



# PENN STATE LAW REVIEW

## Judicial Federalism and the Challenges of State Constitutional Contestation

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Scholars of federalism emphasize the importance of states and state constitutions as alternative sources of power in the United States. Authority does not simply flow from Washington, D.C. Rather, power is spread throughout multiple layers of governance. This proliferation of nodes of authority offers a variety of benefits. For example, if the national government does not adequately address a problem, the states can provide the necessary protection for their citizens. Thus, if federal law does not safeguard personal sexual liberty, grant equality rights to same-sex couples, or guarantee medical care, the states can step in and fill these gaps. These state endeavors may encourage the federal government to act, either by offering best practices or by highlighting the shortcomings of federal efforts. States can lead by example.

In addition, states can directly contest federal practices.<sup>1</sup> Rather than supplementing federal efforts or substituting for federal inaction, states may actively oppose national policy. The means of opposition may be political, as states serve as rallying points for resistance to national programs. On at least one notable occasion, the Civil War, the opposition has taken military form. Recently, however, states have designated the federal courts as the forums of choice. States have brought suit against the national government, claiming that it has violated federal law.

Throughout the nation's history, courts have played some role in mediating disputes about the relative scope of state and federal power. Individuals subject to the coercive authority of the states or the national government have sought judicial redress, asserting that the government's

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1. *See, e.g.*, JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 88 (2005).

action transgressed federal law. In adjudicating these claims, courts have inevitably played a role in defining the boundaries and the overlap of state and federal power. Here, as elsewhere, Tocqueville's observation about the prominent role of courts in the United States has proved accurate.<sup>2</sup> In most of these cases, it was a private party that brought the federal-state conflict into a judicial forum.

This paper considers the role of states in bringing their disputes with the federal government into court. I wish to examine when it is appropriate for states to subject the national government to judicial supervision. In particular, I will focus on those instances where it appears that the state's participation is necessary to make a dispute justiciable. States may become involved in litigation with the federal government for a variety of reasons, such as offering litigation support or bringing public attention to the matter. Here, though, I am interested in those situations where the state's participation is essential to opening the courthouse doors, taking a dispute that otherwise would remain—at least for the moment—outside of judicial cognizance and endowing it with a magic key to the courtroom.

Two recent suits have demonstrated the potential importance of states as parties to litigation. In *Massachusetts v. EPA* in 2007, the United States Supreme Court considered a challenge to the EPA's refusal to regulate greenhouse gases.<sup>3</sup> Given the diffused and long-term causes and effects of global warming, the standing doctrine served as a significant obstacle to the litigation. Doubts existed about whether the harms would be sufficiently particularized and imminent to satisfy the Court's constitutional test. In a five-to-four ruling, the Court upheld Massachusetts' standing, emphasizing the "special solicitude"<sup>4</sup> appropriate to states in the standing analysis. Though the Court's opinion was not a model of clarity, it suggested that state participation was a necessary condition of justiciability and that a private party might not have satisfied the requirements for standing.

The recent health care legislation has spawned dozens of lawsuits contesting its constitutionality.<sup>5</sup> Those actions face significant procedural hurdles. The provision in the crosshairs of the attacks, the

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2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., Anchor Books 1969) (1835) ("There is hardly a political question in the United States which does not sooner or later turn into a judicial one.").

3. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

4. *Id.* at 520.

5. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); see Mary Anne Pazanowski, *Health Care-Insurance: Six More States Join Florida-Based Lawsuit Challenging Health Law's Individual Mandate*, 79 U.S.L.W. 1958 (Jan. 25, 2011); see, e.g. *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

requirement that most people buy insurance or pay a fee, does not take effect until 2014. In addition, the Tax Anti-Injunction Act<sup>6</sup> generally prohibits prospective challenges that aim to prevent the government from collecting money. In *Virginia ex rel. Cuccinelli v. Sebelius*,<sup>7</sup> a federal district judge in the Eastern District of Virginia found that the suit by Virginia was ripe and not barred by the Tax Anti-Injunction Act.<sup>8</sup> The court's opinion quotes the "special solicitude" language from *EPA* and emphasizes the state's sovereign interest in protecting the integrity of its laws.<sup>9</sup> Once again, state participation was crucial.

The justiciability doctrines serve several goals, including the related concerns of promoting judicial restraint and honoring the separation of powers. The doctrines limit the role of the courts in intervening in disputes and thereby empower the executive to promote its policies, constrained by political, rather than judicial, limits. The justiciability principles are controversial and have been subject to widespread criticism.<sup>10</sup> This paper addresses whether state participation in a dispute should alter the justiciability analysis. If the question is whether a particular dispute belongs in court at this time, should the answer depend on whether a state is a party? More particularly, should the justiciability of an action against the federal government turn on state participation?

In some instances, it might be hard to imagine a particular kind of suit except as brought by a state. When the controversy concerns the federal government imposing regulations on the state itself, it is difficult to conceive of an action not involving the state, as in the dispute over the drinking age in *South Dakota v. Dole*<sup>11</sup> or the state's "taking title" to radioactive waste in *New York v. United States*.<sup>12</sup> The *EPA* and *Cuccinelli* cases, however, arose out of ongoing disputes involving numerous private parties. The state participation took the private parties' opposition to federal action and ushered it into court.

Part I considers the doctrinal background to suits by states against the federal government. It examines the range of interests litigated by states and the potential obstacles to states asserting these interests in court. Part II explores how the *EPA* and *Cuccinelli* cases relied on and

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6. 26 U.S.C. § 7421(a) (2000).

7. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010).

8. *Id.*

9. *See id.* at 606 n.5.

10. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

11. *South Dakota v. Dole*, 483 U.S. 203 (1987).

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

expanded these historical principles. Part III assesses the benefits and costs of giving states special keys to the courthouse. While states have a valuable position in contesting the federal government, judicializing these contests raises serious questions. In a sense, these cases turn the “political safeguards of federalism” concept on its head by finding that federalism principles render the disputes uniquely well suited to judicial resolution.

## I. HISTORICAL BACKGROUND OF STATE SUITS AGAINST THE FEDERAL GOVERNMENT

### A. *Pre-Twentieth Century*

Before the advent of the modern regulatory state, suits by states against the federal government were rare.<sup>13</sup> Conflicts between states and the federal government over the scope of their relative powers date to the beginning of the republic. To the extent these disputes ended up in court, though, the cases generally followed the more traditional model of litigation involving an enforcement action brought by the state or federal government against an individual accused of violating a law.<sup>14</sup>

*Worcester v. Georgia*, for example, tested the scope of federal and state power over Indian tribes.<sup>15</sup> The case arose because Georgia enacted a statute requiring the licensing of non-Indians living within Cherokee territory.<sup>16</sup> The state then prosecuted Worcester and others for residing in Cherokee territory without a license.<sup>17</sup> The authority of the national government to establish a bank reached the courts in a similar fashion.<sup>18</sup> In 1818, Maryland imposed a tax on banks not chartered by the state legislature.<sup>19</sup> When McCulloch, the cashier for the Bank of the United States, refused to pay the tax, Maryland brought an enforcement action in state court to recover the money.<sup>20</sup> *Osborn v. Bank of the United States*<sup>21</sup> likewise stemmed from the anticipated, then realized, enforcement of state law. The Bank of the United States sought to head off the enforcement of an Ohio tax by obtaining an injunction prohibiting Osborn, the auditor of Ohio, from proceeding against the bank.<sup>22</sup>

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13. See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 390 (1995).

14. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

15. *Id.*

16. *Id.* at 521-25.

17. *Id.* at 528-29.

18. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

19. *Id.* at 317-18.

20. *Id.*

21. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

22. *Id.* at 739-40.

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Subsequently, an employee of Osborn's broke into a branch of the Bank of the United States and removed \$100,000. The injunction proceedings led to the ruling in the United States Supreme Court.<sup>23</sup>

In each of these cases, the federal-state dispute concerned federal limits on the scope of state regulatory authority. The state exercised what it understood to be its prerogative and attempted to assert jurisdiction over persons or entities within its boundaries. In each instance, the states enacted statutes that precipitated the conflict with federal authority. Those laws expressed the states' beliefs that certain conduct came within their power to regulate. The states asserted their governmental authority, which spawned confrontations with the national government. The enforcement actions gave rise to the constitutional litigation. A particular individual became ensnared in the tangle of state and federal assertions of authority, and the obligations of that individual became the focus of judicial intervention.

More general state efforts to challenge the scope of federal authority faced greater jurisdictional hurdles. In the post-Civil War period, states challenged the constitutionality of the Reconstruction Acts.<sup>24</sup> They claimed that the federal plan effectively obliterated the sovereignty of the states.<sup>25</sup> The United States Supreme Court held these actions to be nonjusticiable.<sup>26</sup> In *Georgia v. Stanton*, for example, the Court rebuffed an attack on Reconstruction by Georgia.<sup>27</sup> The Court explained, "[f]or the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges."<sup>28</sup> The Court held that these claims constituted nonjusticiable political questions.<sup>29</sup> Georgia had tried to buttress its position by asserting that Reconstruction interfered with the state's control over governmental buildings and other property.<sup>30</sup> The Court, however, rejected that theory, refusing to allow Georgia to express its sovereignty argument as a property right.<sup>31</sup> In *Mississippi v. Johnson*,<sup>32</sup> the Court similarly rejected a state's attempt to challenge the constitutionality of Reconstruction.

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23. *Id.* at 741.

24. *See, e.g.*, *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1868).

25. *Id.* at 53.

26. *Id.* at 77.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.*; *Woolhandler & Collins*, *supra* note 13, at 417.

32. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867).

These rulings may have stemmed in part from the Court's reluctance to confront Congress.<sup>33</sup> However, the Court was willing to adjudicate the constitutionality of Reconstruction in the context of claims by wronged individuals. When individuals asserted that the federal government was violating their rights, the Supreme Court found the claims to be justiciable.<sup>34</sup> The well-known habeas corpus cases of *Ex parte Milligan*,<sup>35</sup> *Ex parte McCardle*,<sup>36</sup> and *Ex parte Yerger*<sup>37</sup> illustrate the Court's willingness to address these issues in the proper litigation context. As *McCardle* further demonstrates, the Court honored congressional restrictions on its jurisdiction, but did not find the cases otherwise inappropriate for judicial resolution.<sup>38</sup>

To summarize this brief overview, states generally could not sue the federal government directly to vindicate their power against potential federal encroachment. The question of the relative scope of state and federal authority often did end up in court, but in the context of individuals defending themselves from enforcement actions by states or the federal government. The limitations on state litigation illustrated in the Reconstruction cases thus seem rather formal. One might question why the status of the parties should matter when the underlying issues are appropriate for judicial resolution. What is clear, however, is that state participation did not ease entry into the courtroom. Quite the contrary, the courts entertained broad challenges to federal authority by aggrieved individuals, but barred the states from asserting such claims.

In reviewing this period, Ann Woolhandler and Michael Collins offer some normative arguments in favor of this scheme.<sup>39</sup> Focusing the litigation on individual suits, they argue, emphasizes the structure of federalism in the United States.<sup>40</sup> States and the federal government operate within the same territory.<sup>41</sup> The federal government legitimately acts on individuals, and the state does not function as a kind of sovereign intermediary between the federal government and the people.<sup>42</sup> Further, federalism focuses on protecting the rights of individuals.<sup>43</sup> Accordingly, it is appropriate that the clash between state and federal authority focuses

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33. See Woolhandler & Collins, *supra* note 13, at 418.

34. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

35. *Id.*

36. *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868).

37. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

38. See *McCardle*, 73 U.S. (6 Wall.) at 327.

39. See Woolhandler & Collins, *supra* note 13, at 439-40.

40. *Id.* at 439.

41. *Id.*

42. See *id.*

43. *Id.*

on the impact on individuals and their rights, rather than on bare claims of prerogative by the states or the federal government.<sup>44</sup>

### B. *The Modern Regulatory State*

In the twentieth century, actions by states against the federal government have become more common. In evaluating the justiciability of claims brought by states, commentators have generally divided the state interests into three categories: (1) proprietary interests; (2) sovereign interests; and (3) quasi-sovereign interests.<sup>45</sup> This framework builds on the Supreme Court's analysis in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*.<sup>46</sup>

#### 1. Proprietary Interests

Proprietary interests refer to claims by a state of the same nature as those brought by a private party. States may own land, participate in business ventures, and generally engage in activities similar to those of other proprietors.<sup>47</sup> In these instances, courts generally apply the same rules to states that are applied to private parties.<sup>48</sup> The Eleventh Amendment provides special protection to states as defendants, but does not generally change the rules applicable to states as plaintiffs in litigation.<sup>49</sup> This category of proprietary interests includes ownership interests in state land, streams, and highways. Courts have upheld the ability of states to sue the federal government to vindicate these proprietary interests.<sup>50</sup> For example, in *Hodges v. Abraham*, the Court of Appeals for the Fourth Circuit invoked this theory to allow South Carolina to sue the federal government regarding its alleged violations of the National Environmental Policy Act.<sup>51</sup> Based on the potential harm to a state highway, streams, and wildlife habitats, the court held that the Governor, suing in his official capacity, "is essentially a neighboring landowner."<sup>52</sup>

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44. *See id.* at 439-40.

45. *See* Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES. & ENVTL. L. 273, 294-95 (2007).

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

47. *See id.* at 602; Wildermuth, *supra* note 45, at 295-96.

48. *Snapp*, 458 U.S. at 601-02.

49. *See* Wildermuth, *supra* note 45, at 295-97.

50. *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002).

51. *Id.*

52. *Id.* at 445.

## 2. Sovereign Interests

Defending territorial integrity constitutes a key part of sovereignty, and sovereign interests clearly include border disputes. In *Snapp*, the Court further defined sovereign interests broadly, and somewhat ambiguously, to include “the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal.”<sup>53</sup> Commentators agree that this category includes challenges by states to federal statutes and regulations that apply to state governments.<sup>54</sup> The “commandeering” of states in *New York v. United States*<sup>55</sup> provides one example. Moreover, courts also have permitted states to challenge federal rules requiring them to revise their “state implementation plans” under the Clean Air Act.<sup>56</sup>

The U.S. Supreme Court has allowed states to challenge the federal regulation of voting on similar grounds. For example, in *South Carolina v. Katzenbach*,<sup>57</sup> the Court permitted the state to assert that the federal Voting Rights Act exceeded federal authority and interfered with state regulation of voting.<sup>58</sup> Similarly, in *Oregon v. Mitchell*,<sup>59</sup> the Court exercised jurisdiction over states’ claims that federal voting rights laws infringed on the power of the states to regulate elections.<sup>60</sup> The Court invalidated a federal mandate that states lower the voting age to eighteen in state and local elections.<sup>61</sup> These decisions contain little explicit discussion of the justiciability of the states’ claims, except for *Katzenbach*, in which the Court held that a state could not assert claims based on the Due Process clause, the Bill of Attainder clause, or separation of powers, and explained that these rights belonged to citizens, not to the state.<sup>62</sup>

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53. *Snapp*, 458 U.S. at 601.

54. See Wildermuth, *supra* note 45, at 312-15; Woolhandler & Collins, *supra* note 13, at 492-93, 508-10.

55. *New York v. United States*, 505 U.S. 144 (1992); see Woolhandler & Collins, *supra* note 13, at 509.

56. See *West Virginia v. EPA*, 362 F.3d 861 (D.C. Cir. 2004); see also *National Ass’n. of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1227 (D.C. Cir. 2007) (upholding standing of association of state agencies to challenge EPA rule because of its impact on state implementation plans).

57. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

58. *Id.* at 323 (stating that “[t]hese provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution.”).

59. *Oregon v. Mitchell*, 400 U.S. 112 (1970) (the case was heard together with cases on bills of complaint from Texas, Idaho, and Arizona).

60. *Id.*

61. *Id.* at 117-18.

62. *Katzenbach*, 383 U.S. at 323-24.



As will be discussed more below, the complex and potentially wide-ranging set of sovereign interests may include a state's interest in having its laws not be preempted by federal law. Lower courts have allowed states to bring suit against the federal government based on this theory.<sup>63</sup> *Ohio ex rel. Celebrezze v. U.S. Department of Transportation*, for instance, arose out of a potential conflict between an Ohio statute requiring prior notification of the shipment of radioactive materials and a policy statement of the Materials Transportation Bureau of the United States Department of Transportation, which stated that such state laws were preempted by federal regulations.<sup>64</sup> The Court of Appeals for the Sixth Circuit held that Ohio could sue the federal government in order to seek to vindicate its own law.<sup>65</sup> Similarly, the Ninth Circuit upheld the ability of California to challenge a federal telephone regulation that preempted state law.<sup>66</sup>

### 3. Quasi-Sovereign Interests

Quasi-sovereign interests refer to interests that a state has in the well-being of its inhabitants.<sup>67</sup> The Court has characterized the relevant interests as including health and safety interests and economic interests, as well as a more amorphous collection of interests in proper treatment within a federal system.<sup>68</sup> The Court has emphasized that the state's interest must stand apart from the interests of particular private parties.<sup>69</sup> In *Snapp*, the Court declined to proffer an exhaustive list, but explained that certain characteristics of the relevant interests are "so far evident."<sup>70</sup> The Court stated that:

First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.<sup>71</sup>

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63. See, e.g., *Ohio ex rel. Celebrezze v. U.S. Dep't. of Transp.*, 766 F.2d 228 (6th Cir. 1985).

64. *Id.*

65. *Id.* at 229.

66. See *California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996) (finding that the state Public Utilities Commission "has standing to challenge the FCC's preemption order because of its interest in regulating intrastate telecommunications services consistent with federal constitutional protections and in exercising California's sovereign powers over matters reserved to the states.>").

67. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982).

68. *Id.* at 607.

69. *Id.*

70. *Id.*

71. *Id.*

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The Court in *Snapp* asserted that the *parens patriae* action, as it has evolved in the United States, requires the assertion of a quasi-sovereign interest.<sup>72</sup>

Quasi-sovereign interests include public nuisance cases in which the state seeks to prevent air pollution, water pollution, and other tangible threats to the safety of its residents.<sup>73</sup> The danger to the public, however, need not be physical. In *Snapp*, Puerto Rico brought suit against individuals and companies engaged in the apple industry in Virginia, alleging that the defendants discriminated against residents of Puerto Rico in favor of foreign workers, in violation of federal statutes.<sup>74</sup> The Court held that Puerto Rico could maintain a *parens patriae* action both to protect its residents from discrimination and to ensure its residents full and equal participation in the statutory scheme.<sup>75</sup>

In addition to discussing the requirements for a *parens patriae* action, *Snapp* also reiterated a crucial limitation on such actions articulated in *Massachusetts v. Mellon*<sup>76</sup> in 1923.<sup>77</sup> In *Mellon*, Massachusetts challenged the constitutionality of a federal maternal health program. The state asserted that the burden of the appropriations fell unevenly on the states and that the program invaded the self-government of the states in violation of the Tenth Amendment.<sup>78</sup> The Court held Massachusetts' claim to be nonjusticiable.<sup>79</sup>

In regard to the rights of Massachusetts, the Court found that the suit presented a political question outside the jurisdiction of the courts.<sup>80</sup> The Court also rejected the idea that Massachusetts could bring a *parens patriae* action against the United States.<sup>81</sup> The Court held that such an action conflicted with central principles of federalism:

[T]he citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens . . . , it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as

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72. *Id.* at 601.

73. *Id.* at 604.

74. *Id.* at 597-98.

75. *See id.* at 608-09.

76. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

77. *See Snapp*, 458 U.S. at 610 n.16.

78. *See Mellon*, 262 U.S. at 479.

79. *Id.* at 480.

80. *See id.* at 484-85.

81. *Id.* at 485-86.

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*parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.<sup>82</sup>

Thus, in 1923, the Court held that states could not bring suits against the United States on behalf of their citizens, at least to assert violations of federalism. With respect to the allocation of power among the states and the national government, the federal government represented the interests of the state's residents, and the state could not claim to assert the rights of its citizens against the United States.

In light of *Mellon*, if a state wishes to bring suit against the United States, two key doctrinal questions are: (1) is the state asserting a sovereign or a quasi-sovereign interest, as the two are not always easily differentiated; and (2) if the state is asserting a quasi-sovereign interest, is it the kind of interest that can be distinguished from the claim in *Mellon*? More generally, in light of *Mellon*'s understanding of the national government's role in enforcing a federal system, when would it ever be appropriate for states to force the federal government into a judicial forum to justify its actions? In other words, whether the interest is denominated as "sovereign," "quasi-sovereign," or "proprietary," what kind of interests, if any, should enable states to force a judicial, as opposed to a political, resolution?

## II. RECENT STATE LITIGATION AGAINST THE FEDERAL GOVERNMENT

Two recent major policy disputes resulted in states suing the federal government.<sup>83</sup> In each instance, the states disagreed with the approach adopted by the federal government. Many private parties, as well as states, asserted that the national government's actions violated federal law. Each suit faced substantial justiciability hurdles, with serious questions about the appropriateness of judicial resolution of the issues. In deciding whether the cases could proceed, the courts grappled with the doctrinal framework outlined above. The rulings permitting the suits to go forward both built on and transformed these precedents. The decisions appeared to expand the role of states in facilitating the judicial resolution of complex policy controversies.

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82. *Id* (italics added).

83. See *Massachusetts v. EPA*, 549 U.S. 497 (2007) (regarding issues of global warming and EPA enforcement of environmental protection statutes); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010) (pertaining to the Patient Protection and Affordable Care Act (PPACA) and the health care "mandate").

## A. Massachusetts v. EPA

The Clean Air Act mandates that the Environmental Protection Agency (EPA) regulate the emission of “any air pollutant” from new motor vehicles that “may be reasonably anticipated to endanger public health or welfare.”<sup>84</sup> In 1999, various private organizations filed a petition requesting that the EPA use this authority to restrict carbon dioxide and other emissions from motor vehicles that contribute to global warming.<sup>85</sup> In 2003, the EPA entered an order refusing to regulate these emissions.<sup>86</sup> The EPA asserted that it did not have statutory authority to regulate gases based on alleged links to climate change and that even if it had the authority, it would decline to exercise it.<sup>87</sup> State and local governments intervened to join in challenging the EPA’s decision.<sup>88</sup>

As is often the case in environmental litigation, a crucial issue was standing. Under the Court’s precedents, a party must demonstrate an injury that is imminent, particular rather than generalized, causally linked to the challenged conduct, and likely to be remedied by a favorable ruling.<sup>89</sup> The federal government asserted that the plaintiffs lacked standing in light of the widespread nature of global warming,<sup>90</sup> the small role played by new car emissions,<sup>91</sup> the large impact of gases from other countries,<sup>92</sup> and the conjectural nature of any specific harm.<sup>93</sup>

In *Massachusetts v. EPA*, a sharply divided Court upheld standing to challenge the EPA’s order and ruled that the agency had failed to comply with the statute.<sup>94</sup> In allowing standing, the Court emphasized the special status of states as litigants; that much is clear:

We stress here . . . 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. Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.<sup>95</sup>

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84. 42 U.S.C. § 7521(a)(1).

85. *Massachusetts v. EPA*, 549 U.S. at 510.

86. *Id.* at 511.

87. *Id.*

88. *Id.* at 514.

89. *Id.* at 518.

90. *Id.* at 517.

91. *Id.* at 523.

92. *Id.* at 523-24.

93. *Id.*

94. *Id.* at 526.

95. *Id.* at 518.

The significance of the special status of Massachusetts, however, remains somewhat elusive.

The Court drew on the *parens patriae* line of cases in finding a distinctive role for states in protecting the health and well-being of their inhabitants. The Court emphasized precedents such as *Georgia v. Tennessee Copper Co.*,<sup>96</sup> which had allowed a *parens patriae* action by Georgia to protect its citizens from pollution: “Just as Georgia’s ‘independent interest . . . in all the earth and air within its domain’ supported federal jurisdiction a century ago, so too does Massachusetts’ well-founded desire to preserve its sovereign territory today.”<sup>97</sup> In keeping with the *parens patriae* theory, the Court noted “Massachusetts’ stake in protecting its quasi-sovereign interests.”<sup>98</sup>

The Court’s embracing of a *parens patriae* theory is surprising for at least two reasons. First, when it came to detailing the injury-in-fact for standing purposes, the majority emphasized the threat to Massachusetts’ coastline from rising seas.<sup>99</sup> However, that kind of harm had generally been thought to implicate a proprietary interest of the state as landowner, or conceivably a sovereign interest of the state in its territorial integrity.<sup>100</sup> Second, because of *Massachusetts v. Mellon*, the *parens patriae* category seemed to present the greatest obstacles to a suit by a state against the United States.

To distinguish *Mellon*, the Court drew a distinction between a state seeking to prevent the application of federal law and a state seeking to invoke the protections of a federal statute:

[T]here is a critical difference between allowing a State “to protect her citizens from the operation of federal statutes” (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do). Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens; it rather seeks to assert its rights under the Act.<sup>101</sup>

What this passage elides is that while the Court had frequently allowed states to bring *parens patriae* actions invoking the protection of federal statutes, it had not previously permitted the vindication of federal statutes against the federal government.

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96. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

97. *Massachusetts v. EPA*, 549 U.S. at 519.

98. *Id.* at 520.

99. *Id.* at 522.

100. See Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 265 (2009).

101. *Massachusetts v. EPA*, 549 U.S. at 520 n.17 (quoting *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 447 (1945)). As is apparent from the caption of the case, *Georgia v. Pennsylvania Railroad Co.* did not involve a suit by a state against the federal government. See *Massachusetts v. EPA*, 549 U.S. at 540 n.1 (Roberts, C.J., dissenting).

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In invoking the *parens patriae* doctrine, the Court explicitly drew on the political analysis underlying this theory. In decisions such as *Georgia v. Tennessee Copper*, the Court had characterized *parens patriae* cases as a kind of quid pro quo for joining the federal union.<sup>102</sup> What is a state to do when faced with pollution streaming across its borders? If it were an independent nation, it could use diplomatic, or even military means, to protect its inhabitants. In our constitutional system, diplomacy is limited, and military action against a neighboring state is not permissible. So, an action in federal court represents the constitutional solution to this inter-state dispute. The *Tennessee Copper* Court expressed the argument as follows:

When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.<sup>103</sup>

The federal court is the current alternative to sending the state militia across the border.

In *Massachusetts v. EPA*, the Court extends this analogy by noting that states are disabled from protecting themselves in the foreign relations sphere and that they gave up some of their regulatory authority to the federal government:

When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.<sup>104</sup>

So, it is now up to the federal government to defend the interests of the states. Congress has established a statutory scheme to protect the states, and if the EPA fails to safeguard the states properly, then the states can force the agency into court, just as states can force other states into court. As the Court explained, “[t]hese sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others). . . .”<sup>105</sup> Moreover, Congress has

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102. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

103. *Id.* at 237; *see also Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

104. *Massachusetts v. EPA*, 549 U.S. at 519.

105. *Id.*

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established procedural mechanisms inviting suits to force the agency to comply with the statutory directive.<sup>106</sup>

What this account does not confront directly are the differences between states and the national government. The lesson of *Massachusetts v. Mellon* seemed to be that the federal government did not confront a state as hostile sovereign, an unreliable neighbor against whom judicial process now takes the place of force. Rather, the federal government represents the people of Massachusetts just as much as does the state itself. With respect to the United States, the state has no special claim to represent its citizens. The point is not that no one can challenge the EPA's interpretation of a statute. Principles of administrative law, including judicial review, provide an important check on the agency's operation. Nor is the issue whether a state is a proper party to such an action. No one seemed to dispute that a state that suffered harm had no less right than any other party to challenge the EPA's ruling. The question, rather, is why the state has a special role in bringing such claims on behalf of its citizens.

The majority does cite *Alden v. Maine* for the proposition that states retain the "dignity . . . of sovereignty,"<sup>107</sup> but the opinion does not explicate the significance of this observation. Perhaps this sovereign dignity strengthens the authority of states to sue the federal government. *Alden* was a sovereign immunity case, basically grounded in the Eleventh Amendment, and one could attempt a converse-Eleventh Amendment argument. Although the Eleventh Amendment generally shields states from suits in federal court, that bar does not apply to actions brought by the United States.<sup>108</sup> If the federal government has a special power to force states into court, maybe states should enjoy a special right to drag the federal government into court.

The opinion's lack of specificity may reflect the practical reality of crafting a five-vote majority. The briefs did not emphasize a *parens patriae* theory. Indeed, none of the briefs cited *Tennessee Copper*. The case made a surprise appearance in Justice Kennedy's questions at oral argument.<sup>109</sup> Justice Kennedy, the author of *Alden v. Maine*, apparently believed that the dignity of the states required a less demanding standing threshold.

In the final analysis, the significance of the quasi-sovereign/*parens patriae* theory is not clear. The Court focused on injuries to the state that

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106. *See id.* at 520.

107. *Id.* at 519 (quoting *Alden v. Maine*, 527 U.S. 706, 707 (1999)) (internal quotation marks omitted).

108. *United States v. Mississippi*, 380 U.S. 128, 140 (1965).

109. Transcript of Oral Argument at 15, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120).

would seem to fit into the sovereign or proprietary categories. There is no dispute that these kinds of interests can be litigated against the federal government. The Court, though, did emphasize the “special solicitude” owed to a state.<sup>110</sup> Commentators, moreover, have concluded that the Court’s standing analysis is in fact less demanding than the Court’s precedents otherwise would require.<sup>111</sup>

In sum, *Massachusetts v. EPA* appears to be a case in which the state’s role in the litigation was critical. It is not clear that a private party could have brought the litigation. The state’s presence in the action cleared a justiciability hurdle that might otherwise have kept the case out of court. This solicitude for the states, however, does not fit readily into the existing framework for analyzing litigation by states against the United States.

*B. Virginia ex rel. Cuccinelli v. Sebelius*

The recent health care reform legislation has brought forth an outpouring of state litigation against the federal government. On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (PPACA).<sup>112</sup> Virginia filed suit the same day challenging the constitutionality of the PPACA. Other states quickly filed their own challenges or joined in actions brought by other states.<sup>113</sup> As in most of these suits, Virginia’s claims focused on Section 1501, the “individual mandate” provision requiring most individuals either to obtain a minimum level of insurance or to pay a fee, variously characterized as a penalty or a tax.<sup>114</sup> In addition to claiming that Section 1501 exceeds the power of Congress, Virginia also emphasized the conflict between the PPACA and the Virginia Health Care Freedom Act (VHCFA), signed into law on March 24, 2010, which declares Virginia’s opposition to the individual mandate. In relevant part the Virginia Health Care Freedom Act states:

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110. *Massachusetts v. EPA*, 549 U.S. at 520.

111. See, e.g., Massey, *supra* note 100, at 252 (“The most persuasive understanding of *EPA* is that it permits states, as *parens patriae*, to assert generalized claims of injury suffered in common by all of its citizens that would not be judicially cognizable if asserted by any individual citizen.”); Wildermuth, *supra* note 45, at 316 (characterizing standing analysis in the case as “*Lujan-lite*”); see also Benjamin C. Zipursky, *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, 83 N.Y.U. L. REV. 1170, 1190 (asserting that Justice Stevens’ majority opinion “made new law in the area of standing”).

112. Patient Protection and Affordable care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

113. As of January 25, 2011, twenty-six states were challenging the PPACA. See *Six More States Join Florida-Based Lawsuit Challenging Health Law’s Individual Mandate*, 79 U.S.L.W. 1958 (Jan. 25, 2011).

114. Some of the suits also target the Medicaid regulations contained in the Act.



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No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage. . . .<sup>115</sup>

The litigation brought by Virginia, as well as the other state suits, raises interesting issues about the significance of state participation. No one doubts that an individual eventually could challenge the individual mandate. A person could refuse to purchase health insurance, while not falling within one of the statutory exemptions. The person would then be obligated to pay the fee and could sue for a refund on the ground that the obligation giving rise to the fee was unconstitutional. However, the mandate does not come into effect until 2014. The question is whether a state's participation in the litigation could accelerate or otherwise enhance the effectiveness of a constitutional challenge.

The litigation faced serious procedural obstacles. Under the doctrine of *Massachusetts v. Mellon*, discussed above, the standing of Virginia to sue the United States was in doubt. Moreover, the suit faced ripeness hurdles as well. The challenged provision did not take effect for four years. The Virginia litigation was not just a pre-enforcement challenge, but a pre-effective date challenge. Until 2014, the individual mandate provision did not require any individual to do anything. Further, separate procedural barriers exist for tax cases. In light of the important sovereign interest in collecting revenues, the Tax Anti-Injunction Act<sup>116</sup> generally prohibits a federal court from enjoining the collection of a tax. Instead, the claimant generally must pay the disputed levy and sue for a refund.

The recent decision of the federal district court in Richmond, *Virginia ex rel. Cuccinelli v. Sebelius*,<sup>117</sup> suggested that the state's participation did indeed facilitate the justiciability of the challenge. The court's ripeness analysis focused on the conflict between the PPACA and VHCFA. Further, the state's unique litigation posture proved crucial in overcoming the potential barrier of the Tax Anti-Injunction Act.<sup>118</sup> Thus, the court's decision to uphold Virginia's standing had broad ramifications for surmounting a variety of threshold obstacles.

With regard to the nature of the state interest asserted, Virginia disclaimed any theory of a *parens patriae* action relying on quasi-sovereign interests. The state conceded that *Mellon* barred such a suit against the federal government. Instead, Virginia emphasized its

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115. VA. CODE ANN. § 38.2-3430.1:1 (2010).

116. 26 U.S.C. § 7421(a).

117. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010).

118. 26 U.S.C. § 7421(a).

sovereign interest in the vindication of its laws. The district court endorsed this argument, accepting that “the Commonwealth is exercising a core sovereign power because the effect of the federal enactment is to require Virginia to yield under the Supremacy Clause.”<sup>119</sup> In finding that the conflict between the state and federal law sufficed for standing, the court noted language in the *Snapp* case, concerning the sovereign power to “create and enforce a legal code.”<sup>120</sup> The court relied also on a Tenth Circuit case from 2008 that allowed Wyoming to sue the federal government to seek relief from a federal regulation that might have conflicted with the state’s procedure for expunging domestic violence convictions.<sup>121</sup> In support of its emphasis on state prerogative, the court also noted a United States Supreme Court case that rejected a private party’s attempt to appeal a court’s invalidation of a state statute when the state, itself, declined to appeal.<sup>122</sup> Finally, while disavowing any *parens patriae* theory, the district court did cite *Massachusetts v. EPA* for the proposition that states are entitled to a “special solicitude” in standing analysis.<sup>123</sup>

Virginia’s participation in the suit helped to overcome ripeness obstacles, as well. The court noted that individuals, employers, and insurance companies would need to evaluate the impact of the mandate before its effective date.<sup>124</sup> The court then stated that “[m]ore importantly,” Virginia would have to revamp its health care programs.<sup>125</sup> The court further emphasized that “the alleged injury in this case is the collision between state and federal law.”<sup>126</sup> Thus, the court might have found a suit by an individual to be ripe, but Virginia’s status as a plaintiff provided significant additional assistance in rendering the action ripe.

The Tax Anti-Injunction Act generally prohibits actions seeking injunctions or declaratory judgments concerning the collection of taxes. In avoiding this bar, the special character of the state once again proved critical. The district court first suggested that the Tax Anti-Injunction Act might not apply to states.<sup>127</sup> The court went on, though, to rely on language in *South Carolina v. Regan* to the effect that the Tax Anti-Injunction Act does not bar challenges by aggrieved parties who have no

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119. *Cuccinelli*, 702 F. Supp. 2d at 603.

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

121. *See* Wyoming *ex rel.* Crank v. United States, 539 F.3d 1236 (10th Cir. 2008).

122. *See* Diamond v. Charles, 476 U.S. 54 (1986).

123. *See* *Cuccinelli*, 702 F. Supp. 2d at 606 n.5 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007)).

124. *Cuccinelli*, 702 F. Supp.2d at 608.

125. *Id.*

126. *Id.*

127. *See id.* at 604-06.

alternative remedy.<sup>128</sup> *Regan* concerned South Carolina's challenge to a change in the tax law that imposed registration requirements on tax-exempt bonds.<sup>129</sup> In *Regan*, the Court noted that the new regulations would be costly to issuers such as South Carolina, but that the state would never incur tax liability and thus might not be able to challenge the law by paying the tax and seeking a refund.<sup>130</sup> In *Cuccinelli*, the district court concluded that the *Regan* exception applied because Virginia would never owe any money under the individual mandate and thus could not challenge the PPACA in a refund action.<sup>131</sup> Unless this suit could go forward, Virginia might not have an opportunity to vindicate its sovereign interest in the enforcement of its own laws. It seems unlikely that a private party would have been able to overcome the barrier of the Tax Anti-Injunction Act and instead might have had to wait until 2014, pay, and then seek a refund.

The state participation in *Cuccinelli* thereby offered substantial aid to the dispute's justiciability. How well did Virginia's interest fit into the existing doctrinal framework? As discussed above, lower courts had sometimes found that a state had a sovereign interest in challenging federal statutes that allegedly preempted state law. Those cases, however, generally arose out of anticipated state enforcement proceedings, the traditional setting for judicializing state-federal disputes. In *Celebrezze*, for example, Ohio planned to bring an action to enforce its statute requiring notification of the shipment of nuclear material.<sup>132</sup> The shippers would have raised a defense of federal preemption, thus obtaining judicial review of the state-federal controversy. Alternatively, the shippers could have sought a declaratory judgment as to the invalidity of the state statute. Instead, Ohio went directly to court to initiate the declaratory judgment proceeding. In so doing, Ohio stressed its enforcement of the notification statute.<sup>133</sup> Similarly, in *California v. FCC*,<sup>134</sup> the state Public Utilities Commission sought to enforce state regulations against providers of telephone services. *Crank*, the Tenth Circuit case relied on by the district court in *Cuccinelli*, is less clear.<sup>135</sup> That action concerned a dispute between Wyoming and the federal government over the state measures necessary

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128. *South Carolina v. Regan*, 465 U.S. 367 (1984).

129. *Id.*

130. *Id.* at 379-80.

131. *Cuccinelli*, 702 F. Supp. 2d at 605.

132. *See Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232 (6th Cir. 1985).

133. *See id.*

134. *California v. FCC*, 75 F.3d 1350 (9th Cir. 1996).

135. *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008).

to vPPACate a conviction for a domestic violence misdemeanor.<sup>136</sup> The federal government claimed that the expunction did not satisfy federal standards so as to ease the application of federal gun restrictions on the convict.<sup>137</sup>

In the oral argument in *EPA*, moreover, Justice Scalia expressed skepticism about preemption as a basis for a state's suit against the federal government. The following comes from a colloquy between Justice Scalia and James R. Milkey, the counsel for Massachusetts:

JUSTICE SCALIA: I don't understand that. You have standing whenever a Federal law preempts State action? You can complain about the implementation of that law because it has preempted your State action? Is that the basis of standing you're alleging?

MR. MILKEY: In short, Your Honor -

JUSTICE SCALIA: Do you know any case that has ever held that?

MR. MILKEY: Your Honor, I would cite you to the amicus brief of the State of Arizona et al., which cites several cases, albeit not in this Court, that stand for that principle.<sup>138</sup>

Outside of the enforcement context, the ability of a state to assert standing based on federal preemption of its laws remains in doubt. *Cuccinelli* is about as far outside of the enforcement context as can be. The Virginia Health Care Freedom Act is purely declaratory. The state cannot enforce it against an individual.<sup>139</sup>

### III. THE JUDICIAL SAFEGUARDS OF FEDERALISM REVISITED

State lawsuits against the federal government stand at the intersection of several recent trends in federalism scholarship. Scholars have emphasized the dynamic and conflictual nature of federalism, stressing the importance of states as sources of alternative visions of governance.<sup>140</sup> These conceptions of federalism highlight the

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136. *Id.*

137. *Id.* at 1238-39.

138. Transcript of Oral Argument at 17, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120).

139. See Kevin C. Walsh, *The Ghost That Slew the Mandate*, (July 26, 2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1748550](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1748550), at 9 (emphasizing declaratory nature of Virginia's action).

140. See ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* (Univ. Chicago Press 2009); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

overlapping and competitive nature of federal and state jurisdiction. Litigation offers a very public and formal mechanism for crystallizing the disputes between states and the federal government. The court room served as an important forum for Massachusetts and Virginia to declare their fundamental opposition to federal policies.

At the same time, scholars have offered accounts of federalism that move away from formal notions of sovereignty. The rise of globalization and related developments have undermined some of the traditional notions of sovereignty, even as applied to nation-states.<sup>141</sup> With regard to states in the United States, sovereignty has even less integrity. Judith Resnik, Heather Gerken, and others have disaggregated state sovereignty and stressed the thoroughly plural nature of power, emphasizing the significant potential of cities and even of nongovernmental organizations.<sup>142</sup> Special solicitude for states in suing the federal government does not fit well into this pluralist outlook. The language in *Cuccinelli* and, to some extent, *EPA* sounds in notions of dual sovereignty that many consider out of date.

Placing state-federal controversies in court also runs against the theory, most closely associated with *Garcia v. San Antonio Metro. Transit Auth.*,<sup>143</sup> that such disputes generally belong in the political, rather than the judicial, sphere. In *Garcia*, the Supreme Court appeared to disclaim most judicial review of federalism-based challenges to congressional action.<sup>144</sup> The Court concluded that state interests were properly and adequately represented in the national political process.<sup>145</sup> Writing for the five-Justice majority, Justice Blackmun stated, “the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action.”<sup>146</sup> More recent Supreme Court cases have suggested a renewed concern with judicial enforcement of federalism principles.<sup>147</sup> Nevertheless, these

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141. See Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 44-45 (2007); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1606 n.195, 1606-12 (2006) [hereinafter Resnik, *Law's Migration*]; Robert A. Schapiro, *In the Twilight of the Nation-State: Subnational Constitutions in the New World Order*, 39 RUTGERS L.J. 801 (2008).

142. See Gerken, *supra* note 140, at 23-28; Resnik, *Law's Migration*, *supra* note 141; see also David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2234 (2006).

143. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

144. *Id.* at 560 (Powell, J., dissenting).

145. *Id.* at 552.

146. *Id.* at 556.

147. See, e.g., *New York v. United States*, 505 U.S. 144 (1992).

decisions have not overruled *Garcia*, nor have they suggested that cases involving state claimants are especially appropriate for judicial review.

*Cuccinelli* and *EPA* also represent the intersection of the two fundamental structural principles in the constitutional system of the United States, separation of powers and federalism. The justiciability barriers confronting non-state litigants in these cases are generally justified as preserving the separation of powers.<sup>148</sup> The doctrines of standing, ripeness, and political question define the circumstances in which the courts may oversee the legislative and executive branches of government. The standing doctrine, in particular, has been subject to severe criticism. It may provide a shield to allow the executive to violate the law, free from judicial scrutiny.<sup>149</sup> *Cuccinelli* and *EPA* suggest that federalism may serve to mediate the tensions between respect for the constitutional role of the President and Congress and a license for lawless conduct. Apparently, state governments will have a special ticket into the courthouse. The states will thereby have a distinctive role in enforcing the law. They will have an unusual privilege to subject the political branches to judicial scrutiny.

A serious question remains as to why the states are the appropriate solutions to this problem. If the goal is protect the prerogatives of the President and of Congress, why do these separation of powers principles have less force when it is a state that is knocking at the courthouse door? *Cuccinelli* and *EPA* stretch the bounds of existing doctrine in part because traditional categories of litigable state interests were not created to address these contemporary separation of powers concerns. If the analysis of Massachusetts's interest in *EPA* is awkward, that is because the standing doctrines the Court has fashioned do not match the danger of global warming. Finding that the Virginia Health Care Freedom Act afforded the state a justiciable sovereign interest seems to strain the traditional principles of state standing. That stretch would have been of little moment had the court not also applied an unusual understanding of ripeness and of the Tax Anti-Injunction Act. These cases at best mask, or simply obfuscate, underlying problems with justiciability doctrines. "Special solicitude" for states threatens to become a catch phrase, to enter as a *deus ex machina* ill-suited to the situation for which it is invoked. If separation of powers is the problem, why is federalism the solution? Given that *Garcia* has not been overruled, federalism principles seem especially odd entrance tickets into federal court.

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148. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1881 (2001).

149. See Massey, *supra* note 100, at 284 (noting concern that standing doctrine may protect "executive lawlessness").

## CONCLUSION

It is easy to lose sight of the underlying question in each of these cases. Whether greenhouse gases are subject to regulation under the Clean Air Act is a very significant issue. The constitutionality of the health care reform legislation is extremely important, as well. The harm of facilitating the judicial resolution of these matters seems fairly slight. Federalism plays a vital role in allowing the states to serve as rallying points for opposition to federal policies. Federalism, though, seemed to offer an alternative to litigation in federal court. Instead of individual litigation, state political resistance offers a forceful public statement of rejection of federal policies. Through enacting legislation or other means of public dissent, states express opposition to the federal government in a way that only states can. These political measures reflect the special feature of federalism, which is the unique voice that states enjoy as autonomous political entities within the constitutional structure of the United States. Litigation does not reflect any special capacity of states in a federal system. Individuals generally can bring suits to vindicate their federal rights; state governments provide a different mechanism of power, not just a private litigant on steroids.

The justification for allowing states in particular to open the court house doors, thus, remains elusive. If the EPA's actions or inactions violate the Clean Air Act, why cannot any plaintiff—or at least any coastal landowner—file suit? If the question is whether the challenge to health care reform is justiciable in light of the obstacles raised by ripeness and the Tax Anti-Injunction Act, why is the participation of a state relevant? Traditional doctrines of state standing do not answer this question. Moreover, whatever one thinks of *Garcia's* reliance on the political safeguards of federalism, it is far from clear why federalism should provide a special pass into court. Perhaps states deserve no less judicial protection than other parties, but they do not seem to need more.