

# REINING IN STATE STANDING

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## INTRODUCTION

In upholding standing in *Massachusetts v. EPA*, Justice Stevens said that states “are not normal litigants for the purposes of invoking federal jurisdiction.”<sup>1</sup> While one might agree that the states are not normal litigants,<sup>2</sup> that abnormality might well suggest that states should get standing less easily than private parties.<sup>3</sup>

As a historical matter, states were limited in the kinds of cases they could bring in the federal courts. States typically could not litigate their sovereignty interests (their powers to govern to the exclusion of other governments), nor could they litigate their *parens patriae* interests (the interests of their citizens) against the federal government. Rather, state standing in the federal courts was traditionally available only when states had common-law or equity actions similar to those of ordinary litigants. State standing, however, expanded in the twentieth century, sometimes allowing litigation of sovereignty and *parens patriae* interests. And to the extent states rely on standing similar to individu-

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1 549 U.S. 497, 518 (2007); see also *id.* (“It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan [v. Defenders of Wildlife]*, 504 U.S. 555 (1992), a private individual.”).

2 See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1105 (2015) (noting that the Court’s development of the current tripartite standing test mostly involved private parties and that concepts related to such challenges are awkward when applied to governments as plaintiffs or appellants); *id.* at 1109–10 (suggesting that the Court should make explicit that standing for private parties and states differ in some contexts, although not venturing into specifics).

3 See, e.g., Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 854–55 (2016) (arguing that states should not be entitled to special solicitude in standing, except where they “seek to enforce or defend state law” and “to challenge federal statutes and regulations that preempt, or otherwise undermine the continued enforceability of, state law,” and asserting that states “do not have a special interest in the manner in which the federal executive enforces federal law” (emphasis omitted)).

als, the current injury-in-fact test further increased states' ability to sue. Indeed, as applied to states, we suggest that the injury-in-fact test poses no significant limitation on standing to sue the federal government.

If one believes that standing doctrine is an important structural limitation on the federal courts' ability to make pronouncements of law restraining the political branches and other parties,<sup>4</sup> then the upsurge of state-initiated suits is a matter of concern.<sup>5</sup> Some critics of the injury-in-fact test, even as applied to individuals, suggest that courts should look more directly at whether the plaintiff has a cause of action. Cause-of-action analysis in turn would focus on a "substantive judgment[ ] concerning the protections that particular provisions of law confer."<sup>6</sup> Greater focus on the protections that the Constitution and statutes confer, however, is unlikely to significantly limit state standing. States might easily claim they are the intended beneficiaries of many constitutional provisions as well as of regulatory statutes.

Limiting state standing through focus on cause of action rather than injury in fact may thus require a return to a general presumption that the interests that the Constitution and regulatory statutes protect, particularly in Article III courts, are the interests of individuals. Under such a presumption, state sovereignty interests and *parens patriae* interests should not generally give the states causes of action against the federal government.<sup>7</sup> And as to allegations of more individualized state injuries in fact, states should presumptively be limited to bringing suits only when they are the objects of federal government regulation.

## I. CATEGORIES OF STATE STANDING

State standing tends to fall into the following categories.<sup>8</sup> While scholars sometimes vary their terminology, the categories below roughly correspond to the terminology in state complaints, and in judicial decisions evaluating state standing.

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4 PAUL NOLETTE, *FEDERALISM ON TRIAL* 5 (2015) (expressing concerns in the context of state standing for the "increasing judicialization of American politics," and concerns as to muddying accountability); Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. (forthcoming 2019) (manuscript at 42, 45–47), <https://ssrn.com/abstract=3134464> (arguing that limits on standing constrain and protect the judiciary).

5 Grove, *supra* note 3, at 856 ("[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."); *see also infra* text accompanying notes 71–80.

6 *See, e.g.*, Fallon, *supra* note 2, at 1068–69, 1108; *see also infra* notes 61–67 and accompanying text.

7 This Essay particularly focuses on the state suits against the federal government or federal officials.

8 *See* Fallon, *supra* note 2, at 1109 n.276 (citing Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 213–14 (2014) (using this terminology but noting variants)); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2056, 2064 (2011) (providing categories of state standing).

1. *Enforcement interests.*<sup>9</sup> State enforcement interests are implicated when a state brings an action to enforce state legislation in its own courts against private parties. For example, a state prosecution for murder in a state court vindicates state enforcement interests. A civil action that a state official brings to enforce state legislation also vindicates enforcement interests.

2. *Sovereignty interests.* State sovereignty interests are implicated when the government sues to vindicate its power to govern with respect to a particular subject matter or in a particular territory.<sup>10</sup> When Massachusetts sued a federal official alleging that federal spending on maternal health exceeded congressional powers, it sought to vindicate its claim that only states had the authority to spend or regulate as to that subject.<sup>11</sup>

3. *Quasi-sovereign or parens patriae interests.* These interests are those attributable to citizens of a state, such as interests in the environment. When a state sues an alleged polluter because of harms to the health of its citizens, it is vindicating a *parens patriae* interest.<sup>12</sup>

4. *Proprietary or individual interests.* Individual interests are state interests comparable to the interests that allow a private party to bring suit. For example, if a state sues to collect on certain bonds that it owns, it is suing to vindicate a proprietary or individual interest.<sup>13</sup>

## II. TRADITIONAL LIMITS ON STATE STANDING

The states' pursuit of their enforcement interests in their own courts, with the possibility of Supreme Court review, presents the paradigm of the state as litigant. The Constitution, of course, provided for original Supreme Court jurisdiction over controversies in which a state was a party,<sup>14</sup> thus contemplating that a state might appear as a plaintiff in original civil actions in a federal court. At the same time, the Constitution's placing original state-as-party jurisdiction in the Supreme Court suggested that states would not be plaintiffs in the federal courts very often. And indeed, the Supreme Court restricted state-as-party suits.

First, the Court indicated that, as a general matter, state sovereignty interests did not give states claims for relief.<sup>15</sup> For example, when Georgia sued federal government officials in *Georgia v. Stanton* to challenge the consti-

9 See, e.g., Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 411 (1995).

10 See Crocker, *supra* note 8, at 2053; see also *id.* at 2055 (stating that quasi-sovereign interests are representative, while sovereignty interests are those central to the core of governing).

11 See *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923).

12 See *Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007) (relying in part on quasi-sovereign interests).

13 See *South Dakota v. North Carolina*, 192 U.S. 286 (1904).

14 U.S. CONST. art. III, § 2, cls. 1–2.

15 See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831); *id.* at 28–29 (Johnson, J., concurring); Woolhandler & Collins, *supra* note 9, at 413–14 (discussing *Cherokee Nation*).

tutionality of Reconstruction, the Court stated that such claims involved non-litigable “rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State.”<sup>16</sup> Border disputes between states, however, were an early exception; the Framers apparently had contemplated that such suits would be handled by the Supreme Court, and they resembled common-law claims for property between individuals.<sup>17</sup>

When the state and federal governments did have disputes about whether one government was trenching on the governing powers of the other, such disputes would typically be litigated by either government enforcing its own laws in its own courts against individuals who had violated them.<sup>18</sup> For example, when Georgia claimed that it could regulate in the Indian territory contained within Georgia borders, it passed and enforced a license law against persons working in such territory without a state license.<sup>19</sup> The defendant in an enforcement action raised the unconstitutionality of the state laws as a defense, and on direct review the Court held in *Worcester v. Georgia* that the federal government had exclusive authority to regulate commerce with the Indian tribes; it therefore reversed the judgment of conviction.<sup>20</sup> Similarly, the federal government’s efforts to use military courts rather than state courts during Reconstruction could be contested on federal habeas corpus by individuals challenging their detention resulting from proceedings in a military court. And in *Ex parte Milligan*, the Supreme Court held that a military tribunal lacked jurisdiction in states where the regular courts were open.<sup>21</sup>

The fact that structural disputes between states and the federal government were litigated in cases between government and private parties indicated that a case or controversy under Article III involved certain legal relations that did not generally include conflicting claims of power between governments as adversary parties. Rather, the claims typically took the form of governmental power (through enforcement) versus individual immunity (from the power). The form of such judicial actions reinforced the notion that individuals are the ultimate beneficiaries of even structural constitutional limitations,<sup>22</sup> and that the federal courts’ role was to protect private rights, not directly to resolve political disputes between contending sov-

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16 *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867); *see also* *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866) (holding that the Court lacked the jurisdiction to issue an injunction preventing President Johnson from enforcing the Reconstruction Acts).

17 *See* Woolhandler & Collins, *supra* note 9, at 415–16 (indicating that the Court was willing to litigate these cases in part because they resembled disputes over property).

18 Suits between private parties could also raise disputes about competing sovereigns’ claims to govern. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

19 *See* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 536–37 (1832).

20 *Id.* at 561–63.

21 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119–23 (1866); *see* Woolhandler & Collins, *supra* note 9, at 418, 418 nn.110 & 112 (discussing *Ex parte Milligan*).

22 *See* Woolhandler & Collins, *supra* note 9, at 439 (“[T]he preference for state-versus-individual actions over government-versus-government actions enhanced the status of the individual as a rights-holder against government.”); *id.* at 444.

eigns.<sup>23</sup> Indeed, the legitimacy of the federal courts' decisions restricting political actors is premised on their obligation to apply the law in cases involving private rights.<sup>24</sup>

Similarly, the nineteenth century does not offer examples of federal jurisdiction over suits by states claiming to represent their citizens as *parens patriae* against the federal government.<sup>25</sup> On a few occasions, states brought public nuisance suits against private parties in the Supreme Court. For example, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, the Commonwealth sought to enjoin a privately built bridge's obstruction to navigation.<sup>26</sup> The Court, however, required the Commonwealth to show a particularized injury, just as the common law would have required of a private party who wished to bring a public nuisance suit.<sup>27</sup> This result underscores that common-law injuries, such as might be at issue when a state sued on a contract claim, were meant to be the grist of the Supreme Court's original jurisdiction.<sup>28</sup> Rather than receiving special treatment as plaintiffs in federal courts, states were

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23 *Id.* at 440–41 (stating that limitations on state standing kept the courts from litigating issues of constitutionality *simpliciter*, and limited judicial power by keeping cases to a more tractable scope); *id.* at 442 (indicating that judicial power is limited and also reinforced by limits on cases); *cf.* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1366 (1973) (positing that justiciability doctrines “allowed the current dimensions of judicial review to become established at an acceptable political pace” (emphasis omitted)). In addition, limitations on states’ standing reinforce the notion that the state and federal governments act directly on the people rather than upon each other. *See* Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89 (stating that allowing states to bring suits to challenge federal statutes “would be a fundamental denial of . . . the principle that the federal government is a sovereign coexisting in the same territory with the states and acting, not through them, like some international organization, but directly upon the citizenry”).

24 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”); *id.* at 177–78 (reasoning that if a court is deciding a case and “two laws conflict with each other, the court[ ] must decide on the operation of each”); Bickel, *supra* note 23, at 90 (arguing that suits between states and the federal government would aggrandize judicial power and bring abstract disputes before the courts).

25 The limitations on governmental *parens patriae* suits serve similar ends as the limitations on sovereignty-based actions. *See* Woolhandler & Collins, *supra* note 9, at 442–44. *Parens patriae* and sovereignty suits are to a large extent substitutable for one another. *See* Woolhandler, *supra* note 8, at 226.

26 *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 557 (1851).

27 *See id.* at 561; Woolhandler & Collins, *supra* note 9, at 432–33 (discussing *Wheeling Bridge*); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 703 (2004). The majority treated a state loss of tolls on its public works as a sufficient private injury in *Wheeling Bridge*. *See* 54 U.S. (13 How.) at 558; *see also* *South Carolina v. Georgia*, 93 U.S. 4, 14 (1876) (reiterating the need for a particularized injury like that of a private party).

28 *See, e.g., Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792); Woolhandler & Collins, *supra* note 9, at 406 & n.58 (discussing *Brailsford*).

only given access to federal courts as plaintiffs in fairly limited circumstances, i.e., when their claims looked like the common-law actions of private parties. Had it been otherwise—such that states could freely litigate their sovereignty interests and the interests of their people against the federal government—many notable cases raising constitutional issues would have looked quite different.<sup>29</sup>

### III. THE MODERN COURT

The twentieth century saw the weakening of limitations on state standing. Some restrictions nevertheless persisted, particularly in litigation against the federal government respecting the constitutionality of federal law. A state's interest in governing in an area to the exclusion of the federal government—that is, its sovereignty interests—continues to be a doubtful basis for standing to challenge federal legislation.<sup>30</sup> For example, in *Massachusetts v. Mellon* the Court disallowed a state challenge to congressional spending on maternal health as beyond federal power.<sup>31</sup> More recently, the Fourth Circuit disallowed Virginia's suit to challenge the Affordable Care Act based on Virginia's claim that the federal government had trenched on reserved state powers.<sup>32</sup> In addition, state *parens patriae* suits against the United States or its officials have remained somewhat suspect. When Florida challenged the federal inheritance tax in federal court in *Florida v. Mellon*, the Supreme Court held that the state could not assert *parens patriae* interests against the United States.<sup>33</sup> These limitations on sovereignty and *parens patriae* suits reinforce the tradition that conflicts between the state and federal governments as to

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29 Instead of the Bank of the United States suing Ohio Auditor Ralph Osborn for trespass for collecting an unconstitutional tax, see *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824), Ohio might have sued the Secretary of the Treasury to have the bank declared unconstitutional as exceeding Congress's enumerated powers. Instead of Georgia's attempting to enforce its own laws in its own courts that limited the ability of non-Cherokees to work in Cherokee territory, see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Georgia might have sued a federal official to claim a right to issue licenses for non-Cherokees to work in Cherokee territory. Instead of being barred from doing so in *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), Georgia could have proceeded with its suit to end Reconstruction. And instead of abolitionist Sherman Booth's having to bring a habeas corpus action against his federal custodian who held him for violating the Fugitive Slave Act of 1850, see *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), Wisconsin or any other free state might have sued the attorney general to have the Act declared unconstitutional as beyond Congress's enumerated powers.

30 See *Massachusetts v. Mellon*, 262 U.S. 447, 484–85 (1923).

31 See *id.* at 479–80.

32 See *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 266 (4th Cir. 2011). But cf. *Grove*, *supra* note 3, at 876–78 (arguing that a state has no special standing when a state law is merely declaratory rather than regulatory).

33 See *Florida v. Mellon*, 273 U.S. 12, 18 (1927); see also *Massachusetts v. Mellon*, 262 U.S. at 485–86 (rejecting a state challenge to federal spending on maternal health, and holding that a state cannot assert *parens patriae* standing to protect its citizens from the operation of a federal statute alleged to be unconstitutional).

the scope of federal power should ordinarily be litigated as between private parties and government.

Still, in contrast to the cases noted above (which involved attempts to invoke implied rights of action to challenge the constitutionality of federal legislation) courts have been somewhat more indulgent to state standing in suits challenging federal administrative action under the Administrative Procedure Act (APA). Cases under the APA have frequently allowed states to sue as plaintiffs, partly under expansive interpretations of the APA's judicial review provisions in the aftermath of *Association of Data Processing Service Organizations, Inc. v. Camp*.<sup>34</sup> For example, states have been allowed to challenge agency action that preempts state law—which are clearly sovereignty-based claims. Oregon thus was able to challenge a Justice Department interpretive rule that undermined the state's allowance of physician-assisted suicide.<sup>35</sup> And in *Massachusetts v. EPA*, the Supreme Court entertained a state *parens patriae* challenge to the EPA's failure to regulate greenhouse gas emissions from new motor vehicles.<sup>36</sup> While the Court recognized prohibitions on states' ability to bring *parens patriae* suits against the federal government, it indicated that such prohibitions apply with lesser force where there is an allegation that an agency is not complying with federal law, as opposed to when a state tries to protect its citizens from the operation of congressional statutes.<sup>37</sup>

To be sure, even in cases in which the courts rely on state sovereignty or *parens patriae* interests, the federal courts will generally engage in the usual standing inquiries of injury in fact, causation, and redressability spelled out in *Lujan v. Defenders of Wildlife*.<sup>38</sup> As part of that inquiry, the court may require a state to show particularized injuries. In *Massachusetts v. EPA*, for example, the Court relied on the Commonwealth's showing of a particularized injury in the loss of its coastline.<sup>39</sup> The courts may make findings under

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34 397 U.S. 150 (1970).

35 See *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006), *aff'g* *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004), *aff'g* 192 F. Supp. 2d 1077 (D. Or. 2002). The district court addressed the standing issue, stating, "Oregon has alleged and proved a sufficient injury to its sovereign and legitimate interest in the continued enforceability of its own statutes." *Ashcroft*, 192 F. Supp. 2d at 1087.

36 See *Massachusetts v. EPA*, 549 U.S. 497, 522–23 (2007).

37 See *id.* at 520 n.17; see also *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 161–62 (E.D.N.Y. 2017) (indicating that the prohibition on state *parens patriae* standing against the federal government applied more strongly when there were challenges to statutes, and also determining that a constitutional challenge to certain policies resembled a challenge to statutes); *Texas v. United States*, 86 F. Supp. 3d 591, 626 (S.D. Tex.) (citing a number of administrative challenges against agencies under *parens patriae* theories based on this distinction), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016); Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 401 (2018) (indicating that *parens patriae* suits have been allowed against federal agencies).

38 504 U.S. 555, 560–61 (1992).

39 See *Massachusetts v. EPA*, 549 U.S. at 522–23.

the *Lujan* factors to support sovereignty or *parens patriae* showings, or to support state claims of proprietary or individual injuries.<sup>40</sup>

Whether used to bolster a sovereignty or *parens patriae* claim, or as a separate proprietary or individual basis for standing,<sup>41</sup> states have little trouble alleging such concrete injuries. Nor, where applicable, has the *Data Processing* requirement that the state injury be “arguably within the zone of interests”<sup>42</sup> protected by the statutes at issue posed much of a hurdle; states have been able to cast themselves as regulatory beneficiaries harmed by the federal government’s reduction of enforcement against the objects of federal regulation. Texas thus notoriously obtained standing to challenge the federal government’s Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program on the ground that immigrants whose status was adjusted under DAPA would be able to obtain state driver’s licenses whose issuance would cost the state money.<sup>43</sup> And any adjustment of state law to make licensees bear the full cost of licensing would itself be an injury to the state.<sup>44</sup> More recently, states have challenged a Department of Health and Human Services proposal that would make it easier for employer-based health insurance plans to claim a religious or moral exception to providing contraceptive coverage. The states’ alleged particularized injury was that, absent employer-supported contraception, women would turn to state services, thereby causing the states to incur extra expenses in funding contraception.<sup>45</sup>

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40 See *id.* at 519–20 (relying in part on quasi-sovereign interests); *id.* at 522 (Massachusetts “has alleged a particularized injury in its capacity as a landowner”).

41 See generally Brescia, *supra* note 37. Professor Raymond Brescia takes the position that states are relying less on *parens patriae* and more on individualized injuries. *Id.* at 368. Because the states often allege a variety of injuries and the courts will normally require some form of individual injury under a *Lujan* test no matter what the basis of standing is, it may be difficult to say with certainty where *parens patriae* or some alleged sovereign injury stops and individual injury begins.

42 *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

43 See *Texas v. United States*, 787 F.3d 733, 748 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

44 See *id.* at 749 (indicating that a plaintiff suffers an injury even if it can avoid that injury by incurring other costs).

45 See *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 822 (N.D. Cal. 2017) (finding support for the states’ *parens patriae* standing in that they “will incur economic obligations, either to cover contraceptive services necessary to fill in the gaps . . . or for ‘expenses associated with unintended pregnancies’” (quoting States’ Reply in Support of Motion for Preliminary Injunction at 3, *California v. Health & Human Servs.*, 281 F. Supp. 3d 806 (No. 4:17-cv-05783))), *aff’d in part, vacated in part, and remanded sub nom.* *California v. Azar*, 911 F.3d 558, 571 (9th Cir. 2018) (upholding state standing based on the economic harm caused by women seeking contraceptive care from state-financed programs, and not reaching alternative theories); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 567 (E.D. Pa. 2017) (finding a “direct” injury in the state to support *parens patriae* standing because women will turn to state-funded sources, as supported by affidavits), *appeal docketed*, No. 18-1253 (3d Cir. Feb. 15, 2018). For a decision denying state standing, see *Massachusetts v. U.S. Department of Education*, No. 1:17-cv-02679, 2018 WL 4954150 (D.D.C. Oct.

Given the extent of policymaking that now occurs in the executive branch, broad APA standing is, of course, important in itself.<sup>46</sup> In addition, standing in the APA context tends to spill over to implied actions raising constitutional issues, such as states' attempts to challenge Congress's limitation on the ability of taxpayers to deduct state and local taxes as a matter of federal income tax law.<sup>47</sup> Whether in the APA or in the implied action context, states tend to pile on multiple bases for their standing.<sup>48</sup> For example, Maryland claimed several grounds for standing in challenging President Trump's continued holding of ownership interests in hotels and restaurants as a violation of the Constitution's Domestic and Foreign Emoluments Clauses. Maryland alleged a sovereign interest in not being disadvantaged vis-à-vis other states who might give benefits to Trump businesses, a *parens patriae* interest in its inhabitants' businesses not being subject to unfair competition, and a similar individual state competitive loss with respect to partly state-owned entertainment facilities.<sup>49</sup> The Maryland federal court upheld standing on a number of grounds.<sup>50</sup>

#### IV. THE PROBLEM WITH STATE LITIGANTS

Professor Richard Fallon has stated that current standing doctrine was designed for individuals and not for states.<sup>51</sup> Indeed, both the injury-in-fact test and the arguably-within-the-zone-of-interests test are particularly ill-suited to states. Problems arise in trying to limit standing for a multipurpose public entity by a test designed for individuals.

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12, 2018), where the court denied state standing to contest changes in federal student loan forgiveness programs.

46 See Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism,"* 105 CALIF. L. REV. 1739, 1748 (2017) (suggesting the importance of state challenges to federal executive action to the new process federalism).

47 See Complaint for Declaratory and Injunctive Relief, *New York v. Mnuchin*, No. 1:18-cv-6427 (S.D.N.Y. July 17, 2018). The states claimed multiple grounds for standing: an interference with sovereign interests in setting fiscal and regulatory policy, quasi-sovereign interests in loss of home values to inhabitants, and an individual interest in loss of tax revenue and real estate transfer fees. *Id.* at 6–7, 33, 39–40, 46.

48 See *id.*

49 See Complaint at 5–6, 30–36, 38, 40, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 17-1596).

50 The district court rejected Maryland's standing to enforce the terms on which it entered the union. See *District of Columbia v. Trump*, 291 F. Supp. 3d at 739. It also rejected standing based on alleged lost tax revenues. See *id.* at 739–40. The court found Maryland and the District of Columbia could assert their "quasi-sovereign interests" in not having to give benefits to Trump's Washington hotel. *Id.* at 742. The district court also found injury to some of the plaintiffs' proprietary interests, *id.* at 743, and that the plaintiffs could assert *parens patriae* standing with respect to competitive injuries to their citizens. See *id.* at 747–48.

51 See Fallon, *supra* note 2, at 1105, 1109–10.

### A. *Injury-in-Fact as Ill-Suited to States*

The historical limitations on state standing were not based on any lack of harm in fact to a particular state. Mississippi and Georgia suffered injuries when Reconstruction military governments superseded state power, but the Court did not allow the states to sue federal officials to redress those harms. Florida constituents suffered actual harms when the federal government taxed inheritances, but the Court disallowed the State's assertion of *parens patriae* interests against the federal government in *Florida v. Mellon*.<sup>52</sup> Nor are the states' modern assertions of individualized or proprietary interests as a basis for lawsuits necessarily *de minimis* or insubstantial. Texas's expenses for licenses for DAPA beneficiaries, even if somewhat contrived, were said to be several million dollars.<sup>53</sup>

The problem is not that states lack real injuries—whether to their sovereignty, their constituents, or themselves. The problem is that states can easily satisfy the current standing tests of *Data Processing* and *Lujan*. But as the traditional limitations on litigation of sovereignty interests and *parens patriae* suggest, an actual injury of some kind should not necessarily suffice to give a cause of action to the state.

As applied to individuals and private organizational entities, the injury-in-fact requirement provides at least some limits on the ability of a party to bring claims under the Constitution or the APA. After all, a private party does not have limitless interests that suffice to give him or her a right of action. An internet content provider may claim some injury from the Federal Communications Commission's retreat from net neutrality, but it obviously would not have a claim to challenge the child separation policies of the Department of Homeland Security. States, however, lack comparable limitations on their interests. Their range of potential interests results from states' being sovereigns that govern; that are concerned for the well-being of individuals and businesses within their borders; that provide infrastructure, social services, and schools;<sup>54</sup> and that act as employers. And given the overlap of state and federal regulation, there are few changes in federal administrative policy that cannot plausibly be alleged to have some particularized impact on the states in terms of adjusting state services or regulations.<sup>55</sup> Even in areas

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52 See 273 U.S. 12, 18 (1927).

53 *Texas v. United States*, 86 F. Supp. 3d 591, 617 (S.D. Tex.), *aff'd*, 787 F.3d 733 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

54 See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1159–61 (9th Cir. 2017) (reciting various harms to state universities), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017).

55 See, e.g., *Texas v. United States*, 787 F.3d at 749& n.33 (citing *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985)) (allowing standing in part because federal policy made implementation of existing state statutes more difficult); see also Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1895 (2019) (“[C]hanges in federal policy will almost always meaningfully affect state interests.”). Professor Shannon Roesler maintains that states should have standing “when the federal statute at issue contemplates an implementation role for state governments,” such

where federal regulation is more or less exclusive of state regulation, states have obtained standing based on their being stuck with federal policy.<sup>56</sup> One need only review the multifarious state allegations of injuries, and the district court opinions applying the *Lujan* test thereto, to be convinced of the general futility of the injury-in-fact test as a meaningful limit on state standing.

### B. *Arguably-Within-the-Zone-of-Interests as Ill-Suited to States*

Neither does the arguably-within-the-zone-of-interests test provide a limit on state standing. It is difficult to argue that states are outside the zone of interests protected by particular legal constraints. Like the injury-in-fact test, the zone-of-interests test was designed for individuals. It represented a significant expansion of standing accompanying the injury-in-fact test, but still

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as in cooperative state/federal programs. Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 637, 677–78 (2016) (under a “governance” approach, indicating that federal funding conditioned on state assistance or conditional preemption would be enough, and the state implementation role would not need to be substantial); *see also id.* at 685 (not relying on *parens patriae*, but rather on state interests in governing, including as “cooperative agencies”). A party who implements regulations, however, is not generally thought of as a proper plaintiff to challenge policies for implementing the law. Immigration officers, for example, did not have standing to challenge DACA as contrary to statutory directives. *Crane v. Johnson*, 783 F.3d 244, 253–54 (5th Cir. 2015) (holding as insufficient allegations that plaintiffs would violate their oaths of office, possibly have to change their work in response to the directives, and possibly would suffer adverse employment actions if they failed to follow the directives); *cf. Rodearmel v. Clinton*, 666 F. Supp. 2d 123, 129 (D.D.C. 2009) (per curiam) (holding that a Foreign Service Officer lacked standing to challenge Hillary Clinton’s appointment as Secretary of State as violative of U.S. CONST. art. I, § 6, cl. 2, because the emoluments for that position had been increased while Clinton was a Senator). As Professors Jessica Bulman-Pozen and Heather Gerken have pointed out, moreover, cooperative federalism gives many opportunities for “uncooperative federalism,” and such opportunities are not limited to litigation. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1308 (2009) (indicating that their article focused on political and administrative, not judicial, resistance); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1096 (2014) (indicating there are “three main ways that states . . . contest national policy: they argue that the federal government is exceeding its authority and encroaching on state autonomy; they enact their own legislation to prod the federal government into action or to set a different course; and they administer federal programs in ways that interfere with federal goals”).

56 *Texas v. United States*, 787 F.3d at 746 (referring to the basis on which the district court had ruled); *Texas v. United States*, 86 F. Supp. 3d at 636–44 (discussing “abdication” standing); *see also* Bulman-Pozen, *supra* note 46, at 1747 (noting that *Massachusetts v. EPA*’s “purported reliance on state sovereignty” was “in fact a reliance on its absence. Noting that the state had ‘surrender[ed] certain sovereign prerogatives’ to the federal government, the Court reasoned that the lodging of those sovereign prerogatives in the federal government gave the state a cognizable interest in ensuring the EPA’s compliance with federal law” (alteration in original) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007))). *See generally* Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017) (arguing that federal preemption of state law combined with federal underenforcement of federal law should give state standing).

promised some limits—given the inherently limited nature of individual interests combined with the supposed limitations of the parties Congress might arguably wish to benefit.

Some commentators assumed that broad state standing would not prove to be a problem because states would show restraint in pursuing alleged violations of federal law by federal officials.<sup>57</sup> But state attorneys general (“AGs”) often seem to have concluded that suing the federal government is more important than spending the same resources on enforcing their states’ laws.<sup>58</sup> Political incentives to sue the federal government may often be high, and the ability to pool resources with like-minded AGs and private interest groups loosens resource constraints.<sup>59</sup> When states coordinate, moreover, they can often choose forums where they have a high probability of obtaining newsworthy successful results, at least initially. In all events, AG incentives combined with current standing tests as applied to states have provided no effective limits on state standing, and have made standing restrictions on individuals increasingly irrelevant.<sup>60</sup>

### C. Cause-of-Action Analysis as a Limitation?

In criticizing current standing doctrine more generally, several noted scholars have pointed out that standing may be properly characterized as the injury component of a cause of action.<sup>61</sup> They suggest a de-emphasis on injury in fact in favor of looking to whether the plaintiff has stated a cause of action. Such an inquiry, they suggest, could focus on whether a plaintiff has alleged the type of injury that the constitutional and statutory provisions at issue are specifically designed to prevent.<sup>62</sup>

57 See, e.g., Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1513 (2013); Roesler, *supra* note 55, at 698 (“Moreover, because states do not have unlimited resources, they are not likely to sue unless the administrative scheme will have a substantial impact on state regulatory institutions. In short, the approach does not open the floodgates.”).

58 Cf. Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 633 (2018) (discussing the increase in state suits).

59 See NOLETTE, *supra* note 4, at 16, 34, 159, 174, 192–93 (discussing cooperation among same-party AGs as well as of AGs with private groups).

60 See, e.g., *Massachusetts v. EPA*, 549 U.S. at 518 (“Only one of the petitioners needs to have standing to permit us to consider the petition for review.”); Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481 (2017) (criticizing the one-plaintiff rule).

61 See Caleb Nelson, “Standing” and Remedial Rights in Administrative Law, 105 VA. L. REV. (forthcoming June 2019) (manuscript at 93–97, 102 & nn.465–66), <https://ssrn.com/abstract=3235637>; see also Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 474–75 (1974); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1475 (1988).

62 See, e.g., Fallon, *supra* note 2, at 1068–69 (indicating that standing should entail “substantive judgments concerning the protections that particular provisions of law confer”); *id.* at 1108 (“[I]t would be a small step to recognize that, although injury of some sort is invariantly required, different constitutional and statutory provisions guard against different kinds of injuries, which therefore require contextual characterization and

Such cause-of-action analysis has the advantage of clarifying that an injury, even a significant one, does not necessarily entail that a litigant has a cause of action to sue the federal government. But focusing on the injuries that a particular statutory or constitutional provision is specifically designed to prevent may not significantly restrain state causes of action.<sup>63</sup> The lack of limitation results from the frequent ability of states to claim they are the intended beneficiaries of constitutional limitations as well as statutory provisions. For example, Article I limitations on congressional power inherently benefit the regulatory autonomy of states. Some scholars accordingly have argued that states are perhaps the most interested litigants when there are structural claims against the federal government, and that states should be preferred to individuals in challenges to congressional legislation for exceeding congressional authority.<sup>64</sup>

If one moves from implied actions to enforce the Constitution to the APA, there have been suggestions that courts at least focus on the actual interests Congress intended to protect in a statute rather than just interests it “arguably” protected.<sup>65</sup> But the courts would likely be loath to say Congress had no purpose to protect state interests.<sup>66</sup> And such statutorily protected interests could easily include sovereign interests,<sup>67</sup> *parens patriae* interests,

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appraisal”); cf. Woolhandler, *supra* note 8, at 218–21 (discussing APA suits to address preemption, but not taking a position on their advisability); Woolhandler & Collins, *supra* note 9, at 504–06, 511 (suggesting that focus on legally protected interests might provide some limit on state standing, although indicating that states could often claim their interests were legally protected in the APA context).

63 As Professor Caleb Nelson has pointed out, implied rights of action are no longer countenanced merely based on a protected-interest test. See Caleb Nelson, *Intervention*, 106 VA. L. REV. (forthcoming 2020) (manuscript at 74–82) (on file with authors).

64 See Huq, *supra* note 57, at 1440, 1465, 1490 (arguing that institutional litigants such as states should be preferred to individuals for litigating structural claims); Crocker, *supra* note 8, at 2085 (“Individuals are a grossly inadequate substitute when it comes to asserting the structural constitutional protections underlying state sovereignty.”); see also Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 79–80 (2014) (arguing that governments are the most interested parties in structural litigation). Professor Aziz Huq has even argued that a criminal defendant should not be able to bring a structural challenge to a law under which she was prosecuted. Huq, *supra* note 57, at 1440. In a more modest proposal, Katherine Mims Crocker has argued that “sovereign state standing provides an important means by which states can claim their rightful position in the American constitutional scheme.” Crocker, *supra* note 8, at 2100.

65 See *supra* notes 61–62.

66 See *Texas v. United States*, 86 F. Supp. 3d 591, 624–25 (S.D. Tex.) (indicating that states’ interests in border protection were within the zone of interests of immigration laws), *aff’d*, 787 F.3d 733 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016); cf. *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 163 (E.D.N.Y. 2017) (not deciding the zone of interests challenge since it did not go to justiciability).

67 Professor Tara Grove, for example, would allow standing for states when they “challenge federal statutes and regulations that preempt, or otherwise undermine the continued enforceability of, state law.” Grove, *supra* note 3, at 855; see *id.* at 873. While she would not allow states special standing to challenge the implementation of federal law, she would allow states to sue if they had interests like those of private parties. *Id.* at 854 n.15 (indicat-

and individualized state interests as well. In short, focus on constitutionally and statutorily protected interests would not effectively limit all-purpose state standing. And to the extent a focus on more genuinely protected interests might limit individual standing but not state standing, state-as-plaintiff APA suits might take over a greater proportion of challenges to federal administrative action as compared to private-party-only suits.

## V. A MORE RESTRICTED VIEW OF STATE CAUSES OF ACTION?

If greater focus on causes of action is to act as a limit on state standing, it may be necessary to resort to older versions of when states had litigable cases in the Article III courts. Rather than being favored litigants in the Article III courts, states should perhaps return to their traditional disfavored status as plaintiffs. A restrictive version of permissible state causes of action would entail a strong general presumption against state litigation of their sovereignty interests<sup>68</sup> and *parens patriae* interests. And as to standing based on interests analogous to individuals, states would be limited to standing where they are the direct regulatory objects of federal statutes and regulations. States would be able to challenge, for example, alleged commandeering leg-

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ing that she is focusing on instances where a state may bring suit even when a private party may not). While Grove intended her proposal partly to serve as a limitation on state claims, it is unclear it would do so. It is common for a federal regulation to trump state law even without the agency's making a claim to exclusive power in an area, and such claims could be brought as sovereignty claims under Grove's proposal. See CALEB NELSON, STATUTORY INTERPRETATION 851–54 (2011) (discussing various categories of conflict preemption). For example, the Department of Justice did not purport to provide the exclusive regulation of physician-assisted suicide in *Gonzales v. Oregon*, when it issued a regulation that prescriptions issued to assist suicide were not for a valid medical purpose. See *Gonzales v. Oregon*, 546 U.S. 243 (2006). Relatedly, allegations of agency interference with the enforcement of state law are relatively easy to allege, given the multiple interactions of federal and state law. For example, the federal government's immigration policy to separate children from parents was alleged by the states to interfere with their licensing schemes for child care. Complaint for Declaratory and Injunctive Relief at 52, *Washington v. United States*, No. C18-939, 2018 WL 3752220 (W.D. Wash. Aug. 8, 2018) (No. 2:18-cv-00939), 2018 WL 3139446 (“Defendants’ Policy and subsequent actions harm the States’ sovereign interests by interfering with their licensing authority and rendering the States unable to honor their own policies favoring family unity.”); *id.* at 25 (“Attorney General Sessions also requests an exemption from state licensing requirements . . .”).

68 They would retain their traditional ability to litigate boundary disputes.

isolation,<sup>69</sup> and changes in the Fair Labor Standards Act that would increase their wage bill for state employees.<sup>70</sup>

Some might question why the courts should take such a step. If the current injury-in-fact test is taken to define the constitutional contours of a case and a cause of action, then one may see no problem to be addressed. So long as a court can find some injury in fact, as well as arguable congressional authorization in the APA or in some other applicable law, then states can sue whenever their AGs feel aggrieved. But even if it is not always clear what defines an Article III case, it is still possible to have a concept of what it is not. And widespread litigation at the instance of plaintiffs with a virtually unconstrained ability to complain that the public interest is not being served goes beyond Article III limits.

In this regard, consider whether Congress could promulgate a statute that purported to authorize states to bring actions under the APA against the federal government any time they believed the federal executive was acting contrary to federal statutory<sup>71</sup> or constitutional law.<sup>72</sup> Such a statute would seem to run up against the basic proposition that standing doctrine generally is meant to foreclose such all-purpose advocacy plaintiffs.<sup>73</sup> Should such a prohibition on general-public-interest plaintiffs change because the plaintiff is a governmental entity rather than a private plaintiff? Consider government enforcement suits. Enforcement actions are the paradigmatic form of

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69 See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–81 (2012) (Roberts, C.J.) (upholding an anticommandeering challenge to certain aspects of the Affordable Care Act); *New York v. United States*, 505 U.S. 144 (1992). One may criticize this proposal for treating states as regulatory objects as more entitled to standing than states as regulatory beneficiaries. But the regulatory-beneficiary category poses no substantial limit for states as opposed to individuals.

70 See, e.g., *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 524–26 (E.D. Tex. 2016) (holding that states could challenge the narrowing of the “white collar” exemption from overtime).

71 This would include the range of challenges available under the APA, such as claims alleging that agency action was arbitrary and capricious.

72 We can add to our general-public-interest-plaintiff statute a provision allowing states to bring any constitutional challenges to any congressional statute. For simplicity, our analysis focuses on challenges to executive action. The federal government itself lacks general authority to sue states based on claims that state statutes or policies violate the constitutional or federal statutory rights of citizens. *But cf. Arizona v. United States*, 567 U.S. 387 (2012) (allowing the federal government to sue to enjoin Arizona immigration laws on preemption grounds). See generally Woolhandler, *supra* note 8 (criticizing implied actions by governments to vindicate their sovereignty interests). If Congress purported to give the federal government such authorization to challenge any state statute or policy alleged to violate the rights of individuals, one would likely think that it had given the federal executive and the federal courts excessive power to attack state exercises of power without the necessity of determining private rights. The same would be true of a statute purporting to give states the ability always to challenge federal legislation. *Cf. Muskrat v. United States*, 219 U.S. 346 (1911) (indicating that congressional authorization to challenge a federal statute alone did not confer constitutional standing).

73 Comparable to the hypothetical statute would be one that allowed the national political parties to sue under the APA whenever their members' interests were affected.

government litigation, taking the traditional form of public power versus private immunity.<sup>74</sup> Such government enforcement, however, generally requires the more or less explicit authorization of the relevant legislature.<sup>75</sup> Not even the federal executive enjoys a blanket authorization to bring civil suits to enforce all federal law.<sup>76</sup>

By contrast, under the hypothetical general-public-interest statute described above, states would purportedly have such a blanket authorization to bring suits against the federal government any time their AGs believed the federal executive was acting contrary to federal law. True, the statute would purport to provide congressional authorization, and states would not be suing individual defendants with liberty and property interests at stake.<sup>77</sup> But Congress's authorizing the states to serve as the omniplaintiffs to enforce federal law against the federal government raises concerns of excessively enhancing the power both of the states and of the federal courts to the detriment of federal executive power. What is more, the absence of individual rights at stake moves the courts outside of the territory in which the necessity of deciding issues of private rights justifies judicial pronouncements on the legality of political branch action.

The argument that states should not be allowed to serve as general-public-interest plaintiffs against the federal government is reinforced by the traditional restriction on *parens patriae* suits. The federal executive itself is limited in its ability to sue as a *parens patriae* plaintiff without congressional authorization,<sup>78</sup> which follows from the fact that the federal executive is not authorized to bring civil suits to enforce all federal law. And states traditionally could claim no *parens patriae* power to enforce the federal Constitution and laws against the federal government.<sup>79</sup> While the government in suing as *parens patriae* purports to represent their citizens who have suffered injuries, citizens themselves can bring such claims—and in the preferred form of individual immunity against government power. The ban on state sovereignty-based claims against the federal government similarly directed suits

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74 The federal executive enforces federal law and the state executive enforces state law against individuals. In limited circumstances, Congress has authorized states also to bring civil actions under specific federal statutes. See NOLETTE, *supra* note 4, at 39–40 (listing selected federal statutes authorizing state litigation). In addition, Congress has permitted states to intervene in certain cases in which the constitutionality of their statutes is drawn into question. See 28 U.S.C. § 2403(b) (2012).

75 Criminal statutes generally authorize the appropriate executive officials of the particular sovereignty to prosecute statutorily defined offenses.

76 See generally Davis, *supra* note 64 (discussing a mixed record of courts in implying federal and state government rights of action under federal law, and arguing that such actions should be more readily implied for institutional (sovereignty) interests); see also Woolhandler & Collins, *supra* note 9, at 434 (discussing the Court's reluctance to countenance federal suits without statutory authorization).

77 Such concerns may be implicated indirectly, however, in that regulatory beneficiaries are generally seeking greater regulation of individuals.

78 See Woolhandler, *supra* note 8, at 225–26, 226 n.89.

79 But cf. *supra* notes 34–37 and accompanying text (noting inroads).

over the legality of government action to this traditional form,<sup>80</sup> and limited the federal courts to deciding issues of the validity of governmental action to instances in which such a determination was necessary to resolve issues of private rights.

Of course, the hypothetical statute discussed above is not that far from what exists under current law. While Congress itself has not explicitly authorized such broad state standing, the Court's current standing tests as applied to states have led to comparable results. Thus, it would not help the hypothetical statute if one were to add a requirement that states show an injury in fact, given that the injury-in-fact test has not provided effective limits on standing. And if one can agree that the hypothetical statute stretches the limits of Article III, there might be like concerns when the federal courts in countenancing states' suits have similarly expanded their own power by constitutional and statutory construction.

### CONCLUSION

The presumptions we have proposed against sovereignty and *parens patriae* claims, and limiting states to standing as regulatory objects, would help to restore some limits on state standing. These presumptions have constitutional and historical roots and have strong normative justifications. They rely on the proposition that constitutional and statutory limits on the political branches are ultimately for the protection of individuals. The presumptions would reinforce the principle that Article III courts do not exist to resolve the policy disputes between governments, and that the legitimacy of courts' pronouncing on the legality of government actions derives from the necessity of deciding cases of private rights.

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80 See Woolhandler, *supra* note 8, at 226 (“[S]overeignty based suits may resemble and substitute for *parens patriae* suits, and by extension, for individual suits.” (footnote omitted)).

