted, there *was* an invasion . . . of the quasi-sovereign right of the State to *regulate* the taking of wild game within its borders.”<sup>152</sup>

This limitation on special state standing (to protect only “regulatory” laws) also makes sense in light of broader principles of standing doctrine. Standing doctrine seeks in part to discern, perhaps imperfectly,<sup>153</sup> when litigants have an interest that merits judicial resolution, while leaving many other mat-

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<sup>147</sup> 317 U.S. 341, 350–52 (1943) (upholding a California program designed to stabilize raisin prices on the ground that the program “derived its authority and its efficacy from the legislative command of the state”).

<sup>148</sup> *Id.* at 351; see also *id.* at 352 (emphasizing that “[t]he state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application”); see also Milton Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 15 (1976) (“As Chief Justice Stone pointed out, no state can explicitly authorize conduct which the antitrust laws condemn. This would violate the very concept of preemption and federal supremacy.” (footnote omitted)).

<sup>149</sup> Indeed, the current test for the “state action exemption” in antitrust law seeks to limit the exemption to situations in which the State actively oversees the private conduct that is deemed anticompetitive. See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (identifying “two standards for antitrust immunity under *Parker v. Brown*”: (1) “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’”; and (2) “the policy must be ‘actively supervised’ by the State itself” (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978))).

<sup>150</sup> That was the heart of the Supreme Court’s *parens patriae* ruling. *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) (“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.”).

<sup>151</sup> *Id.* at 484–85.

<sup>152</sup> *Id.* at 481–82 (emphasis added).

<sup>153</sup> See *infra* note 154 (noting criticisms of standing doctrine).

ters to the political process.<sup>154</sup> The judiciary has long recognized that governments *must* have standing to enforce and defend their regulatory laws in suits against private parties. I argue here that such standing extends to state suits against the federal government; such suits also protect the continued enforceability of state laws—given that federal preemption has much the same impact on state law as a judicial declaration of unconstitutionality. Broader state standing, as discussed further below, might threaten to erode the limits on the federal judicial power.<sup>155</sup>

#### D. The Case for State Standing to Protect State Law

I argue that States should have broad standing to bring suit against the federal government to protect state law. Such state standing safeguards a core principle of federalism. Federalism scholars have repeatedly emphasized the importance of state regulatory autonomy.<sup>156</sup> Indeed, “virtually all the values

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<sup>154</sup> See *Allen v. Wright*, 468 U.S. 737, 750 (1984) (“The several doctrines that have grown up to elaborate [the “case” or “controversy”] requirement are ‘founded in concern about the proper—and properly limited—role of the courts in a democratic society.’” (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975))); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [one’s] views in the political forum or at the polls.”). I acknowledge, of course, that standing doctrine has itself been subject to severe scholarly criticism. See, e.g., Heather Elliott, *The Functions of Standing*, 61 *STAN. L. REV.* 459, 486–88 (2008) (suggesting, in the context of private party standing, that the Court’s standing jurisprudence relegates the wrong individuals to the political process because it “tends to admit those who already have access to the political system, and reject those who lack such access”); see also Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 *YALE L.J.* 341, 381 (1989) (arguing that “modern standing doctrine lacks a coherent conceptual foundation”); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 *CORNELL L. REV.* 393, 480 (1996) (arguing that standing doctrine is “theoretically incoherent”). I do not seek here to wade into that debate. I assume here that there will continue to be some limitations on who can bring suit. My goal is to show the circumstances under which state governments have the strongest case for “special” standing.

<sup>155</sup> See *infra* notes 170–171 and accompanying text.

<sup>156</sup> See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *COLUM. L. REV.* 215, 219, 278, 283 (2000) (“[F]ederalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices.”); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 *VAND. L. REV.* 1629, 1648 (2006) (arguing that federal preemption is problematic because “state regulatory autonomy is needed to realize the values that federalism is typically thought to advance”); see also DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 106, 119–21 (1995) (asserting that constitutional principles and practical concerns support “a vigorous federal system in which the states play a significant policy-making role”); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *TEX. L. REV.* 1321, 1323–25 (2001) (arguing that “enforcement of federal lawmaking procedures,” which limit federal

that federalism is supposed to promote—such as regulatory diversity, political participation, and restraints on tyranny—turn on the capacity of the states to exercise self-government.”<sup>157</sup>

State standing against the federal government is one way to help preserve this regulatory autonomy and its accompanying benefits. Thus, in *Gonzales v. Oregon*, the State brought suit to protect its “experiment” with physician-assisted suicide.<sup>158</sup> In *Missouri v. Holland* and *Wyoming v. United States*, the States sought to preserve state laws that reflected their citizens’ distinct perspective on matters of national debate (balancing the interests of hunters with the need to protect endangered species, and the proper scope of gun rights). In sum, when the federal government attempts to “nullify” state law and impose a national rule, the State should have standing to protect the continued enforceability of its law—and thereby preserve the preferences and tastes of its own citizens.<sup>159</sup>

A State has less regulatory autonomy, of course, when it agrees to implement federal law as part of a cooperative federalism program. But even in this context, as *Florida v. Weinberger* illustrates, a State can assert its independence by resisting federal regulations that undermine existing state implementation plans. State lawsuits can thus be seen as what Jessica Bulman-Pozen and Heather Gerken have dubbed “uncooperative federalism”—a way for the States to “use their power as federal servants to resist, challenge, and even dissent from federal policy.”<sup>160</sup>

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power to enact laws with a preemptive effect, can protect the “governance prerogatives” of States and localities (quoting Kramer, *supra*, at 222)).

<sup>157</sup> Young, *supra* note 17, at 4, 130 (“The first priority of federalism doctrine ought to be limiting the preemptive impact of federal law on state regulation.”).

<sup>158</sup> Cf. *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006) (noting that Oregon was “the first State to legalize assisted suicide”); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>159</sup> Cf. *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1079, 1087 (D. Or. 2002), *aff’d*, 368 F.3d 1118 (9th Cir. 2004), *aff’d sub nom. Gonzalez v. Oregon*, 546 U.S. 243 (2006) (emphasizing that Oregon citizens voted in favor of legalizing assisted suicide and recognizing the State’s standing to protect the continued enforceability of its statute).

<sup>160</sup> Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1288–89, 1293–94, 1307 (2009).

A number of scholars, however, oppose state standing to protect state law against federal interference.<sup>161</sup> Although the objections vary, these scholars most strongly contest what I refer to as special state standing: In cases like *Missouri v. Holland*, *Gonzales v. Oregon*, and *Wyoming v. United States*, the federal statute or regulation at issue was directed *not* at the States but at private parties (hunters, physicians, and would-be gun owners). Accordingly, the State's only interest was to "vindicate its power to govern [the] subject matter."<sup>162</sup> Commentators suggest that, in such cases, only the regulated private parties, not the State, should have standing to bring suit.<sup>163</sup>

Although I do not dispute that the affected private parties could bring suit,<sup>164</sup> I do challenge the assumption that States *lack* a sufficient interest in the federal government action. In cases like *Missouri v. Holland*, *Gonzales v. Oregon*, and *Wyoming v. United States*, the federal government did not simply regulate private conduct; the federal action "nullified" state law. In such cases, the State has a sovereign interest in the continued enforceability of its law—just as it does when it defends against a constitutional challenge brought by a private party. The fact that private parties are injured does not negate the harm to the State.

Indeed, the State will often have very different interests and incentives than private parties in such cases. For example, a hunter criminally prosecuted for violating the Migratory Bird

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<sup>161</sup> See Bickel, *supra* note 27, at 85–90 (asserting that a State lacks standing to assert a sovereign interest "in the continued execution of her own laws without hindrance from national authority"); Vladeck, *supra* note 27, at 849–50 (arguing against state standing simply to challenge federal preemption); Woolhandler & Collins, *supra* note 27, at 396–97 (advocating limits on state standing to pursue "sovereignty interests"); see also Kevin C. Walsh, *The Ghost That Slayed the Mandate*, 64 STAN. L. REV. 55, 69 (2012) (agreeing that States do not have standing to sue the federal government solely to challenge the preemptive effect of federal law).

<sup>162</sup> Woolhandler, *supra* note 27, at 214.

<sup>163</sup> See Woolhandler & Collins, *supra* note 27, at 504 ("The state's role in protecting the rights of its citizens in the federal system ought not to consist in bringing lawsuits to vindicate rights that belong to citizens . . . ."); see also Bickel, *supra* note 27, at 88 (arguing that, in litigation against the United States, "a state should have no recognizable interest in ensuring the fidelity of Congress to constitutional restraints. Only citizens [with personal injuries] have a litigable interest of this sort . . . .").

<sup>164</sup> I thus do not endorse Aziz Huq's important argument that private parties should generally *not* have standing to assert structural constitutional claims, even when the private actors are directly affected by the law. See Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1440–41 & 1440 n.16 (2013).



Treaty Act (the statute at issue in *Missouri v. Holland*) may challenge the prosecution—and the constitutionality of the federal statute. But the hunter has no particular incentive to emphasize the continued enforceability of state law; after all, he may prefer to be exempt from *all* legal requirements. In other contexts, private parties may be reluctant to “take on” the federal government and may simply adhere to federal requirements. Thus, a State may often need to take the lead in challenging federal action that undermines state law—as the States did in *Gonzales v. Oregon* and *Wyoming v. United States*.

These differences between state and private party incentives underscore why state standing to protect the continued enforceability of state law is distinct from *parens patriae* standing. The State seeks to secure its own authority to *regulate* private individuals, not simply to protect those individuals “from the operation” of federal law.<sup>165</sup> The State thus represents its own interests, not those of private parties, in challenging the federal government.<sup>166</sup>

In recent work, Ann Woolhandler has argued that, even if the state and federal governments have an Article III interest in the continued enforceability of their respective laws, “sovereignty disputes” between governments should be permitted only with congressional authorization.<sup>167</sup> This is a forceful argument with respect to the federal executive, whose powers are created by the Constitution and generally subject to congressional mandate; the executive’s authority to bring suit in federal court should perhaps be controlled by Congress.<sup>168</sup> But the argument is far less strong with respect to the States.

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<sup>165</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923); *see also supra* Part I.C.2.

<sup>166</sup> This point helps explain why the Court in *Mellon* could establish a prohibition on *parens patriae* actions, while at the same time reaffirming *Missouri v. Holland*.

<sup>167</sup> *See* Woolhandler, *supra* note 27, at 212, 229–30, 233, 236 (urging that courts should “decline to use their discretion to recognize” “sovereignty-based suits,” absent congressional authorization).

<sup>168</sup> *See* U.S. CONST. art. II, art. I, § 8, cl. 18. Scholars have long debated whether the executive should have the power to bring suit in federal court, absent congressional authorization. *Compare* Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U. L. REV. 111, 114–17 (1997) (arguing that the executive branch has implied power to enforce the Fourteenth Amendment), *with* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993) (contending that the executive has only a limited power to “protect and defend the personnel, property, and instrumentalities of the United States”), *and* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 5 (2014) (arguing that courts should imply a cause of action “when a public litigant sues to protect typically public interests” but not when it sues to protect private interests).

In sharp contrast to the federal executive, the States' authority to enforce, or to protect the continued enforceability of, their laws was not created by the federal Constitution (or federal statutes). Instead, a State's sovereign interest in its own laws can be understood as a "reserved" power that is recognized by, but does not stem from, the federal Constitution.<sup>169</sup> Admittedly, cooperative federalism programs are different; perhaps in that context, where Congress has enlisted the States in implementing federal law, Congress should have control over state standing to preserve state implementation programs. But outside of that context, state standing to protect the continued enforceability of state law should not be subject to congressional control. Indeed, it seems unwise to require States to seek congressional permission for suits to preserve state law against federal interference.

Alexander Bickel raised a separate concern—that broad state standing could undermine the constitutional limitations on the federal judicial power. Writing in the wake of *South Carolina v. Katzenbach*, Professor Bickel worried that allowing state standing in such cases would “make a mockery . . . of the constitutional requirement of case or controversy,” because it would “countenance automatic litigation” by States to challenge any federal statute, thereby transforming the Supreme Court into a “council of revision.”<sup>170</sup>

However, Bickel overlooked the limits of state standing. As *Massachusetts v. Mellon* suggests, a State lacks standing to object to “the mere enactment of [a federal] statute” that has no impact on state law.<sup>171</sup> A State has special standing only when

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<sup>169</sup> See U.S. CONST. amend X; *New York v. United States*, 505 U.S. 144, 155 (1992) (stating that “no one disputes the proposition that [t]he Constitution created a Federal Government of limited powers,” and reserved other powers in the States, and noting that the Tenth Amendment makes this principle “explicit” (alteration in original) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991))). Notably, my argument does not rely on an assumption that the federal Constitution had no impact on the scope of state sovereignty. “State sovereignty” is a deeply contested concept. For an insightful discussion, see Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 230–35, 240–55, 288–93 (2005). I assert only that the States' sovereign authority to enact and enforce state law does not stem from the federal Constitution. For many States, such authority necessarily predated the federal Constitution; any government (including those possessed by the States under the Articles of Confederation) must have the power to enact and enforce its own laws.

<sup>170</sup> Bickel, *supra* note 27, at 88–90 (“There would then be no need to worry about who could sue if Congress or the President . . . established a church, or conducted . . . this or that disagreeable war. [Any State] could sue . . .” (footnotes omitted)).

<sup>171</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 483 (1923); see also *supra* note 100.

a federal statute or regulation preempts, or otherwise undermines the enforceability of, state law. Furthermore, the State may seek redress only for that harm—by asking that the preemption be lifted, and the state law restored. As I argue below, these limitations matter tremendously when a State brings suit against the federal government, not to protect its own state law, but to challenge the manner in which a federal agency implements federal law.

## II

### THE LIMITS OF STATE STANDING

In recent years, commentators have argued that States should have broad standing to ensure that the federal executive branch complies with federal law.<sup>172</sup> This argument builds on the Supreme Court’s decision in *Massachusetts v. EPA*, where the Court applied what many view as a relaxed version of the injury-in-fact, causation, and redressability analysis to hold that the State of Massachusetts could challenge the EPA’s refusal to regulate greenhouse gas emissions.<sup>173</sup> In its decision, the Court repeatedly “stress[ed] . . . the special position and interest of Massachusetts,” strongly indicating that States are “entitled to special solicitude in [the] standing analysis” when they challenge federal agency action (or inaction).<sup>174</sup>

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<sup>172</sup> See *supra* notes 10–11 and accompanying text.

<sup>173</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 520–26 (2007) (concluding that the gradual loss of the State’s coastline was a “particularized injury” that was traceable to the EPA’s failure to regulate and suggesting that regulation by the EPA could “slow or reduce” global warming as well as the risk to Massachusetts’ coastline). In dissent, Chief Justice Roberts insisted that the Court applied a relaxed standard to the state plaintiff. See *id.* at 536, 547–48 (Roberts, C.J., dissenting) (criticizing the Court for “[r]elaxing Article III standing requirements because asserted injuries are pressed by a State”); see also Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1082 (2015) (asserting that the “important point” from *Massachusetts v. EPA* was that the Court “either recognized or introduced special standing rules for states suing to protect their property and other quasi-sovereign interests”); Massey, *supra* note 10, at 252, 280 (concluding that “EPA approves, for states as *parens patriae*, a relaxed conception of a case or controversy while leaving in place the hard standard” for private parties); Andrew P. Morriss, *Litigating to Regulate: Massachusetts v. Environmental Protection Agency*, 2007 CATO SUP. CT. REV. 193, 193 (criticizing the Court for “dramatically loosening the rules of standing” in *EPA*); Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2184 (2009) (noting that the Court “bestowed ‘special solicitude’ upon the state in its analysis of standing” and suggesting that courts “accord similar latitude” to private groups “deputized to represent state regulatory interests”).

<sup>174</sup> 549 U.S. at 518, 520 (“stress[ing] . . . the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual”). The oral argument in the case also indicated that some Justices were inclined to treat Massachusetts as a

As scholars have observed, *Massachusetts v. EPA* seems to give States “a special role in monitoring and improving federal administration.”<sup>175</sup> I argue, however, that States should have no special license to oversee the federal executive’s implementation of federal law.

#### A. States Lack a Special Interest in the Enforcement of Federal Law

States have broad standing to protect their interest in the continued enforceability of state law, including in actions against the United States.<sup>176</sup> Indeed, I have argued that States have a special status to bring such actions. As *Missouri v. Holland* and *Colorado v. Toll* illustrate, States may challenge federal statutes or regulations that preempt or otherwise undermine the enforceability of state law, even when the States are not themselves the objects of the regulations. But these cases underscore not only the breadth but also the limits of state standing. States have special standing to seek redress only for the harm to their sovereign interest in preserving state

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special litigant. During the argument, Justice Kennedy suggested that Massachusetts might have “some special standing as a State” that would differentiate it from a “big [private] landowner that owned lots of coastline” and pointed to *Georgia v. Tennessee Copper Co.* (a case that had not been relied upon by the litigants) as the “best case” to support such special standing. See Transcript of Oral Argument at 14–15, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05–1120) (statement of J. Kennedy). Justice Ginsburg later picked up on this theme. See *id.* at 16–17 (statement of J. Ginsburg) (asking the Massachusetts attorney general whether it made a difference that the litigants here were “a number of States who are claiming that they are disarmed from regulating . . . ? I thought you had a discrete claim based on the sovereignty of States and their inability to regulate dependent on the law Congress passed that gives that authority to the EPA.”).

<sup>175</sup> Metzger, *supra* note 8, at 67 (“The strongest support for the view that the Court may be assigning the states a special role in reforming federal administration comes in *Massachusetts*.”); see also Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 67–69 (suggesting that this “special” state standing theory was likely needed to garner a “crucial fifth vote” from Justice Kennedy). That is, of course, not the only way to interpret *Massachusetts*. Some scholars have suggested that the standing analysis was relaxed because the State asserted a “procedural injury” arising out of the EPA’s failure to issue a regulation. See Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 171, 191–93 (2012); see also 549 U.S. at 517–18 (stating that a litigant “‘accorded a procedural right to protect his concrete interests’ . . . ‘can assert that right without meeting all the normal standards’” (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992))). But see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. BRIEF 63, 68 (2007) (urging that the statutory provision mentioned by the Court did not establish “procedural rights, at least not as such terms have been defined to date”).

<sup>176</sup> See *supra* Part I.B–D.

law. Scholars and jurists have overlooked these important limits in arguing for broad state standing against federal agencies.

### 1. *State Sovereign Standing and Preemption*

The Supreme Court in *Massachusetts v. EPA* did not itself explain why a State might enjoy “special solicitude” in the standing analysis. The majority opinion relied heavily on *Georgia v. Tennessee Copper Co.*, declaring that “[w]ell before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”<sup>177</sup> But the *Georgia* case was an original action in the Supreme Court to enforce public nuisance law against a private party.<sup>178</sup> The case is noteworthy in that it allowed the State to bring an original action to protect its sovereign (or, as the Court then said, “quasi-sovereign”) interest in enforcing state law.<sup>179</sup> But *Georgia* says nothing about state standing to object to a federal agency’s enforcement of federal law.

Scholars, however, have sought to fill the gap and provide a rationale for special state standing to sue federal agencies. The most powerful theory, which was first suggested by Gillian Metzger and then elaborated by Jonathan Nash, “focuses on preemption.”<sup>180</sup> When “Congress has disabled [States] from asserting regulatory authority in their own right,” they “have a sovereign interest in ensuring that the federal government performs its regulatory responsibilities so that regulatory gaps are avoided.”<sup>181</sup> Indeed, Professor Nash argues, the federal government “infringes upon states’ sovereignty” when it “depriv[es] states of their ability to regulate” and yet “leav[es] a federal

<sup>177</sup> 549 U.S. at 518–19.

<sup>178</sup> See *supra* notes 90–93 and accompanying text.

<sup>179</sup> *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). The *Georgia* case, of course, predated *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Thus, to the extent that *Georgia* sought to enforce the common law of nuisance, one could describe the case as involving general common law, rather than state law. However, the case record reveals that *Georgia* also sought to enforce its state statutory prohibitions on public nuisances. See *supra* note 92. Accordingly, I believe it is reasonable to describe the case as involving state law.

<sup>180</sup> Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2037–38 (2008).

<sup>181</sup> *Id.* at 2037–39 (suggesting this theory but noting that it was open to objections); see also Wildermuth, *supra* note 5, at 318–21 (arguing that States may challenge not only federal preemption but also the manner in which a federal agency implements federal law); Weinstock, *supra* note 10, at 828 (arguing that “[w]hen the federal government decides to regulate an issue” and preempts state law, “states have an interest . . . in the faithful execution thereof”).

regulatory void.”<sup>182</sup> Accordingly, “States ought to have greater solicitude” to challenge the “federal government’s failure to regulate,” whenever the federal government has preempted state law.<sup>183</sup>

There is reason to believe that this concern was (at least partly) driving the Supreme Court’s opinion in *Massachusetts v. EPA*. The Court suggested that Massachusetts had a special interest in ensuring that the EPA regulated motor vehicle emissions, because the Clean Air Act generally preempts state law standards.<sup>184</sup> Likewise, during oral argument, Justice Ginsburg suggested that States should have special standing to challenge a federal agency’s refusal to regulate, whenever the States are “disarmed from regulating” themselves.<sup>185</sup>

This argument has tremendous intuitive appeal. If Congress has prevented the States from regulating, shouldn’t they be able to insist that the federal executive do its job? Moreover, this argument seems to focus on the very sovereign interest that I have suggested gives the States special standing: their interest in state law. Under this view, in a case like *Massachusetts v. EPA*, “[t]he injury is not loss of land, but loss of sovereign prerogative.”<sup>186</sup>

But this argument overlooks a crucial feature of standing doctrine: there must be a link between the injury and the request for relief.<sup>187</sup> In cases like *Colorado v. Toll* and *Gonzales v. Oregon*, the States had standing to contest federal agency action that undermined (that is, caused harm to) state law and to seek redress for that harm. Accordingly, Colorado objected to federal regulations that preempted—and thus rendered ineffec-

<sup>182</sup> Nash, *supra* note 10, at 1018–19, 1051.

<sup>183</sup> *Id.* at 1073–74.

<sup>184</sup> See 42 U.S.C. § 7543(a) (2012) (“No State . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines . . .”); *Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007) (noting that the State’s “exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted. These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to” such emissions (citation omitted)).

<sup>185</sup> Transcript of Oral Argument at 16–17, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05–1120) (statement of J. Ginsburg) (asking whether it made a difference that the litigants here were “a number of States who are claiming that they are disarmed from regulating and that the regulatory responsibility has been given to the Federal Government and the Federal Government isn’t exercising it?”).

<sup>186</sup> Nash, *supra* note 10, at 1074.

<sup>187</sup> See *supra* note 54; cf. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”).

tive—its own state regulations of the tourism industry.<sup>188</sup> Oregon challenged action by the federal Attorney General that would have rendered inoperable its Death with Dignity Act.<sup>189</sup> In each case, a favorable court decision would redress the State’s sovereign injury; as soon as the court invalidated the federal agency action, each State could once again enforce and apply its state law as it saw fit.

By contrast, in *Massachusetts v. EPA*, the State’s sovereign injury—the inability to regulate—was caused *not* by the EPA’s inaction, but by the provision of the Clean Air Act that prohibits Massachusetts from regulating motor vehicle emissions. And the only way to redress the State’s sovereign injury was to lift the preemption—and thereby allow the State to “exercise . . . its police powers” to regulate motor vehicle emissions itself.<sup>190</sup> The State would continue to suffer the injury identified by Professors Metzger and Nash—the inability to regulate—no matter what the EPA did (or failed to do).<sup>191</sup>

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188 See *Colorado v. Toll*, 268 U.S. 228, 229 (1925).

189 See *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006).

190 See *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007).

191 Notably, there was another way a State might have challenged the EPA’s failure to regulate motor vehicle emissions. Although the Clean Air Act generally prohibits States from regulating such emissions themselves, see 42 U.S.C. § 7543(a) (2012), the Act contains a special exception for California. The Act permits California to establish state law standards that are “at least as protective of public health and welfare as applicable Federal standards” and further permits other States to adopt California’s standards. See *id.* at §§ 7543(b), 7507; see also *Chamber of Commerce v. EPA*, 642 F.3d 192, 196 (D.C. Cir. 2011) (noting that the exception applies only to California). Separate from the *Massachusetts v. EPA* litigation, California had applied to the EPA for permission to issue its own regulation of motor vehicle emissions. See Letter from Catherine Witherspoon, Executive Officer, California Air Resources Board, to Stephen L. Johnson, Administrator, EPA (Dec. 21, 2005), <http://www.arb.ca.gov/cc/docs/waiver.pdf> [<https://perma.cc/DP39-BM4W>] (requesting waiver for regulation that would go into effect in 2009). When the EPA refused to grant a waiver, California had standing to challenge *that* decision—and any accompanying interpretation of the Clean Air Act—because the decision prevented the State from adopting and enforcing state law.

But, crucially, such a lawsuit would have looked very different from the case before the Supreme Court. The focus would have been the sovereign interest that States have standing to protect: their own state laws. And a ruling in favor of California would have redressed the State’s interest in state law—allowing the State to enact and enforce its own standards for motor vehicle emissions. Such a decision would *not* have opened the door to other claims by States that they have a special interest in ensuring that the federal executive faithfully executes federal law. Ultimately, the controversy between California and the EPA ended when the Obama administration took office. See Deborah Zabarenko, *US EPA Approves California Auto Emissions Standard*, REUTERS (June 30, 2009), <http://www.reuters.com/article/2009/06/30/autos-epa-california-idUSN3044688920090630> [<https://perma.cc/6ZFG-MNMV>] (“[t]he Obama administration . . . ap-

This point can be expanded to other contexts. In recent years, a number of States have brought suit against the federal executive, alleging that the executive failed to properly “secure the nation’s borders against illegal immigration.”<sup>192</sup> Notably, federal immigration law largely occupies the field and allows little room for state regulation.<sup>193</sup> Accordingly, in this context as well, a State could argue that, because it has been “disarmed from regulating,”<sup>194</sup> it has a special interest in ensuring that the federal executive properly implements federal immigration law. But here, again, the State would suffer the same sovereign injury—the inability to regulate—whether the federal executive took an aggressive approach to “secur[ing] the nation’s borders”<sup>195</sup> or instead opted, perhaps on humanitarian grounds, to allow many undocumented immigrants to remain in the country. A State lacks a special interest in the federal executive’s implementation of federal law, simply because state law is preempted.

## 2. *Federal Agencies and State Interests*

Some commentary suggests that States should have special standing to sue federal agencies in order to “preserve constitutional federalism in the administrative era.”<sup>196</sup> This argument builds on a common assumption that federal agencies have few institutional pressures or other incentives to pay heed to state interests, at least as compared to Congress.<sup>197</sup>

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proved California’s long-standing bid to set its own tough standards for vehicle emissions”).

<sup>192</sup> *Colorado ex rel. Suthers v. Gonzales*, 558 F. Supp. 2d 1158, 1160, 1162–65 (D. Colo. 2007) (noting that Colorado brought suit, seeking an order that the Attorney General and the Secretary of the Department of Homeland Security “prepare and implement a comprehensive plan to secure the nation’s borders against illegal immigration”); *see also supra* note 1 (listing other state suits against the federal executive for failing to enforce federal immigration law).

<sup>193</sup> *Cf. Arizona v. United States*, 132 S. Ct. 2492, 2510–11 (2012) (holding various provisions of state law preempted by federal immigration law and stating that “[t]he National Government has significant power to regulate immigration. . . . Arizona may have understandable frustrations with the problems caused by illegal immigration . . . but the State may not pursue policies that undermine federal law.”).

<sup>194</sup> Transcript of Oral Argument at 16–17, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05–1120) (statement of J. Ginsburg).

<sup>195</sup> 558 F. Supp. 2d at 1160.

<sup>196</sup> Metzger, *supra* note 8, at 72–74; *see infra* note 201 and accompanying text.

<sup>197</sup> That is why many scholars argue that Congress should be in charge of deciding whether state law is preempted by federal law. *See* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 699 (2008); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 871 (2008); *see also* Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933,



Although States can influence the federal legislative process through their representation in the Senate<sup>198</sup> and through powerful lobbies,<sup>199</sup> they have less of a voice in the federal administrative process.<sup>200</sup> Accordingly, scholars in the state standing literature have reasoned, in an era of extensive delegation to administrative agencies, States should have special standing to challenge delegated authority. In fact, “ensuring states access to federal court to challenge federal administrative action” may be “necessary to preserve constitutional federalism.”<sup>201</sup>

I believe these considerations strongly support state standing to protect state law from interference by federal agencies. When the federal executive “nullifies” a state experiment—like Oregon’s Death with Dignity Act or Wyoming’s expungement law—a State should have the authority to bring suit to protect the continued enforceability of its law. Indeed, one of the central purposes of this Article is to show that both longstanding

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1936–41 (2008) (noting that most scholars assert that “agency power to displace state lawmaking should be more limited than Congress’s power to do so” but disputing this point and arguing that courts should defer to agency preemption determinations).

<sup>198</sup> See U.S. CONST. amend XVII; see also Clark, *supra* note 156, at 1325–27 (emphasizing that the role of the Senate in the federal lawmaking process helps to preserve federalism).

<sup>199</sup> Some scholars have suggested that state officials’ influence depends in large part on partisan affiliation. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080, 1092 (2014) (arguing that federal lawmakers pay attention to the concerns of state lawmakers from the same party); Kramer, *supra* note 156, at 219, 278, 283 (emphasizing state influence due to the link created by political parties).

<sup>200</sup> Scholars often dispute whether federalism is adequately protected by “political safeguards.” Compare, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559–60 (1954) (arguing that the political checks in Congress largely obviate the need for judicial review of federalism issues), and Kramer, *supra* note 156, at 218–19 (relying on different political checks to arrive at a similar conclusion to Wechsler), with Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460–61 (2001) (strongly advocating judicial review of federalism issues). But there seems to be considerable agreement that Congress is more sensitive to state concerns than federal agencies. See, e.g., Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 762–63, 766, 769–77, 787, 791 (2004) (asserting that “the institutional competence of both Congress and the judiciary with respect to . . . abstract federalism benefits seems superior to that of agencies”); sources cited *supra* note 197.

<sup>201</sup> Metzger, *supra* note 8, at 72–74; see also Massey, *supra* note 10, at 267 (emphasizing that the “federal bureaucracy . . . lacks the ‘procedural safeguards’ that apply to Congress” and arguing that “when Congress delegates to an agency the power to grant or withhold the benefits of federal law,” States should have broad standing to challenge federal agency action).

precedent and constitutional principle support broad state standing in this context.

I do, however, dispute the assertion that States should have special standing to challenge *any* federal implementation of federal law. Such standing not only lacks precedential support; notably, the only case relied on by the Supreme Court in *Massachusetts v. EPA* to support its standing theory—*Georgia v. Tennessee Copper Co.*—involved state standing to enforce state law.<sup>202</sup> But this theory also seems to rest on an assumption that States have a *greater* stake in the executive's compliance with federal statutes than other members of society—private parties, localities, and even Congress.<sup>203</sup>

There seems to be little basis for such an assumption. Many members of society are currently engaged in a national debate over the federal executive's implementation of federal law, particularly its power not to enforce federal statutes.<sup>204</sup>

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<sup>202</sup> See *supra* notes 90–93, 177–179, and accompanying text.

<sup>203</sup> The Supreme Court has said little about the scope of congressional standing, but the existing precedent does not seem to support broad standing. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 820–21, 829–30 (1997) (holding that a group of legislators lacked standing to challenge the Line-Item Veto Act); see also *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (declining to decide whether the House of Representatives had standing to defend the Defense of Marriage Act). Compare *id.* at 2703–04 (Scalia, J., dissenting) (arguing on behalf of himself and two other Justices that the legislature lacks standing to sue when the executive declines to enforce or defend federal law), with *id.* at 2711–14, 2712 n.1 (Alito, J., dissenting) (asserting, only for himself, that a chamber of Congress may defend a federal law, when the executive declines to do so). A recent lawsuit by the House of Representatives, challenging the federal executive's implementation of the Affordable Care Act, may provide an opportunity for courts to clarify the scope of legislative standing. See U.S. House of Representatives v. Burwell, No. 14–1967 (RMC), 2015 WL 5294762, at \*16 (D.D.C. Sept. 9, 2015) (holding that the House had standing insofar as the executive spent funds not authorized by a congressional appropriation but otherwise lacked standing to challenge the federal executive's implementation of federal law).

<sup>204</sup> See David A. Fahrenthold, *Lawmakers Get Pep Talk on Standing Up to Obama*, WASH. POST, Feb. 27, 2014, at A2 (discussing debates about the executive's non-enforcement of the law); Michael D. Shear, *Obama Moves Ahead on Immigration*, N.Y. TIMES, Nov. 21, 2014, at A1 (stating that “accusations of a presidential abuse of power appear to have gained traction in recent days” and citing a Wall Street Journal/NBC News poll that “found just 38 percent support for Mr. Obama's executive actions”). A good deal of recent academic commentary on the separation of powers focuses on the executive branch's duty to enforce and defend federal law. See, e.g., Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 (2012) (arguing that the President should neither enforce nor defend laws that he views as unconstitutional); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1235 (2012) (arguing that “the executive branch should enforce and defend statutes . . . even when it views them as wrongheaded [and] discriminatory”); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674–75 (2014) (arguing that the constitutional text, structure, and history support only a

Indeed, this issue may be the most significant separation of powers concern today.<sup>205</sup> Many state officials undoubtedly feel strongly about particular instances (or general policies) of non-enforcement—as do private organizations, individuals, and federal legislators. But such concerns do not give States, any more than other groups, a special interest in ensuring that the federal executive “take[s] Care that the Laws be faithfully executed.”<sup>206</sup> States have broad standing to protect federalism principles, not the constitutional separation of powers.

### 3. *Modern Day Application: Texas v. United States*

These principles help shed light on recent litigation over the federal executive’s immigration program. Under the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, the executive declines to remove undocumented immigrants with close ties to the United States, because their children are U.S. citizens or lawful permanent residents.<sup>207</sup> The program also allows eligible individuals to apply for work permits.<sup>208</sup> In 2014, Texas and twenty-five other States brought suit, arguing that the DAPA program violated both the Administrative Procedure Act and the executive’s

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limited non-enforcement power and that, absent congressional authorization, the executive branch cannot adopt policies of non-enforcement “for entire categories of offenders”).

<sup>205</sup> See *supra* note 204; see also *supra* note 203 (discussing a recent lawsuit by the House of Representatives challenging the executive’s implementation of federal law).

<sup>206</sup> U.S. CONST. art. II, § 3; cf. *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23–24 (1998) (stating that private plaintiffs lack standing to assert “abstract,” “generalized grievance[s]” like the “interest in seeing that the law is obeyed” (citation omitted)).

<sup>207</sup> See Memorandum from Jeh Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, at 4–5 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/PNQ5-56GT>] (directing the U.S. Citizenship and Immigration Services to “establish a process . . . for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis” to decline to remove certain individuals who have “a son or daughter who is a U.S. citizen or lawful permanent resident”).

<sup>208</sup> See *id.* at 4; see also *id.* at 4–5 & n.4 (relying on regulation 8 C.F.R. § 274a.12, which establishes classes of undocumented immigrants eligible for work authorization, including those “granted deferred action” if they “establish[] an economic necessity for employment”).

constitutional duty to “take Care that the Laws be faithfully executed.”<sup>209</sup>

The court of appeals held that Texas had standing to bring the suit, underscoring that Texas “is entitled to the same ‘special solicitude’ as was Massachusetts” in *Massachusetts v. EPA*.<sup>210</sup> The court accepted Texas’s argument that it had standing to challenge the DAPA program, because of its “sovereign” interest in issuing driver’s licenses, and then ruled in the State’s favor on the merits, upholding a nationwide injunction against the program.<sup>211</sup>

Notably, the DAPA program says nothing about state driver’s license regimes. Instead, Texas’s own state law requires it to issue a driver’s license to any person with a valid work permit.<sup>212</sup> Texas contended, however, that if it refused to issue licenses to DAPA beneficiaries, its state law might be subject to challenge as in conflict with, and thus preempted by, the DAPA program.<sup>213</sup> In this respect, Texas was “forced” to

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<sup>209</sup> U.S. CONST. art. II, § 3; see *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015).

<sup>210</sup> *Texas*, 787 F.3d at 751–52.

<sup>211</sup> See *id.* at 743, 748–54, 768–69 (refusing to stay or narrow the scope of the preliminary injunction issued by the district court). The court of appeals later issued a final decision, affirming the district court’s preliminary injunction against the DAPA program. See *Texas v. United States*, 809 F.3d 134, 146, 188 (5th Cir. 2015). The court’s standing analysis was similar to that in its previous ruling, repeatedly emphasizing the importance of Texas’s status as a sovereign state. See *id.* at 151–53, 154–55 & nn. 25–26 (concluding that “the states are entitled to ‘special solicitude’ in our standing inquiry under *Massachusetts v. EPA*”). The federal government sought review in the Supreme Court, and the Court, on January 19, 2016, granted the petition for certiorari. Notably, the Court directed the parties to address not only the questions raised in the federal government’s petition (which focused on standing and the alleged violation of the Administrative Procedure Act) but also the question “[w]hether [DAPA] violates the Take Care Clause of the Constitution, Art. II, § 3.” *United States v. Texas*, Docket No. 15-674. The *United States v. Texas* case was still pending before the Supreme Court when this Article went to print.

<sup>212</sup> See TEX. TRANSP. CODE ANN. § 521.142(a) (2011); see also *Texas*, 787 F.3d at 748 (finding that documentation under DAPA would satisfy Texas state law).

<sup>213</sup> See Brief for Appellees at 29–31, *Texas*, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238). Texas pointed to a recent decision by the Ninth Circuit Court of Appeals involving the (related) Deferred Action for Childhood Arrivals (DACA) program, “which authorizes certain immigrants who came to the United States as children, without permission, to remain in the United States.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1057–58 (9th Cir. 2014). When Arizona Governor Janice Brewer announced that the State would not grant driver’s licenses to DACA beneficiaries, several beneficiaries brought suit, arguing that this refusal both violated the Equal Protection Clause and was in conflict with, and thus preempted by, the DACA program. See *id.* at 1058–59. The court of appeals directed the district court to issue a preliminary injunction, concluding that the plaintiffs were likely to succeed on their equal protection claim, but expressly declined to decide whether the state law was preempted by the DACA program.

grant driver's licenses to DAPA beneficiaries. Texas would certainly have standing to defend its state law against any such preemption challenge. Relatedly, Texas could bring suit against the federal government, seeking a declaration that neither DAPA nor any other federal law requires Texas to issue driver's licenses to DAPA beneficiaries. But Texas would have standing because it has a judicially cognizable interest in the enforcement and continued enforceability of *state law*.

This point underscores the misdirected nature of Texas's current challenge. Even if Texas is correct that the DAPA program requires the State to issue driver's licenses to DAPA beneficiaries,<sup>214</sup> Texas has standing *only* to challenge that requirement and to seek redress for that harm—by requesting a court ruling that would lift the requirement and allow Texas to apply its state law as it saw fit.<sup>215</sup> Texas's sovereign interest in its driver's license regime does not give it a special license to challenge the federal executive's implementation of federal immigration law throughout the nation.

## B. Functional Reasons to Limit State Standing

I contend that States have special standing to protect their interest in state law but lack any special role in overseeing the federal administrative state. My argument relies primarily on constitutional principle and precedent. But I also believe there are functional reasons to support this divide between “state law” and “federal law.” State attorneys general, who control

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See *id.* at 1061, 1063–67, 1069 (stating that the court was “unable to resolve” the conflict-preemption claim, but finding the claim “plausible”).

<sup>214</sup> See *supra* note 213 and accompanying text.

<sup>215</sup> A case like *Texas v. United States* strikingly illustrates the need for a link between the State's injury and the request for relief. If Texas filed a declaratory judgment action, arguing that its state law was not preempted by the DAPA program (as I have suggested it could), Texas could presumably challenge the legal validity of the program under the Administrative Procedure Act or the federal Constitution—just as the State in *Missouri v. Holland* challenged federal preemption by arguing that the Migratory Bird Treaty Act violated the Tenth Amendment. See *supra* Part I.B.1. But Texas would be limited to seeking redress for the injury to its state law. Accordingly, much like the State in *Missouri v. Holland*, Texas could ask that the preemption be lifted “within its borders” so that it could once again enforce and apply its state driver's license regime as it saw fit. See *id.* (emphasizing that Missouri only alleged, and the Court only upheld, state standing to challenge the application of the federal law “within [the State's] borders”). Texas could not seek a broader injunction against the nationwide enforcement of the federal law. I do not claim that standing doctrine always requires such a tight link between “injury” and “request for relief.” But such a link not only seems to follow from state standing precedents but also seems crucial in the context of “special” state standing, where States already have broader authority to invoke the federal judicial power than other litigants.

virtually all state litigation in federal court,<sup>216</sup> have strong incentives to protect the interests of *their States*. But these officials have little incentive to be mindful of the national public interest in the enforcement (or non-enforcement) of federal law.

Some scholars, however, have argued that one rationale for the “special solicitude” theory in *Massachusetts v. EPA* is that state attorneys general are politically accountable actors who, unlike private parties, can be trusted to bring actions in the “public interest.”<sup>217</sup> Calvin Massey, for example, emphasizes that “[s]tate attorneys general have limited resources and are politically constrained” and will likely target “[o]nly particularly egregious executive violations of public rights.”<sup>218</sup>

This argument seems to overlook central features of the office of state attorney general. These state officials have a legal obligation to protect the interests of their respective States (by, for example, litigating on behalf of state agencies, or defending state law); they have no special responsibility to focus on the national public interest.<sup>219</sup> Moreover, state attorneys general are elected by the voters of the State<sup>220</sup> and often politically ambitious.<sup>221</sup> (Indeed, one political scientist has suggested

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<sup>216</sup> See NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 47–49, 84 & n.1 (Emily Myers ed., 3d ed. 2013).

<sup>217</sup> See Massey, *supra* note 10, at 274–75, 279 (“Not only is the number of possible plaintiffs reduced to fifty, the political process within each state will likely operate to restrain wholesale challenges to the exercise of federal executive discretion.”); see also Mank, *supra* note 7, at 1783–85 (arguing that, although state attorneys general might bring actions for ideological reasons, they “must respond to a broad range of constituents and therefore have an incentive to serve the public interest”); Metzger, *supra* note 8, at 71–72 (asserting that “[w]hat does differentiate the states from private litigants is [the] political accountability” of state attorneys general, although also noting that political accountability may “prompt state officials to . . . challenge federal actions that are unpopular in their states”).

<sup>218</sup> Massey, *supra* note 10, at 274, 279.

<sup>219</sup> See NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 216, at 88 (“The vast majority of the attorneys general have a duty to litigate, affirmatively and defensively, on behalf of client agencies.”).

<sup>220</sup> See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 & n.3 (2006) (noting that “[t]he Attorney General is independently elected in forty-three states”).

<sup>221</sup> See Clayton, *supra* note 5, at 538 (observing that, beginning in the 1980s, the position of state attorney general became “increasingly attractive to a younger, better educated, and more ambitious caliber of attorney” because States were allocating a larger portion of the budget to and assigning more responsibility to the attorney general and that “[t]he new breed of attorneys general have included individuals like” Bill Clinton); Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS 37, 40 (2003) (“[M]any attorneys general run for higher office. . . . [O]f the 166 attorneys

that “AG” is often short for “aspiring governor.”<sup>222</sup>) Accordingly, state attorneys general have strong political incentives to respond to the preferences of state constituents. Perhaps unsurprisingly, the existing research suggests that state attorneys general often bring lawsuits that are likely to curry favor with state voters.<sup>223</sup>

To be clear, I do not mean to assert either that state attorneys general are motivated entirely by political considerations or that political motivations are a bad thing. Political pressure may lead these state officials to do a better job of representing the State in court. For example, the state attorneys general in *Gonzales v. Oregon* and *Wyoming v. United States* may have been motivated to protect their state laws against federal interference because of state public opinion favoring those laws.<sup>224</sup>

But I do claim that state attorneys general are not likely to be particularly savvy overseers of the federal executive’s implementation of federal law.<sup>225</sup> Instead, we should expect these

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general who served at least two years between 1980 and 1999, more than 70 ran for a governorship or a U.S. Senate seat.”).

<sup>222</sup> Colin Provost, *When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597, 604 (2009) (reporting that about fifty-four percent of attorneys general who began their service between 1988 and 2003 eventually ran for higher office).

<sup>223</sup> See, e.g., Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RES. Q. 609, 616 (2006) (concluding, based on an empirical study of consumer litigation, that the litigation choices of state attorneys general were heavily influenced by citizen ideology and in-state interest groups); see also Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2145 (2015) (asserting that “ambitious attorneys general have proven adept at expanding their base by launching high-visibility legal challenges”); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 729–30 (2011) (observing that “Republican attorneys general running for re-election or higher office in 2010 emphasized issues like combating child pornography, while Democrats were more likely to highlight the environment”); Provost, *supra* note 222, at 603 (“Generally, we can expect AGs to push hard on issues for which they feel confident they will get support from the electorate and from state elites.”).

<sup>224</sup> Cf. Eli Stutsman, *Twenty Years of Living with the Oregon Death with Dignity Act*, 30 GP SOLO 49, 50 (July–August 2013) (stating that the Oregon Death with Dignity Act “remains widely popular”). Wyoming’s effort to enable those with misdemeanor convictions to obtain firearm permits underscores the state support for gun rights. See *supra* notes 121–125 and accompanying text; see also Laura Hancock, *Amended Bill Would Let Wyoming Schools Decide on Concealed Weapons*, STAR TRIBUNE (Feb. 25, 2015 1:45 PM), [http://trib.com/news/state-and-regional/govt-and-politics/updated-amended-bill-would-let-wyoming-schools-decide-on-concealed/article\\_39a49d03-48b0-53ca-a4ea-b5c4ca909ac7.html](http://trib.com/news/state-and-regional/govt-and-politics/updated-amended-bill-would-let-wyoming-schools-decide-on-concealed/article_39a49d03-48b0-53ca-a4ea-b5c4ca909ac7.html) [<https://perma.cc/HXN2-KGSV>] (noting that many officials in Wyoming support concealed carry permits, and that some advocate concealed weapons in schools).

<sup>225</sup> Notably, there is no reason to presume that state attorneys general will do a “better” job of overseeing federal agencies than private nonprofit groups. Orga-

state officials to bring suits against federal agencies that serve state, not national, interests—or, at a minimum, please constituents at home. Thus, it is unsurprising that the Massachusetts attorney general pushed for enforcement of federal environmental law, while the Texas attorney general focused on federal immigration law. Conversely, Texas opposed the suit in *Massachusetts v. EPA*,<sup>226</sup> while Massachusetts filed a brief in *Texas v. United States*, insisting that the DAPA program is “lawful, will substantially benefit States, and will further the public interest.”<sup>227</sup> Each state attorney general undoubtedly channeled the preferences of voters in his home State and thereby arguably served the interests of the State. But these state officials had little incentive to focus on the national public interest.

Accordingly, functional considerations seem to line up with the constitutional design. Constitutional principle and precedent strongly suggest that States have special standing to enforce, and to protect the continued enforceability of, state law—even in suits against the federal government. State attorneys general can, on balance, be expected to protect these state interests.<sup>228</sup> But state attorneys general should have no spe-

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nizations like the Sierra Club, the Freedom from Religion Foundation, or the Chamber of Commerce likely have more expertise with respect to federal agency action that impacts their members than generalist attorneys general. Cf. NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 216, at 11 (noting the range of functions performed by state attorneys general). Yet the Supreme Court accords such groups no “special solicitude.” See *Sierra Club v. Morton*, 405 U.S. 727, 730, 739 (1972) (observing that the Sierra Club has “a historic commitment” to environmental protection, but declining to grant the group standing based on its “special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country”).

<sup>226</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 505 & n.5 (2007) (noting that ten States—Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah—supported the EPA in the litigation).

<sup>227</sup> See Brief of the Amicus States of Wash., Cal., Conn., Del., Haw., Ill., Iowa, Md., Mass., N.M., N.Y., Or., R.I., Vt., Va., & D.C. in Support of the U.S. at 1, *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238).

<sup>228</sup> I do not mean to suggest that state attorneys general will *always* enforce and defend state laws on behalf of the State. Some state attorneys general may, for example, decline to defend laws based on their interpretations of the federal Constitution—as illustrated by the refusal of some state officials to defend laws banning same-sex marriage. See, e.g., Timothy Williams & Trip Gabriel, *Virginia's New Attorney General Opposes Ban on Gay Marriage*, N.Y. TIMES, Jan. 24, 2014, at A12 (noting that Virginia Attorney General Mark Herring declared: “I cannot and will not defend a law that violates Virginians' fundamental constitutional rights”); see also Devins & Prakash, *supra* note 223, at 2106–07 (arguing that such refusals to defend are motivated in large part by ideology); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 235–46 (2014) (discussing nondefense in the states). Nevertheless, I do believe that state attorneys general can, on balance, be expected to protect state interests.



cial role in overseeing the federal executive's implementation of federal law.

#### CONCLUSION

The Supreme Court has long granted the States special access to the Article III courts in order to protect state law. I argue that States have standing to assert this interest not only against private parties, but also against the federal government. Accordingly, States may challenge federal statutes or regulations that preempt, or otherwise undermine the enforceability of, state law. But States should have *no* special role in ensuring that the federal executive properly implements *federal* law. States have special standing to protect federalism principles, not the constitutional separation of powers.

