



Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

8-2-2019

Some Puzzles of State Standing

Felicia A. Burton

College of William and Mary - School of Law, SSRNeditor@wm.edu

Tara Leigh Grove

University of Alabama - School of Law, tgrove@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Felicia A. Burton & Tara L. Grove, *Some Puzzles of State Standing*, (2019).

Available at: https://scholarship.law.ua.edu/fac_working_papers/124

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.



WILLIAM & MARY LAW SCHOOL

SOME PUZZLES OF STATE STANDING

Tara Leigh Grove

William & Mary Law School

William & Mary Law School Research Paper No. 09-400
94 NOTRE DAME L. REV. 1883 (2019) (INVITED ESSAY: INTRODUCTION TO SYMPOSIUM
ON FEDERAL COURTS, PRACTICE AND PROCEDURE)

This paper can be downloaded without charge from
the Social Science Research Network Electronic Paper Collection:

[http://ssrn.com/abstract= 3429080](http://ssrn.com/abstract=3429080)

SYMPOSIUM

FOREWORD: SOME PUZZLES OF STATE STANDING

*Tara Leigh Grove**

When should states have standing? In recent years, there has been an explosion in literature on that question.¹ Yet, even today, there seem to be as many questions as answers. In this Foreword to the *Notre Dame Law Review's* 2019 Federal Courts, Practice, and Procedure Symposium on state standing, I discuss a few such puzzles. First, should states have “special” standing when they sue the federal government—that is, greater access to federal court than private parties? Second, and conversely, should states have at least “equal” access to federal court, or should they face more barriers than private parties? These questions are at the heart of the literature on state standing, including the excellent contributions to this Symposium.

I. PUZZLE ONE: SPECIAL STANDING?

In *Massachusetts v. EPA*, the Supreme Court held that the State had standing to challenge the Environmental Protection Agency’s failure to regulate greenhouse gas emissions.² In so doing, the Court declared that the

© 2019 Tara Leigh Grove. Individuals and nonprofit institutions may reproduce and distribute copies of this Foreword in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Professor of Law and Cabell Research Professor, William and Mary Law School.

1 For a sample (in addition to the excellent pieces in this Symposium), see Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and “The New Process Federalism,”* 105 CALIF. L. REV. 1739 (2017); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. (forthcoming 2019); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016); F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83 (2018); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637 (2016); Stephen I. Vladeck, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845 (2012); sources cited *infra* note 14. Prior to the recent wave of scholarship, the seminal work—and still a must-read for anyone who writes in this area—was Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995).

2 *Massachusetts v. EPA*, 549 U.S. 497, 519–21 (2007).

State was “entitled to special solicitude in our standing analysis.”³ Since that 2007 decision, scholars have debated precisely what the Court meant by that “special solicitude” statement (and even whether the State’s “special” status mattered to the holding in that case).⁴ But, whatever the proper interpretation, the case spurred an explosion in commentary and, it seems, litigation.⁵

Much of the commentary has focused on the extent to which a state has a “special” power to sue the federal executive branch. As many scholars have observed, in upholding state standing in *Massachusetts*, the Court suggested that “states should be accorded special access to federal court in order to challenge federal agency action” and inaction.⁶ In other words, states may bring suit to contest the federal executive’s handling of federal law, even when other litigants cannot.

States themselves seem to be taking full advantage of that opportunity. State suits against the federal executive have risen dramatically in recent years, particularly during the Obama and Trump administrations.⁷ These “State v. United States” cases have alleged that the federal executive flouted

3 *Id.* at 520; *see id.* at 504–06.

4 The Court purported to apply the typical injury-in-fact, causation, and redressability test. *See id.* at 520–26 (concluding that the gradual loss of Massachusetts’s coastline was a “particularized injury” that was traceable to the EPA’s failure to regulate and suggesting that regulation by the EPA could “slow or reduce” global warming as well as the risk to Massachusetts’s coastline (emphasis omitted)). But many observers, including the dissenters in *Massachusetts*, have asserted that the Court applied a relaxed standard at all three stages of the standing analysis. *See id.* at 536, 547–48 (Roberts, C.J., dissenting) (criticizing the Court for “[r]elaxing Article III standing requirements because asserted injuries are pressed by a State”); *see also, e.g.,* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1082 (2015) (asserting that the “important point” from *Massachusetts v. EPA* was that the Court “either recognized or introduced special standing rules for states suing to protect their property and other quasi-sovereign interests”).

5 There are likely multiple reasons for the recent explosion in state lawsuits against the federal executive. But the *Massachusetts* decision appears to be one factor. *See* PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* 21 (2015) (documenting the rise in multistate litigation); Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1306 (2019) (attributing the rise to the *Massachusetts* decision).

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

7 *See* Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS (Oct. 27, 2017), <https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump>; *supra* note 5.

the will of Congress in various areas, including the environment,⁸ immigration,⁹ and health insurance.¹⁰

In his contribution to this Symposium, Ernest Young applauds this trend in intergovernmental litigation, contending that states should have considerable leeway to challenge federal executive action and inaction.¹¹ Andrew Hessick, for his part, argues that the bar on *parens patriae* cases should be lifted; states should be able to sue on behalf of their citizens to contest federal conduct that violates constitutional or statutory commands.¹² Bradford Mank and Michael Solimine agree that courts should apply “somewhat relaxed criteria,” when states bring suit against the federal executive.¹³ This work supplements a string of recent scholarship, which has likewise advocated special state standing to challenge the manner in which the federal executive implements federal law.¹⁴

8 See, e.g., *Massachusetts*, 549 U.S. at 505–06 (upholding state standing in a suit challenging the EPA’s failure to regulate motor vehicle emissions).

9 See *Texas v. United States*, 787 F.3d 733, 743, 748–54 (5th Cir. 2015) (upholding state standing to challenge the Obama administration’s Deferred Action for Parents of Americans and Lawful Permanent Residents program), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016); see also *Texas v. United States*, 328 F. Supp. 3d 662, 671 & n.1, 690–705 (S.D. Tex. 2018) (upholding state standing in a suit demanding that the Trump administration rescind the Deferred Action for Childhood Arrivals program).

10 See *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 797–98, 801–03, 804–08 (E.D. Pa. 2019), *appeals docketed*, No. 19-1189 (3d Cir. Jan. 24, 2019), No. 19-1129 (3d Cir. Jan. 23, 2019); *California v. Health & Hum. Servs.*, 351 F. Supp. 3d 1267, 1270–71, 1281–84 (N.D. Cal. 2019) (upholding state standing to challenge the Trump administration’s regulations that make it easier for employers to claim a religious or moral exemption to providing health insurance coverage for contraceptives; States arguing regulations violate the Affordable Care Act), *appeal docketed sub nom. California v. March for Life*, No. 19-15150 (9th Cir. Jan. 28, 2019).

11 See Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1893–96, 1921–25 (2019) (advocating broad state standing to challenge federal policy). To be sure, Young asserts that states will often have standing, even absent special rules. See *id.* at 1897–98; see also *infra* Part II (discussing the puzzle of “equal” state standing).

12 See F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 NOTRE DAME L. REV. 1927, 1927–29 (2019); *id.* at 1935–36 (asserting that although “the beneficiaries of these quasi-sovereign interests are the populace of the state,” “it is the state that holds and acts on these interests to protect the populace”). In *Massachusetts v. Mellon*, the Supreme Court announced that a state cannot bring a *parens patriae* action against the federal government—that is, the state may not act as the representative of private citizens to enforce their federal rights. 262 U.S. 447, 485–86 (1923). There is considerable disagreement over the scope of that prohibition, including whether it is a constitutional or only a prudential bar. See Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 225–26, 225 n.88 (2014) (noting the debate over this issue).

13 Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1956 (2019).

14 See, e.g., Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1771–72 (2008) (agreeing with “the *Massachusetts* majority that states [may bring suit] if the federal government has allegedly failed to perform a statutory or constitutional duty”);

Mank and Solimine, along with Jonathan Nash, ask whether this reasoning should extend to the area of remedy, recognizing that many of the debates over state standing intersect with the ongoing debates over national injunctions against the federal executive.¹⁵ In careful and thoughtful essays, these commentators do not advocate any hard-and-fast rules. But they suggest that, under certain (limited) circumstances, courts should be more willing to grant nationwide relief when the lawsuit is brought by a state (or multiple states).¹⁶

Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 252, 276 (2009) (arguing that broad state standing “does no more than ensure that executive discretion is confined within the boundaries of the Constitution and federal law”); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1073–74 (2010) (arguing that states are entitled to “special solicitude” to challenge an agency’s failure to regulate, when state law is preempted); Nash, *supra* note 1, at 206 (advocating state standing when the state alleges “the Executive Branch has underenforced the federal law in a way that is inconsistent with a governing statute” and Congress has preempted state law); Roesler, *supra* note 1, at 641–42, 679–81 (arguing that “states should have ‘governance’ standing to challenge federal power and action when the federal law at issue contemplates an implementation role for state governments,” and supporting standing in *Massachusetts v. EPA* as authorized by Congress). Notably, some scholarly endorsements are more qualified. See Metzger, *supra* note 6, at 67–75 (exploring the possibility that states may be effective monitors of federal agencies but suggesting that Congress should decide whether states ought to play such a special role). Jessica Bulman-Pozen thoughtfully suggests that state standing could stimulate the political process by encouraging negotiations between federal and state officials. See Bulman-Pozen, *supra* note 1, at 1744, 1748–49 (asserting that state lawsuits may encourage “the President or federal agency officials [to] come to the table” and bargain with state officials).

15 Scholars use a variety of terms for this concept—“nationwide injunctions,” “universal injunctions,” and “national injunctions.” I use the term “national injunction” to mean an injunction that is enforceable by both nonparties and parties to the lawsuit. For a small sample of the rich debate on this topic, compare Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420–23 (2017) (arguing that “[a] federal court should . . . enjoin[] the [federal] defendant’s conduct only with respect to the plaintiff”), and Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 620 (2017) (arguing that nationwide injunctions should be granted “if at all . . . only under certain narrow circumstances”), with Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018) (offering a qualified defense); see also Zachary D. Clopton, *National Injunctions and Preclusion*, 117 MICH. L. REV. (forthcoming 2019) (urging that the rules of preclusion provide guidance on this issue).

16 See Mank & Solimine, *supra* note 13, at 1958 (“[B]efore issuing [national injunctions], courts should take into account factors such as the number and geographic and partisan diversity of the states, who (attorney general or governor) is representing a state, and which one or more states are *opposing* the decrees, as parties or amici curiae.”). Likewise, in his characteristically careful and thoughtful fashion, Nash offers a qualified endorsement. He suggests that, although states and private parties should generally be treated the same at the remedial stage, states may deserve special access to nationwide relief when they (alone) can bring suit. See Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 1987–88, 2011–13 (2019).

One might wonder why states warrant “*special solicitude*”—that is, access to court over and above that of private parties—at either the standing or the remedial stage. Scholars continue to debate this issue, but there are some common themes. State attorneys general (who represent the state in the bulk of cases) are politically accountable officials who seem likely to bring actions in the public interest.¹⁷ Moreover, there are a limited number of state attorneys general (fifty), so broad state standing will not flood the federal courts with cases. Under this view, “[s]tate attorneys general have limited resources and are politically constrained” and thus will likely target “[o]nly particularly egregious executive violations of public rights.”¹⁸

As I have suggested in prior work,¹⁹ there are reasons to doubt these assumptions. State officials may not be better positioned than private parties to police the federal executive’s handling of federal law. First, a state attorney general has an obligation to represent the interests of her *state*, not the national public interest.²⁰ Second, in an era of growing party polarization,²¹ state attorneys general may be motivated by partisanship, rather than a broad conception of the public interest.²² Indeed, many recent “*State v. United States*” lawsuits could be seen as efforts by state officials to go after their polit-

17 See Hessick, *supra* note 12, at 1949 (“[U]nlike individuals, states are democratically accountable bodies A state’s decision to bring suit thus does not subvert the political process; instead it reflects the views of the people as embodied by their elected officials.”); Massey, *supra* note 14, at 274–75, 279 (“Not only is the number of possible plaintiffs reduced to fifty, the political process within each state will likely operate to restrain wholesale challenges to the exercise of federal executive discretion.”); Young, *supra* note 11, at 1914 (“One significant advantage that states have over private organizations and class actions is that they have built-in mechanisms of democratic accountability for their conduct of litigation on behalf of their citizens.”).

18 Massey, *supra* note 14, at 274, 279.

19 See Grove, *supra* note 1, at 895–99.

20 See NAT’L ASS’N OF ATTORNEYS GEN., *STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES* 47–49, 84 & n.1 (Emily Myers ed., 3d ed. 2013); *id.* 88 (“The vast majority of the attorneys general have a duty to litigate, affirmatively and defensively, on behalf of client agencies.”).

21 Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RES. Q. 219, 219–20 (2005) (“By the end of the 1980s, partisanship in Congress had risen dramatically and has remained at a high level ever since.” (citations omitted)); Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 POL. SCI. Q. 5, 6 (2001) (stating that in the 1990s, “the stark partisan polarization among the parties’ politicians . . . accelerated”).

22 See, e.g., Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597, 603 (2009) (“Generally, we can expect AGs to push hard on issues for which they feel confident they will get support from the electorate and from state elites.”); see also Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2150–54 (2015) (urging that state attorneys general are increasingly likely to be motivated by partisanship); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 729–30 (2011) (“Republican attorneys general running for re-election or higher office in 2010 emphasized issues like combating child pornography, while Democrats were more likely to highlight the environment”).

ical opponents on a national stage.²³ Republican attorneys general—led by Texas—attacked Obama-era policies, such as the deferred action programs for undocumented immigrants.²⁴ With President Trump in the White House, the litigation incentives have flipped; now Democratic attorneys general—led by New York and California—challenge the Trump administration’s policies on immigration, the environment, and health insurance.²⁵

Some supporters of broad state standing are sensitive to the issues of party polarization. They suggest that courts ought to take such concerns into account. Courts could, for example, grant standing and nationwide relief only when the state lawsuit has bipartisan support.²⁶ At first glance, this approach has considerable appeal. But I do want to offer a cautionary note: it is not clear that federal courts are institutionally suited (much less willing) to examine the ideological background of the litigants before them.

In past work, I proposed a more limited scope for special state standing against the federal government. My argument built on the fact that states have long had the power to go to court when private parties could not: states may enforce and defend state law, absent any showing of concrete injury.²⁷ I

23 In recent work, Margaret Lemos and Ernest Young caution that we should not assume state attorneys general have uniformly partisan motivations. For example, many state suits against corporations have bipartisan support. But the authors recognize that partisanship seems more likely to influence state suits challenging the federal executive’s handling of federal law. See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 86–92, 94 (2018) (“[S]tate litigation against business interests tends to be more bipartisan than state litigation against the federal government.”). These “State v. United States” cases are at the heart of the state standing literature.

24 See cases cited *supra* note 9. Many of those same officials have continued this litigation into the Trump administration, seeking the federal judiciary’s assistance in terminating Obama-era policies. See Lauren McGaughy, *With Trump in Charge, Why Is Texas Still Suing the Federal Government? Because Now It Can Win*, DALLAS MORNING NEWS (Feb. 8, 2018), <https://www.dallasnews.com/news/texas-politics/2018/02/08/trump-charge-texas-still-suing-federal-government-now-can-win> (“Thanks to a like-minded partner in the White House, Texas is now winning more lawsuits against the U.S. government than ever before. . . . Most of these suits target policies put in place by Democratic presidents . . .”).

25 See Neuhauser, *supra* note 7; David Schultz, *Blue Wave Roils Environmental Lawsuits as States Turn to Courts*, BLOOMBERG (Jan. 8, 2019), <https://news.bloombergenvironment.com/environment-and-energy/blue-wave-roils-environmental-lawsuits-as-states-turn-to-courts>.

26 See Hessick & Marshall, *supra* note 1, at 103, 105–08 (encouraging courts “to relax the injury in fact test for states” suing the federal executive “but impose prudential constraints” on those lawsuits by requiring states to show bipartisan support for any challenge, and by ensuring that a given official has the power to represent the state); Mank & Solimine, *supra* note 13, at 1958 (“[B]efore issuing [national injunctions], courts should take into account factors such as the number and geographic and partisan diversity of the states, who (attorney general or governor) is representing a state, and which one or more states are *opposing* the decrees, as parties or amici curiae.”).

27 See Grove, *supra* note 1, at 858–62; see also *Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013) (“No one doubts that a State has a cognizable interest ‘in the continued enforceability’ of its laws” (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986))); Tara

showed that, historically, states could assert that same interest in suits against the United States; that is, states could challenge federal statutes or agency regulations that preempted state law.²⁸ Drawing on this history and precedent, I offered a limiting principle for special state standing: states have broad standing to sue the federal government to protect *state* law (as in preemption cases), but not to oversee the federal executive's implementation of *federal* law.²⁹ Such a principle, I argued, would more carefully map onto the political incentives of state attorneys general; after all, they are selected to further the interests of the residents of their respective *states*, not to protect the national interest.³⁰ In his thoughtful contribution to this Symposium, Robert Mikos challenges this (more limited) scope of state standing, questioning whether states should even have a special power to enforce and defend their laws in federal court.³¹ His work powerfully unsettles many assumptions about state access to federal court.³²

Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. (forthcoming 2019) (manuscript at 22–25) [hereinafter Grove, *Government Standing*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134464 (underscoring that this principle is well established for both the state and the federal governments). In sharp contrast, the Supreme Court has made clear that private parties *lack* standing to protect the “continued enforceability” of state law, absent a showing of concrete injury. See *Hollingsworth*, 570 U.S. at 705–15 (rejecting private party standing to defend a state law banning same-sex marriage, given that the private actors’ “only interest was to vindicate the constitutional validity of a generally applicable California law,” but making clear that the state government could have defended the law); *Diamond v. Charles*, 476 U.S. 54, 64–67 (1986) (holding that a private individual, who strongly opposed abortion, lacked standing to defend a restrictive Illinois abortion statute, but stating that the State would have standing to defend the statute).

28 See Grove, *supra* note 1, at 863–72.

29 See *id.* 854–56 (“States . . . should have standing to challenge federal action that preempts, or otherwise undermines the enforceability of, state law—and thereby hinders the capacity of States to exercise self-government. . . . In sum, . . . States have broad standing to protect *federalism* principles, not the constitutional separation of powers.”). To be clear, I did not assert that a state has standing to challenge *any* federal action that arguably undermines federalism, such as a statute that may exceed federal power. Instead, my contention was that state standing to preserve state law helps to safeguard core federalism principles. See *id.* at 855 n.18. In their contribution to this Symposium, Ann Woolhandler and Michael Collins powerfully question whether my proposal sufficiently limits state access to federal court. See Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2027 n.67 (2019) (emphasizing that “[i]t is common for a federal regulation to trump state law”); see also Robert A. Mikos, *Standing for Nothing*, 94 NOTRE DAME L. REV. 2033, 2047–48 (2019) (expressing a similar concern).

30 See Grove, *supra* note 1, at 895–99.

31 See Mikos, *supra* note 29, at 2036 (“[P]roponents of protective standing have overstated the need for and value of standing to protect state law.”).

32 This brief Foreword is not the place to respond to Mikos’s thoughtful essay. For present purposes, I will simply note that it has long been settled that states may defend their laws, even in circumstances when private parties cannot do so. See *supra* note 27 (noting that in *Hollingsworth v. Perry* and *Diamond v. Charles*, the Supreme Court denied standing to private parties to defend a state law because the private litigants lacked a concrete injury, but the Court made clear that the state government itself could have defended

II. PUZZLE TWO: EQUAL STANDING?

Many commentators (myself included) have assumed that, at a minimum, states should have the same power as private parties to sue the federal government. For example, if a state alleges that the federal executive breached a contract by cutting off federal funds, the state may sue to redress that pocketbook injury.³³ Ernest Young forcefully defends (at least) this equal status.³⁴ Along the same lines, Katherine Mims Crocker argues that this assumption may justify many lawsuits against the federal executive, if states are treated as analogous to private associations.³⁵

But several contributors to this Symposium powerfully challenge this notion of “equality.” States, they argue, simply cannot be treated like private litigants. As Ann Woolhandler and Michael Collins point out, states—in their role as operators of public universities, police departments, prisons, healthcare networks, and highways and other infrastructure programs—may be injured by an almost infinite number of federal actions.³⁶ By contrast, “a private party does not have limitless interests An internet content provider may claim some injury from the Federal Communications Commission’s retreat from net neutrality, but it obviously [could not] challenge the child separation policies of the Department of Homeland Security.”³⁷ Along similar lines, building on his own recent work, Seth Davis contends that commentators need to more carefully parse the cases in which states suffer a “concrete” harm; not all state injuries—even financial injuries—are truly comparable to those of private entities.³⁸

This research suggests an intriguing possibility: courts may need to accord states *less* access to federal court (in theory) in order to *equalize* state

the law absent any showing of concrete injury). Accordingly, I am not as confident as Mikos that when another party brings suit, states could “adequately . . . defend their laws *without resort to protective standing*,” that is, playing by the same standing rules that apply to private parties. Mikos, *supra* note 29, at 2035.

33 See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205–06, 211–12 (1987) (upholding, against a Spending Clause challenge, a federal law that required states to raise the minimum drinking age to twenty-one or risk losing federal highway funds); Grove, *supra* note 1, at 867–69 (observing that, although the *Dole* Court did not mention standing, the State had a concrete pecuniary interest in the federal funds).

34 See Young, *supra* note 11, at 1896–1902, 1909–15 (arguing for equal standing and arguing against any special disabilities for state plaintiffs).

35 See Katherine Mims Crocker, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057, 2059 (2019) (contending that “the legal community should feel at least as comfortable with lawsuits led by states as with lawsuits led by other associations”).

36 Woolhandler & Collins, *supra* note 29, at 2024–26 (urging that, given the breadth of potential state interests, the injury-in-fact test provides no “meaningful limit on state standing”).

37 *Id.* at 2024–25 (“As applied to individuals and private organization[s], the injury-in-fact requirement provides at least some limits . . .”).

38 See Seth Davis, *The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091, 2091 (2019) (doubting that one should always assume governments have standing to sue based upon their private rights); see also Davis, *supra* note 1.

and private plaintiffs (in fact).³⁹ This possibility suggests the need for more work (along the lines of Davis's impressive scholarship), tackling when states' apparently "concrete" injuries should be treated as judicially cognizable.⁴⁰ Courts should perhaps also be more attentive to the causation and redressability elements of standing doctrine—ensuring that the relief sought by the state connects to its asserted injury.⁴¹ An alternative approach is to dispense altogether with the injury-causation-redressability standard, and articulate an entirely new test for state standing.

Of course, as Aziz Huq thoughtfully reminds us, in answering any of the questions of state standing, we must be attentive not simply to precedent and history (standard fare for federal courts scholarship).⁴² We must also consider politics and party polarization, litigant incentives (particularly those of state attorneys general), and how different standing rules may impact the enforcement of structural constitutional values.⁴³

In keeping with those broader themes, in separate work, I have expressed concern about the risks that intergovernmental litigation may pose to the federal judiciary. To the extent that federal courts become embroiled in (what at least appear to be) increasingly partisan disputes, that may not bode well for the long-term future of the third branch.⁴⁴ Other scholars have likewise begun to consider state standing in a broader institutional context.⁴⁵ I am confident that this trend will continue.

39 Cf. Woolhandler & Collins, *supra* note 29, at 2015 ("While one might agree that the states are not normal litigants, that abnormality might well suggest that states should get standing less easily than private parties." (footnote omitted)).

40 Alternatively, one could adopt Young's approach and embrace the possibility that states may have standing to challenge a virtually unlimited range of federal action—and, thus, in practice, have greater access to federal court than private parties. See Young, *supra* note 11, at 1895–96 ("States are . . . likely to enjoy broad standing even under ordinary Article III analysis.").

41 In my past work on state standing, I have underscored the need to connect the "injury" to the other aspects of the standing analysis. See Grove, *supra* note 1, at 888–90, 893–95, 895 n.215.

42 See Aziz Z. Huq, *State Standing's Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2132 (2019) (emphasizing the importance of "articulat[ing] the interesting normative consequences of narrowing or widening the Article III gauge in this contested class").

43 See *id.* at 2140.

44 In prior work, I have raised concerns about how government-initiated lawsuits (by states and other government entities) will impact the federal judiciary in the long run. See Grove, *Government Standing*, *supra* note 27 (manuscript at 42, 45–47); Tara Leigh Grove, Essay, *Justice Scalia's Other Standing Legacy*, 84 U. CHI. L. REV. 2243, 2259–64 (2017). These concerns may be even more pressing today, given the recent challenges to judicial independence. See Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)) (discussing recent attacks on the federal judiciary).

45 See, e.g., *supra* notes 22–23 and accompanying text (describing how scholars have taken note of the apparently partisan nature of "State v. United States" disputes).

CONCLUSION

State lawsuits against the federal government raise challenging questions of constitutional law, party polarization, remedies, and the proper scope of the federal judicial power. The pieces in this Symposium helpfully elucidate this debate and offer several steps forward. Scholars will undoubtedly pick up on these themes in future work, as state litigants continue to press the boundaries of their “special” standing. Indeed, with all the puzzles surrounding state standing, one thing seems fairly clear: state lawsuits against the federal government are not going away any time soon.