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QUASI-SOVEREIGN STANDING

*F. Andrew Hessick**

INTRODUCTION

Government power is divided between the states and federal government. States have general government authority within their borders, while the federal government has only limited powers but jurisdiction over the entire country. One reason for this division of power is to guard against the abuse of government power. As James Madison put it, “[t]he different governments will control each other.”¹ But the balance of power established by the Constitution has shifted over time. Changes in technology, commerce, politics, and various other areas have led to the expansion of federal power. Broad interpretations of Article I have expanded the realm of federal policymaking, and the rise of administrative agencies has expanded the power of the federal executive branch.

These expansions suggest a greater need for oversight to ensure that the federal government does not abuse its power. That task has fallen to the courts. Courts no longer play only their traditional role of resolving disputes between individuals.² They now regularly review agency actions and assess the constitutionality of federal statutes.³

But courts cannot always effectively ensure federal compliance with the law. One impediment is the law of standing. Ordinarily, for an individual to have standing, he must demonstrate that he has suffered a particularized, concrete injury in fact.⁴ For this reason, individuals cannot sue the United States simply for violating the Constitution or federal law.⁵ The injury from

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1 THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

2 See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1369–70 (1973) (describing the shift in the role of the federal courts).

3 See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 291 (2008) (discussing the rise of “nontraditional forms of action, such as declaratory judgments and actions authorizing agency review”).

4 See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016).

5 See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575–76 (1992).

disobedience is “undifferentiated and ‘common to all members of the public,’”⁶ and redressing that injury thus is a task for “the political branches.”⁷ To have standing to proceed in federal court, the individual must establish that he suffered a factual injury because of the failure to obey the law.

But for states, things are different. Like private persons, states can establish standing by demonstrating that they have suffered or are about to suffer an injury in fact. But states are not individuals; they are sovereigns, and in that capacity they have the power to protect the public interest. For that reason, the Supreme Court has developed two strands of doctrine supporting broader state standing. First, states can establish standing by demonstrating a violation of a sovereign interest, such as a violation of a state law.⁸ Second, states have standing to vindicate so-called quasi-sovereign interests—an ill-defined category of interests that roughly captures the state’s interest in protecting its populace.⁹ Because quasi-sovereign interests protect state residents, the Court has held that states have standing to press those interests in their capacity as *parens patriae*—as the representative of the residents.¹⁰

This latter type of standing would seem to support state standing to sue the federal government for not obeying federal law and the Constitution. After all, those laws exist for a reason; they reflect a judgment that their observance will improve society. States accordingly have a quasi-sovereign interest in seeing that they are observed.

Nevertheless, judges have concluded that states do not have standing based on their quasi-sovereign interests to sue the United States for not obeying the law. Two different reasons have been given. First, because a state can assert quasi-sovereign interests only in its capacity of representing its residents, a state has standing to press those interests only if it can demonstrate that its residents have suffered an injury in fact.¹¹ On this view, states do not have general standing to sue the federal government for disobeying the law; they have standing only if they can show that the disobedience injured a resident. Second, states are not the appropriate bodies to represent as *parens patriae* the interests of their residents in seeing the United States comply with the law. Instead, the United States itself, which also represents the residents of a state, is the appropriate body to ensure that it complies with federal and constitutional law.¹²

6 *Id.* at 575 (quoting *United States v. Richardson*, 418 U.S. 166, 176–77 (1974)); *see also* *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (stating that “generalized grievances” are “most appropriately addressed in the representative branches” (internal quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975))).

7 *Lujan*, 504 U.S. at 576.

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

9 *See id.*

10 *See id.* at 600, 602.

11 *See Massachusetts v. EPA*, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting).

12 *See Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923).

This Essay challenges these conclusions. It does so in two ways. First, it argues that *parens patriae* is the wrong frame to evaluate state standing to assert quasi-sovereign interests. The states themselves, not their residents, hold quasi-sovereign interests. A state that asserts those interests is not acting in a representative capacity; it is asserting its own interest. Therefore, it is irrelevant to the state's standing whether the resident has suffered a harm. And it is irrelevant whether the state or the United States is the appropriate body to assert the resident's interests.

Next, the Essay argues that states should be able to assert this quasi-sovereign interest against the United States for three reasons. First, states have the primary responsibility for enforcing the law and ensuring the safety of society. Second, they act as a check on the federal system. Third, permitting states to pursue those claims aligns with the purposes of extending Article III jurisdiction to suits in which states are a party.

The Essay proceeds in five Parts. Part I describes the three strands of state standing. It focuses particularly on *parens patriae* standing to assert quasi-sovereign interests. Part II criticizes the *parens patriae* framework. It argues that states hold quasi-sovereign interests and accordingly should have direct standing to assert them. Part III argues that states should be able to assert these interests against the United States because of the unique role that states play in our federal system. Part IV argues that recognizing state standing to bring these suits is consistent with the separation of powers theories underlying standing doctrine. Part V acknowledges that although the Constitution does not prohibit state standing to sue the federal government for disobeying the law, there may be nonconstitutional reasons to limit the states' ability to sue the federal government. But it argues that for structural reasons, Congress, and not the courts, is the appropriate body to impose those subconstitutional limitations.

I. THE CURRENT LAW OF STATE STANDING

Standing defines who may bring suit in federal court. It has both constitutional and prudential components. The constitutional standing doctrines implement the "case" and "controversy" limitation in Article III. To have Article III standing, the plaintiff must assert the violation of a legally protected interest. Prudential standing doctrines do not derive from the Constitution, but instead are judicially created limitations on federal jurisdiction. Prominent among those doctrines is the restriction on third-party standing. Even when a party has Article III standing to bring suit, that party ordinarily cannot assert the rights of another individual. If a plaintiff fails to establish Article III or prudential standing, the court must dismiss for lack of jurisdiction.¹³

For the most part, cases discussing standing have focused on Article III standing. According to the Court, the driving force behind Article III stand-

13 See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

ing is the separation of powers.¹⁴ Standing's requirements aim to prevent the federal courts from usurping the role of the political branches of government. As the Court has put it, standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society."¹⁵ Standing achieves this goal by confining the judicial power to resolving disputes that were "traditionally amenable to, and resolved by, the judicial process."¹⁶

The Court has identified three different types of interests that can support state standing. First, a state can establish standing by demonstrating that it has suffered an injury in fact to its proprietary interests.¹⁷ Second, a state can establish standing by demonstrating a violation of the state's sovereign interests.¹⁸ Third, a state can establish standing to its quasi-sovereign interests.¹⁹ When a state asserts these sovereign or quasi-sovereign interests, it need not meet the same factual injury threshold.

A. *Proprietary Standing*

Ordinarily, for an individual to have standing, he must establish that he has suffered an "injury in fact."²⁰ That injury must be "concrete" and "particularized," and it must involve the "invasion of a legally protected interest."²¹ Moreover, the injury must be traceable to the defendant and it must be of the sort that the courts can redress through a favorable decision.²² According to the Court, requiring individuals to demonstrate injuries in fact ensures that courts stay within their traditional role of remedying individual rights.

To protect the separation of powers, however, the Court has limited the types of injuries that can support standing. It has concluded that individuals lack standing to bring suit alleging only that the government failed to comply with the law.²³ According to the Court, the injury from disobedience is a "generalized grievance" that is "undifferentiated and 'common to all members of the public.'"²⁴ Redressing that injury thus is not "the business of the courts" but is instead a task for "the political branches."²⁵ To have standing

14 See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) ("The law of Article III standing . . . is built on separation-of-powers principles" (internal quotation marks omitted) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013))).

15 *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (internal quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

16 *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

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

18 *Id.*

19 *Id.* at 602–03.

20 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

21 *Id.* at 1548 (internal quotation marks omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

22 See *id.* at 1547.

23 See, e.g., *Lujan*, 504 U.S. at 575–76.

24 *Id.* at 575 (quoting *United States v. Richardson*, 418 U.S. 166, 176–77 (1974)).

25 *Id.* at 576.

to proceed to court, the individual must establish that he suffered a factual injury because of the failure to obey the law.

This same standing scheme applies to the states. Like individuals, states can enter into contracts and own property.²⁶ And states can bring suit to vindicate these proprietary interests.²⁷ Moreover, just like an individual, to establish standing to assert these interests, the state must demonstrate that it has suffered a distinct, concrete injury in fact by this wrongdoing.²⁸ The same restrictions on what injuries will support standing also apply. States cannot invoke their proprietary interests to sue the United States solely on the ground that the United States has failed to comply with the law. Only if the violation results in a particularized injury to a state does the state have proprietary standing.²⁹

B. Sovereign Standing

Although demonstrating an injury in fact is the only way that an individual can establish standing, states can establish standing in other ways. States are sovereigns, and they have the responsibility to protect their populace and territory. States may bring suit to vindicate these sovereign interests, including the ability to enforce their laws,³⁰ to protect their borders from encroachment, and to prevent the federal government from legislating in areas reserved to state control.³¹

Unlike with nonsovereign interests, states can sue to enforce these sovereign interests without demonstrating an injury in fact.³² A state need not demonstrate that it has suffered a factual injury to have standing to bring a prosecution for violation of state criminal laws.³³ Thus, states have sovereign

26 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793) (Wilson, J.).

27 See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601–02 (1982).

28 See *id.*

29 Although courts have applied the injury-in-fact requirement to the states asserting proprietary standing, the requirement arguably should be relaxed for the states. See F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 105 (2018) (“[T]he injury in fact test should be relaxed when a state sues to force executive officers to comply with the law.”).

30 See *Alfred L. Snapp*, 458 U.S. at 601.

31 See *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (finding state standing based on the “interest in the continued enforceability of its own statutes”); Tara Leigh Grove, *When Can A State Sue the United States?*, 101 CORNELL L. REV. 851, 886 (2016) (“States may challenge federal statutes or regulations that preempt or otherwise undermine the enforceability of state law, even when the States are not themselves the objects of the regulations.”).

32 See Grove, *supra* note 31, at 886.

33 Although standing is not a barrier, states cannot prosecute state crimes in federal court because of the ancient doctrine that one sovereign cannot execute the criminal laws of another sovereign. See *Massachusetts v. Mellon*, 262 U.S. 447, 481 (1923); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 288 (1888). Moreover, it may be that Article III forbids state prosecutions in federal court because it extends diversity jurisdiction only to “controversies,” which some have argued refers to civil cases. See, e.g., James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 607 n.207

standing to challenge federal laws that preempt state laws even when the preempting federal law does not factually harm the state,³⁴ and states have sovereign standing to defend their laws against claims that their laws are unconstitutional or preempted, even when no other factual harm would result if the state law were struck down.³⁵

Under current thinking, however, sovereign standing does not provide a basis for states to sue the United States for failing to comply with federal law or the U.S. Constitution. The states' sovereign interests are in the creation and enforcement of *state law*. A state does not have sovereign interest in the enforcement of federal law or the U.S. Constitution.³⁶ It is only if the violation of the federal law or the Constitution interferes with state law that a state suffers a sovereign injury supporting sovereign standing.³⁷

C. *Quasi-Sovereign Standing*

States also have standing to assert so-called quasi-sovereign interests. The Court has not precisely defined these interests.³⁸ It has said that they are not nonsovereign interests comparable to those held by individuals, nor are they sovereign interests relating to the state's ability to govern.³⁹ They consist roughly of the state's interest in protecting "the well-being of its populace."⁴⁰ In place of a more specific definition, the Court has given two examples of interests falling into this category. The first is the state's interest in "not being discriminatorily denied its rightful status within the federal system."⁴¹ The second is the state's interest in protecting the physical and economic health of its residents by, for example, reducing pollution and

(1994) (collecting scholarly articles agreeing that "controversies," unlike "cases," exclude criminal cases).

34 See *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004) (finding state standing to challenge federal regulation requiring states to adopt new standards or to accept federal standards).

35 *Taylor*, 477 U.S. at 137 ("[A] State clearly has a legitimate interest in the continued enforceability of its own statutes.").

36 There are reasons to doubt these conclusions. Among other things, the Supremacy Clause obliges states to enforce federal and constitutional law when they conflict with state law. See U.S. CONST. art. VI. Additionally, the Supreme Court has strictly limited the ability of states to curtail their own jurisdiction to hear claims involving federal or constitutional law. See *Haywood v. Drown*, 556 U.S. 729, 737–38 (2009). Thus, not only is "federal law . . . as much the law of the several States as are the laws passed by their legislatures"; states also have an affirmative obligation to provide a forum to enforce those laws. *Id.* at 734.

37 See *South Carolina v. Katzenbach*, 383 U.S. 301, 323–25 (1966) (upholding South Carolina's standing to seek enforcement of state law against U.S. Attorney General).

38 See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) ("[A] 'quasi-sovereign' interest . . . is a judicial construct that does not lend itself to a simple or exact definition.").

39 See *id.* at 602 ("They are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party.").

40 *Id.*

41 *Id.* at 607.

unemployment in the state or preserving wildlife in the state.⁴² Although quasi-sovereign interests are held by the states, the populace of the state is the beneficiary of asserting the interest. For this reason, the Court has said that states asserting these interests operate in a representative capacity—they have standing *parens patriae*.⁴³

As with sovereign interest standing, states have generally not been successful in relying on *parens patriae* standing to sue the federal government for disobeying federal law or the Constitution. That is so for two, interrelated reasons. First, according to some cases, states must demonstrate that its populace has suffered an injury in fact to assert *parens patriae* standing. Under these decisions, a legal violation that does not cause injury in fact to the populace is not a basis for *parens patriae* standing. Second, the Court has held that, even if the populace *does* suffer a factual injury from the federal government's failure to obey the law, the states cannot sue the federal government *parens patriae* because the federal government is the appropriate party to protect the populace from violations of federal law.

1. *Parens Patriae* as Third-Party Standing

One obstacle to *parens patriae* standing to challenge the federal government's failure to comply with the law is a strand of opinions suggesting that *parens patriae* standing is a species of third-party standing under which the state asserts the rights of its populace. Under this view, to establish *parens patriae* standing, the state must show that the populace whose rights are being asserted has suffered an injury in fact. States accordingly do not have *parens patriae* standing to challenge failure to comply with the law unless they can demonstrate that the legal violation harmed individuals.

This view of *parens patriae* standing derives from the historical definition of *parens patriae*. Historically, *parens patriae* referred to the notion of the king as parent of the country. In that role, the king could stand as guardian for persons incapable of acting for themselves, such as infants, lunatics, and charities. In that capacity, the king could exercise all the usual powers of a guardian,⁴⁴ including bringing suits on behalf of those persons.⁴⁵

Early American law adopted this definition of *parens patriae*. In decisions through the late nineteenth century, the Court stated that states had the power to act *parens patriae* "for the prevention of injury to those who cannot protect themselves."⁴⁶ In the 1900 decision of *Louisiana v. Texas*, the Court expanded *parens patriae* to refer to the state acting as the protector of *all her*

42 See *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 393–94 (1938).

43 See *Alfred L. Snapp*, 458 U.S. at 604.

44 See Michael Malina & Michael D. Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U. L. REV. 193, 198 (1970); see also 2 WILLIAM BLACKSTONE, COMMENTARIES *427–28.

45 See *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411, 412 (1970); see also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57–58 (1890).

46 *Latter-Day Saints*, 136 U.S. at 57.

citizens, not just those who were incapable of acting for themselves.⁴⁷ But in expanding the scope of *parens patriae*, the Court did not abandon the basic principle that a state acts as a representative of others when it sues as *parens patriae*. Thus, *parens patriae* suits were originally akin to a type of third-party standing. The state did not bring a suit to assert its *own* rights. Instead, the state brought suit as a representative of individuals to assert their rights.

Based on this view, Chief Justice Roberts in his dissent in *Massachusetts v. EPA* concluded that *parens patriae* actions do not provide an independent basis for state standing; instead, he described *parens patriae* as a form of third-party standing.⁴⁸ In his view, for a state to have *parens patriae* standing, it must establish that the residents being protected have suffered factual injuries supporting Article III standing.⁴⁹ As Roberts put it, “a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III.”⁵⁰

On this view, *parens patriae* standing does not permit the state to sue the federal government for failing to comply with the law in situations when individuals cannot. *Parens patriae* standing provides a basis for such a challenge only if the government’s illegal conduct results in an identifiable injury to the state’s populace. The state accordingly has no special role in preventing federal misconduct.

2. The Restrictions on the United States

The second obstacle to *parens patriae* standing to sue the United States is that the Court has held that a state simply does not have *parens patriae* standing to force the federal government to comply with federal law or the Constitution.⁵¹ The reason is that the states do not have the only interest in protecting the populace. Rather, because residents of a state are also residents of the United States, the United States also has an interest in protecting the population.⁵² According to the Court, the United States has the primary responsibility of managing the federal government and ensuring its compliance with federal law.⁵³ Therefore, states cannot sue the federal government as *parens patriae* to protect state citizens from the operation of federal law. For example, in *Massachusetts v. Mellon*, the Court held that Massachusetts lacked *parens patriae* standing to challenge the constitutionality of a federal law giving money to states that took certain measures to protect mothers and infants.⁵⁴ According to the Court, “it is the United States, and

47 *Louisiana v. Texas*, 176 U.S. 1, 19 (1900).

48 *Massachusetts v. EPA*, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting).

49 *Id.*

50 *Id.*

51 *See Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923).

52 *See id.*

53 *See id.*

54 *Id.* at 479, 486.

not the state, which represents [the people] as *parens patriae*” in ensuring the proper administration of federal law.⁵⁵

Although a separate restriction on suits against the United States, this limitation is tied to the view of *parens patriae* as a restriction on third-party standing. The theory is that a state can sue *parens patriae* only if (1) its populace has suffered an Article III harm and (2) the law authorizes the state to bring that suit. Thus, in *Mellon*, the Court concluded that the law does *not* authorize the states to bring suit on behalf of its citizens against the United States to challenge a federal law.⁵⁶ According to the Court, the law assigns to the United States the role of protecting the interest of U.S. citizens in not being subject to an unconstitutional federal law.⁵⁷ Moreover, because it is a restriction on third-party standing, which is a prudential doctrine, Congress can waive it through appropriate legislation.⁵⁸

II. FIXING THE INCOHERENCE SURROUNDING QUASI-SOVEREIGN INTERESTS

Both of the restrictions on states asserting their quasi-sovereign interests as a basis for standing to sue the federal government are unwarranted. First, *parens patriae* standing is the wrong framework to evaluate suits in which states assert quasi-interests. Those interests belong to the states, not their populace. Accordingly, states asserting quasi-sovereign interests assert their own interests; they do not act as a *parens patriae* asserting the rights of others. Second, because states assert their own interests and do not act as *parens patriae* when they assert quasi-sovereign interests, the relationship of the federal government to the populace is irrelevant to the states’ ability to assert those interests.

The two quasi-sovereign interests that the Court has identified are the interest in protecting “the well-being of its populace” and ensuring the state is “not . . . discriminatorily denied its rightful status within the federal system.”⁵⁹ Individuals do not hold these interests. Individuals do not have the duty to protect the well-being of the state’s populace or the rightful status of a state. Instead, the state has these responsibilities. To be sure, the *beneficiaries* of these quasi-sovereign interests are the populace of the state. But it is the state that holds and acts on these interests to protect the populace.⁶⁰

55 *Id.* at 486.

56 *Id.* at 485–86.

57 *See id.* at 485–86 (“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” (citation omitted)).

58 *See* *Md. People’s Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985) (arguing that Congress can waive *parens patriae* limitations).

59 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602, 607 (1982).

60 *See* *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (“[I]t must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.”).

Early standing decisions support this understanding. For example, in *Pennsylvania v. West Virginia*, two States brought suit to block the enforcement of a West Virginia law limiting the export of natural gas.⁶¹ In holding that the States could bring suit, the Court did not focus on the harm to the States' residents. Instead, the Court said that cutting off the gas would jeopardize the "health, comfort and welfare" of each State's residents and accordingly that the State, "as the representative of the public, has an interest apart from that of the individuals affected" to address this "matter of grave public concern."⁶²

More recently, the majority opinion in *Massachusetts v. EPA* reiterated that view.⁶³ There, Massachusetts sued the EPA for refusing to regulate carbon dioxide emissions that could lead to global warming.⁶⁴ In considering whether Massachusetts had standing to assert quasi-sovereign interests, the Court stated that, when a state asserts quasi-sovereign interests, it does not simply represent her citizens "to protect [them]."⁶⁵ Instead, the state seeks to "assert its rights under federal law."⁶⁶

To be sure, a state that asserts a quasi-sovereign interest acts in a capacity similar to a traditional *parens patriae*. In both situations, the state is asserting interests that benefit residents of the state. But there is a significant difference between a *parens patriae* suit and a quasi-sovereignty suit. In a *parens patriae* suit, the state asserts the interests of another person for that person's benefit—much like a guardian may assert an interest of its ward. By contrast, in a quasi-sovereignty suit, the state asserts its *own* interest in protecting the populace—much like the Sierra Club has its own interest in protecting the environment, though doing so benefits the public.⁶⁷

61 *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

62 *Id.* at 592 ("Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected."). Other decisions from that era that today would be considered to involve quasi-sovereign interests likewise did not label the interests at stake as quasi-sovereign. See *New York v. New Jersey*, 256 U.S. 296, 301–02 (1921) ("The health, comfort and prosperity of the people of the state and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the state is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States."); *Kansas v. Colorado*, 206 U.S. 46, 99 (1907) (holding that Kansas had standing to bring suit to challenge Colorado water appropriations, because a state "has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state."); *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) (not distinguishing between sovereign and quasi-sovereign interests).

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

64 *Id.* at 520–21 n.17.

65 *Id.* (internal quotation marks omitted) (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945)).

66 *Id.*

67 Unlike the Sierra Club, states have standing to assert these intangible interests because they are sovereigns. See *supra* notes 32, 38–40 and accompanying text.

The first case to recognize *parens patriae* standing, *Louisiana v. Texas*,⁶⁸ supports this understanding. There, Louisiana sued Texas, seeking to enjoin a Texas embargo prohibiting the importation of goods from Louisiana.⁶⁹ In determining whether Louisiana had standing, the Court explained that Louisiana did not allege “any infringement of the powers of the State of Louisiana, or any special injury to her property.”⁷⁰ Instead, her basis for bringing suit was that the “matters complained of affect her citizens at large.”⁷¹ That interest, the Court concluded, sufficed to support Louisiana’s suit.⁷² In so concluding, the Court did *not* say that Louisiana was acting as *parens patriae* by asserting the rights of its citizens—nor could it since *parens patriae* described when a state sought to assert the rights of those incapable of acting for themselves, as opposed to all citizens. Instead, it said that Louisiana was “present[ing] herself in the *attitude of parens patriae*”⁷³—phrasing that suggests that the Court considered Louisiana’s suit to be similar to a *parens patriae* suit, but not actually a *parens patriae* suit.

One might argue that, even if quasi-sovereign interests belong to the states, the violation of those interests alone does not support standing. Instead, to have standing, the state must point to some additional harm suffered by the citizenry. But the cases do not support that conclusion.⁷⁴ Many cases upholding state standing based on quasi-sovereign interests do not focus on the injury to the residents.⁷⁵ For example, in *Missouri v. Illinois*, the Court held that Missouri was the “proper party” to sue to enjoin Illinois from diverting sewage into a channel flowing into the Mississippi River.⁷⁶ The Court did not base Missouri’s ability to sue on particular harms suffered by the residents. Instead, the Court stated that the “threat[]” to the “health and comfort of the inhabitants of a State” provided an adequate basis for the State’s suit.⁷⁷

68 176 U.S. 1 (1900).

69 *Id.* at 11.

70 *Id.* at 19.

71 *Id.*

72 *See id.*

73 *Id.* (emphasis added).

74 *Md. People’s Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985) (“It is unquestionable that a state, in its *parens patriae* capacity, does qualify as ‘personally . . . suffer[ing] some actual or threatened injury’” (alterations in original) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982))).

75 *See e.g., id.* (stating that if violations of quasi-sovereign interests alone did not support standing, “the numerous cases allowing *parens patriae* standing in suits not involving the federal government would be inexplicable”).

76 *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

77 *Id.*; *see also* *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). In *Alfred L. Snapp*, Puerto Rico brought suit challenging federal laws that Puerto Rico claimed disproportionately injured the Puerto Rican economy. *Id.* at 594. In assessing Puerto Rico’s standing, the Court explained that states have a quasi-sovereign interest in removing barriers that burdened commerce with those states. *Id.* at 607–08. Moreover, the Court said, a state need not demonstrate any harm to any individual from the discrimi-

In short, states, and not their citizens, hold quasi-sovereign interests in the well-being of the populace. When a state asserts those interests, it does not assert the interests of another. Accordingly, the current doctrinal framework of *parens patriae* standing to assert quasi-sovereign interests is superfluous and should be discarded.

Recognizing that states should be able to assert quasi-sovereign interests directly, as opposed to through *parens patriae* standing, also undermines the separate restriction on states basing their standing on quasi-sovereign interests to sue the United States. As noted in Part I, this separate limitation rests on the theory that, when states invoke quasi-sovereign interests, they represent their residents, and the federal government is in a superior position to represent their residents on matters involving federal law. That logic does not apply if states hold quasi-sovereign interests.

In that case, when a state seeks to vindicate quasi-sovereign interests, the state asserts its own interests, not the interests of its residents. The standing to assert that state-held interest is independent of its relationship with its citizens. It is accordingly irrelevant whether the state or the United States is in a better position to represent the interests of residents. The states can opt to assert those interests even if the residents would prefer that they not.

III. THE COGNIZABILITY OF CLAIMS ALLEGING FEDERAL DISOBEDIENCE

That a state has a quasi-sovereign interest in protecting the well-being of her populace does not necessarily establish that the state has standing to force the federal government to comply with the Constitution and federal law. After all, individuals have an interest in ensuring that the federal government complies with the law, but the Court has held that they lack standing to pursue those claims.⁷⁸

But that restriction should not apply to states. Instead, states should be able to force the federal government to comply with the law, for at least three reasons. First, states have the primary responsibility for enforcing the law and ensuring the safety of society. Second, they act as a check on the federal system. Third, permitting states to pursue those claims aligns with the purposes of extending Article III jurisdiction to suits in which states are a party.

A. *The State Power to Enforce the Law*

Under our constitutional system, states shoulder the primary responsibility of protecting their citizens.⁷⁹ Unlike the federal government,⁸⁰ the states

nation. *Id.* Instead, the Court explained, “a State . . . ha[s] an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population.” *Id.* at 608.

78 See *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (“[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”).

79 See, e.g., *Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016).

80 See *United States v. Lopez*, 514 U.S. 549, 567 (1995).

have general police power to promote the “health, peace, morals, education, and good order of the people.”⁸¹ One aspect of this power is the ability to sue to address unlawful conduct. States generally have the power to bring prosecutions and other lawsuits to remedy violations of the law.

Although usually discussed in the context of enforcing state law, this role of the state extends more broadly. States have all those powers that are not withheld by the Constitution,⁸² unless federal law provides otherwise. They accordingly have the ability to enforce both the Constitution and federal law.⁸³ States can arrest individuals who violate those laws,⁸⁴ and, with those laws and their courts, can enter judgments enforcing those laws.⁸⁵ Those laws exist for the benefit of society, and states can choose to recognize those benefits through seeking the law’s enforcement.

The Constitution explicitly contemplates that the states will enforce federal and constitutional laws. Under the Supremacy Clause, the Constitution and federal law are the supreme law in every state.⁸⁶ Because they are law in the states, states have the power to enforce them to the same extent as state laws. True, the Supremacy Clause is usually invoked to bind the state courts. But the Clause is not limited to the state courts; it states that federal law and the Constitution “shall be the supreme law of the land,”⁸⁷ which suggests that all officials must follow it. To be sure, Congress can limit the power of states to enforce federal law.⁸⁸ For example, a federal statute may authorize only the federal government to bring suit.

The state’s interest in preventing legal violations does not apply only to violations by individuals and other states; it also extends to the federal government. Federal violations are no less violations than violations committed by others. Accordingly, in the absence of a provision barring state enforcement, states should be able to rely on their police power to address those violations.

81 *Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

82 See *THE FEDERALIST* NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that states retain all power except those powers exclusively delegated to the federal government or prohibited to the states).

83 See Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 155 (1992) (“[S]tate lawmakers typically may support the Constitution’s mandates using their general police power under their state constitution . . .”).

84 See, e.g., *United States v. Argueta-Mejia*, 615 F. App’x 485, 488 (10th Cir. 2015) (“The federal constitution allows a state law enforcement officer to make an arrest for any crime, including federal immigration offenses.”); Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 477–80 (2018).

85 See *Haywood v. Drown*, 556 U.S. 729, 737–38 (2009).

86 U.S. CONST. art. VI, cl. 2.

87 *Id.*

88 See Kerr, *supra* note 84, at 478.

B. The Role of the States in the Federal System

The role of the states in the Constitution's design supports state standing to ensure the federal government's compliance with the Constitution and federal law. A central theme of the Constitution is to prevent each government body from accumulating too much power. One way that the Constitution achieves this goal is by dividing power between the state and federal governments. States are governments of general power. They have broad regulatory and enforcement authority. By contrast, the federal government has only limited powers. For example, Congress can legislate in only a few specific areas, and federal courts can decide only certain types of cases. At the same time, however, when the federal government acts in the areas permitted by the Constitution, that federal action trumps contrary state policies.

Another way that the Constitution limits federal power is by imposing multiple structural constraints on the federal government. Take, for example, the bicameralism and presentment requirements.⁸⁹ Even when Congress seeks to legislate in an area within its authority, the proposed legislation must pass both houses of Congress and be presented to the President.

States play a critical role in enforcing these limitations on the federal government. As Alexander Hamilton explained in *Federalist No. 28*, in an effort to preserve their own power, state officials will "stand ready to check the usurpations" of the federal government.⁹⁰ Madison echoed this sentiment in *Federalist No. 51*, stating that the competition for power between the state and federal government ensures that "[t]he different governments will control each other."⁹¹

One way for states to check federal power is to sue to enforce the constraints imposed by the Constitution on the federal government.⁹² There are at least two reasons states would do so. First, to the extent the federal law embodies a policy with which the citizens of the state disagree, the states have an interest in challenging those policies. A successful challenge would not only result in the voiding of the federal law; it would also encourage the federal government to obey those constraints, many of which aim to improve government policy choices.

89 U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States").

90 THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

91 THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); see also *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) (noting the states' role in cabinining federal power).

92 Others have disagreed with this point. Professor Grove, for example, has argued that states do not have a cognizable interest in seeing the federal government comply with separation of powers requirements. See Grove, *supra* note 31, at 893. In her view, "[s]tates have broad standing to protect federalism principles, not the constitutional separation of powers." *Id.* That view is entirely reasonable. My view is that we should recognize the states because states have an interest in federal observance of the separation of powers, and because they have been assigned various roles in policing the separation of powers.

Second, states have an interest in enforcing these provisions because federal policies trump state laws. So long as a federal law remains on the books, it preempts inconsistent state laws. Moreover, that threat of preemption also discourages states from enacting legislation in those areas in the future. A successful challenge arguing that the federal government's actions violate the Constitution would result in the law being struck down and would leave the states with the authority to regulate in that area.

This state interest is not limited to constitutional provisions constraining the legislative process. It extends to all provisions limiting the federal government, because each limitation imposed by the Constitution leaves greater responsibility to the states.⁹³

The Incompatibility Clause provides an example.⁹⁴ That Clause prohibits executive officers from being members of Congress.⁹⁵ The reason for the Clause is to prevent undue executive influence over Congress. States have an interest in enforcing that prohibition because executive control over Congress could lead to fewer conflicts between Congress and the executive. The increased federal efficiency could lead to more federal policies and actions that either displace state policies or, if those federal policies are deregulatory, potentially foist more costs onto the states.

Nor is the state's interest limited to enforcing constraints against Congress. It extends to constraints on all the branches of the federal government. Consider the process for appointing federal judges. Under the Constitution, the President nominates judges and sends them to the Senate for confirmation.⁹⁶ States have an interest in enforcing that process, because fewer federal judges results in a smaller federal judiciary and, consequently, more cases being filed in state court. The increased state dockets mean that state judges have greater control over the implementation and development of state and federal law. Of course, states may *choose* not to enforce the confirmation process because they would prefer to share the workload with the federal courts. But this suggests only that states have discretion whether to bring suit, not whether they can at all.

93 This argument—that states should have standing to force the federal government to comply with the Constitution and federal law—does not extend to federal violations of individual rights. It supports standing only for federal violations of structural provisions that cabin the scope of federal power. Moreover, historically only those individuals whose rights had been violated could bring suit to vindicate those rights. See F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 704 (2017) (developing historical point that the government could not vindicate individual rights).

94 U.S. CONST. art. I, § 6, cl. 2.

95 See *id.*

96 *Id.* art. II, § 2 (“[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . .”). This provision requires only that Supreme Court Justices be confirmed by the Senate, which suggests that lower Article III judges need not be confirmed by the Senate, but no Article III judges have been appointed outside this process. See Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 57 (2016).

The discussion to this point has focused on the Constitution, but states also have an interest in forcing the federal government to comply with federal law. Federal law constrains the federal government just as much as the Constitution. For example, an agency cannot promulgate a regulation outside its area of delegated authority, nor can it promulgate a regulation without consulting with the Department of the Interior to ensure that its rule does not jeopardize an endangered species as required by the Endangered Species Act.⁹⁷ States have an interest in enforcing these limitations because they limit federal power and accordingly leave more power to the states.

Moreover, these limitations also aim to produce better policies. Restrictions on agency actions promote democratic accountability by limiting the power of unelected federal officials; the consultation requirement aims to ensure that federal policies do not harm endangered species. State enforcement of these limitations helps promote better policies.

One might argue that although states play a role in constraining the federal government, the Constitution prescribes ways other than litigation they may do so. Under the Constitution, states draw districts for the House,⁹⁸ appoint presidential electors,⁹⁹ and elect senators.¹⁰⁰ These provisions give the states considerable roles in the political branches where they can affect federal policy.¹⁰¹ Because these political mechanisms are explicitly listed in the Constitution, one might argue, they are the exclusive means by which the states can force the federal government to comply with the Constitution and federal law.¹⁰²

But one should not lightly read implicit limitations on the states into the Constitution. The states do not owe their existence or powers to the Constitution.¹⁰³ States exist independently of the Constitution, and they have general power except to the extent that the Constitution limits it. Those powers include the power to litigate. Without an explicit provision prohibiting state litigation, it should be permitted.

There is a much more mundane explanation for the provisions specifying the states' role in Congress and the presidency. Congress and the presi-

97 16 U.S.C. § 1536(a)(2) (2012).

98 See U.S. CONST. art. I, § 4.

99 *Id.* art. II, § 1.

100 *Id.* amend. XVII.

101 See THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961) (“[E]ach of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.”); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–47 (1954).

102 Cf. Wechsler, *supra* note 101, at 546–47.

103 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 448 (1793) (Iredell, J., dissenting) (“A State does not owe its origin to the Government of the *United States*, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself . . .”).

dency are offices of the United States, not of the states. Because one sovereign does not ordinarily pick the officers of another sovereign, states would not have a role in selecting those officers if the Constitution did not include those provisions. Those provisions empower states; they do not disempower them.

C. *The Extension of the Federal Judicial Power to State Suits*

State standing to force compliance with the Constitution is also consistent with the provisions extending federal jurisdiction to suits brought by states. Before the enactment of the Constitution, each state was a separate sovereign. Historically, sovereigns ordinarily did not sue in the courts of another sovereign, although they could if they chose to do so.¹⁰⁴ Instead of filing suits, sovereigns that had disputes often relied on diplomacy or war.¹⁰⁵

So too with the states.¹⁰⁶ Before 1789, state courts did hear claims against other states and other out-of-state litigants, but those decisions were not always honored.¹⁰⁷ When one state disapproved of the decision of a court from another state, the former state would simply refuse to respect the decision.¹⁰⁸ The inadequacy of this process meant that states turned to other means to resolve their disputes. States often resolved disputes through non-judicial negotiations.¹⁰⁹ But they sometimes resorted to bloodshed.¹¹⁰ A dispute between Connecticut and Pennsylvania over territory led to war in the 1770s;¹¹¹ conflict also erupted in 1779 over a dispute involving Massachu-

104 See *Hullett v. King of Spain* (1828) 4 Eng. Rep. 1041, 1048; 2 Bligh N.S. 31, 47–48 (recognizing British judicial jurisdiction over the king of Spain).

105 See THE FEDERALIST NO. 6, at 54 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting “the uniform course of human events” to resort to war to resolve sovereign disputes); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 673 (1959).

106 See THE FEDERALIST NO. 7, at 61–66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing hostilities between the states).

107 See Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1427–28.

108 See *id.* at 1428 (“The state courts also showed little respect for the decrees of other states.”).

109 See 1 HAMPTON L. CARSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES WITH BIOGRAPHIES OF ALL THE CHIEF AND ASSOCIATE JUSTICES* 74–76 (Philadelphia, P.W. Ziegler Co. 1891) (recounting examples).

110 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (opinion of Jay, C.J.) (“There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.”); CARSON, *supra* note 109, at 66 (noting that controversies between states “ragged with such fierceness as in some instances to lead to bloodshed”); Kristin A. Linsley, *Original Intent: Understanding the Supreme Court’s Original Jurisdiction in Controversies Between States*, 18 J. APP. PRAC. & PROCESS 21, 26 (2017) (“Before the formation of the federal union, the states were separate sovereigns, and, as such, had at least the theoretical ability to resolve disputes among themselves by war or negotiation.”).

111 CARSON, *supra* note 109, at 67.

setts, New Hampshire, New York, and Vermont.¹¹² To avoid these hostilities, the Articles of Confederation contained a provision for the establishment of ad hoc tribunals to resolve interstate disputes,¹¹³ but the process was rarely used,¹¹⁴ presumably because a state did not want to send its disputes to a tribunal that might not have the state's best interests at heart.

The Constitution sought to prevent the strife and disunity that could result from these hostilities. To that end, Article I, Section 10 expressly forbids the states from engaging in those activities without the consent of Congress.¹¹⁵ At the same time, the Constitution affords the states an alternative avenue for resolving their disputes. Article III authorizes states to bring suits in the federal courts.¹¹⁶ Thus, as Justice McLean put it, permitting states to bring suit in federal court was necessary to prevent "an appeal to the sword."¹¹⁷

Although the greatest risk of conflict was between states, potential conflicts could also arise between the states and the United States. States and the United States could disagree over their borders and other topics touching on sovereignty.¹¹⁸ As Samuel Dana explained in the debates over the Judiciary Act of 1802, just as states might resort to force to resolve their disputes, so too in "controversies between a State and the United States . . . [t]he parties . . . might put armed forces in motion."¹¹⁹ Extending federal jurisdiction to state suits against the United States, he explained, aimed to prevent this mode of dispute resolution.¹²⁰

In this light, state standing should not be confined to suits asserting interests cognizable at common law. Instead it should extend more broadly to suits asserting categories of interests for which the states would resort to arms if they had the ability to do so.

The Supreme Court has recognized this point. It has acknowledged that Article III expanded the range of justiciable actions to include "[s]ome

112 CARSON, *supra* note 109, at 76–78.

113 ARTICLES OF CONFEDERATION of 1781, art. IX.

114 See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 6 n.34 (7th ed. 2015) (identifying only a single case decided through such a tribunal).

115 U.S. CONST. art. I, § 10.

116 *Id.* art. III, § 2.

117 *Rhode Island v. Massachusetts*, 39 U.S. (14 Pet.) 210, 276 (1840) (internal quotation marks omitted) (quoting EMMERICH DE VATTTEL, *THE LAW OF NATIONS* 277 (Joseph Chitty ed., 6th ed. 1844) (1758)).

118 See Lochlan F. Shelfer, *The Supreme Court's Original Jurisdiction over Disputes Between the United States and a State*, 66 BUFF. L. REV. 193, 216 (2018).

119 1 ANNALS OF CONG. 929 (Joseph Gales & William W. Seaton eds., 1851) (1802).

120 *Id.* The most obvious conflict between the states and federal government that led to hostilities is the Civil War. Needless to say, it is doubtful that expansive federal jurisdiction would have prevented that war, especially given the possibility that the decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, was one of the causes of the war. See Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13, 14 (2011).

things . . . which were not known as such at the common law.”¹²¹ Thus, although sovereign interests were not traditionally cognizable, in 1799 Justice Washington concluded that states could assert sovereign interests in federal court.¹²² He stated that, although “a State could [not] sue at law for such an incorporeal right, as that of sovereignty and jurisdiction,” it could sue at equity to protect those rights because of the lack of a legal remedy.¹²³

This rationale underlies the decisions upholding the ability of states to bring boundary challenges.¹²⁴ Traditionally, boundary disputes were not cognizable at common law. Sovereigns resolved those disputes through war and diplomacy. Before the states became separate sovereigns in 1776, the King’s Privy Council resolved boundary disputes through a nonjudicial process.¹²⁵ But as early as 1799, the Court recognized the power of the federal courts to resolve those disputes.¹²⁶

Ensuring that the federal government complies with the Constitution arguably falls within this category of interests. In ratifying the Constitution, the states relinquished their ultimate sovereignty to the federal government.¹²⁷ But the risk was that the federal government would be too powerful and usurp the role of the states.¹²⁸ The fear led to the idea that the federal government would have only limited powers and would be constrained by various structures prescribed by the Constitution.¹²⁹ Given that these structures were seen as integral to preserving state sovereignty, states could well be inclined to resort to arms to force the federal government to comply with them, if the states had the ability to do so.

121 *Missouri v. Illinois*, 180 U.S. 208, 233–34 (1901).

122 *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411, 413 (1799) (opinion of Washington, J.).

123 *Id.*

124 See *Linsley*, *supra* note 110, at 32 (“Over the years, disputes between States have represented the vast majority of the Court’s original jurisdiction cases . . .”).

125 1 BLACKSTONE, *supra* note 44, at *231 (“Whenever also a question arises between two provinces in America, or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises *original* jurisdiction therein, upon the principles of [feudal] sovereignty.”).

126 *New York v. Connecticut*, 4 U.S. (4 Dall.) 1, 3 (1799).

127 See THE FEDERALIST NO. 39, at 244 (James Madison) (Clinton Rossiter ed., 1961).

128 See Akhil Reed Amar, *Anti-Federalists*, *The Federalist Papers*, and *the Big Argument for Union*, 16 HARV. J.L. & PUB. POL’Y 111 (1993) (discussing the concerns about a centralized federal government).

129 See THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”); Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 FLA. L. REV. 1139, 1154 (2013); Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 518–19 (2015) (detailing how the Founders imposed structural constraints to limit the federal government); see also THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (rebutting claims that the federal government would be supreme by indicating that the federal government’s “jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects”).

IV. SEPARATION OF POWERS AND STATE STANDING

Although there are many reasons that states should be able to sue the federal government to force it to comply with the law, this does not mean that states should necessarily have standing to bring those suits. One might argue that separation of powers, which the Court has described as the “single basic idea” underlying Article III standing,¹³⁰ supports limiting state standing to enforce compliance with the law. But that is not so.

Over the years the Court has focused primarily on three ways that standing protects the separation of powers.¹³¹ First, standing doctrine maintains the balance of power established at the Founding by confining the federal courts to the historical role of the courts.¹³² Second, standing doctrine protects democracy by ensuring that the federal courts do not decide matters more appropriately addressed to the elected branches of government.¹³³ Third, standing doctrine prevents Congress from infringing on the executive’s duty to take care that the law is enforced.¹³⁴ None of these threads of separation of powers warrant barring state standing to challenge federal disobedience of the law.

A. *History*

According to the Supreme Court, standing implements the case and controversy language by authorizing federal courts to resolve only those disputes that were “traditionally amenable to, and resolved by, the judicial process.”¹³⁵ This historical vision of the courts, however, does not preclude state standing to sue the federal government for disobeying the law.

Historically, courts did not recognize the three categories of interests that form the basis of state standing today—proprietary interests, sovereign interests, and quasi-sovereign interests. Instead, courts heard two types of legal disputes. The first consisted of suits to vindicate “private rights.” Private rights were the typical rights held by individuals.¹³⁶ They included,

130 *Allen v. Wright*, 468 U.S. 737, 752 (1984).

131 A fourth separation of powers argument that the Court has occasionally made is that standing prevents the weakening of the courts by protecting their legitimacy. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (suggesting that public confidence in the courts depends on the courts “refrain[ing] from passing upon the constitutionality of an act [of the representative branches] unless . . . the question is raised by a party whose interests entitle him to raise it” (second alteration in original) (internal quotation marks omitted) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919))). There are many reasons to doubt this theory. *See Hessick*, *supra* note 93, at 695–97. And the Court appears to have abandoned it by not having invoked it for over forty years.

132 *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998).

133 *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 407–09 (2013).

134 *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992).

135 *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (internal quotation marks omitted) (quoting *Steel Co.*, 523 U.S. at 102).

136 *See Hessick*, *supra* note 3, at 280.

among other things, the rights of personal security, life, liberty, and property.¹³⁷ The victim of a private wrong could seek a remedy by bringing the appropriate form of action, such as a writ of trespass.¹³⁸ Like individuals, the government could hold these private rights—it could, for example, enter into contracts and own property¹³⁹—and bring suit to seek remedies for their violations.¹⁴⁰

The second type of dispute was to vindicate “public rights.” Public rights were those held collectively by the public.¹⁴¹ They include the right to navigate the public waters of the state and to fish therein, to use the public highways, and to be free from criminal violations. This body of public rights was not static. The legislature could restrict or expand these rights, and it could create new rights by enacting new laws.¹⁴² The violation of a public right was a public wrong; it hurt the public as a whole, not merely an individual. Consequently, the government, as the representative of the public, was the proper party to bring suit to vindicate that public right.¹⁴³

American law adopted this framework. States could bring suit to pursue private interests,¹⁴⁴ and as the representatives of the public, states had the power to vindicate state public rights. The most obvious example is that states could bring prosecutions for violations of states’ criminal laws.¹⁴⁵ Federal courts adhered to the same view. The United States could bring suit to assert contractual and other “private” rights.¹⁴⁶ It also could bring suit to

137 1 BLACKSTONE, *supra* note 44, at *141; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (O.W. Holmes, Jr., ed., Boston, Little, Brown & Co. 12th ed. 1873) (1826) (“The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable.”); Hessick, *supra* note 3, at 280.

138 Hessick, *supra* note 3, at 280.

139 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793) (opinion of Wilson, J.) (“[A state] may acquire property distinct from that of its members: It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts.”).

140 See 2 GEORGE STUART ROBERTSON, THE LAW AND PRACTICE OF CIVIL PROCEEDINGS BY AND AGAINST THE CROWN AND DEPARTMENTS OF THE GOVERNMENT, WITH NUMEROUS FORMS AND PRECEDENTS 146 (1908) (recounting the Crown’s power to sue for debt and other “private actions”).

141 See 4 BLACKSTONE, *supra* note 44, at *5 (referring to “the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity”).

142 See Hessick, *supra* note 3, at 280.

143 *Id.*; see, e.g., *State v. Duestoe*, 1 S.C.L. (1 Bay) 377, 375 (1794) (state prosecution of crimes).

144 See *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 415 (1793) (resolving debt suit by a state); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 406 (1995) (“[S]ome common-law ‘individual’ rights could easily be ‘states’ rights’ as well. For example, states are capable of owning and suffering injury to property. Furthermore, states can be party to contracts with individuals who might breach those contracts.”).

145 See *State v. Phelps*, 1 Kirby 282, 282 (Conn. 1787).

146 See *United States v. Gurney*, 8 U.S. (4 Cranch) 333 (1808) (breach of contract action brought by the United States).

vindicate federal public rights, such as by seeking punishment against those who violated federal criminal laws.¹⁴⁷

Although the courts did not recognize the three categories of interests that support state standing under modern doctrine, those three categories are the offspring of those historical rights. Today's proprietary-interest standing derives from private rights suits.¹⁴⁸ According to the Court, the injury-in-fact test, which serves as the gatekeeper for standing based on proprietary interests, ensures that the judiciary stays within its "province . . . of decid[ing] on the rights of individuals."¹⁴⁹

Likewise, today's standing based on sovereign and quasi-sovereign interests derives from suits alleging violations of public law. As with the historical public rights, only the government has standing to assert those interests.¹⁵⁰ Moreover, both sovereign and quasi-sovereign interests fall within the definition of public rights. That is clearly so for sovereign interests, which include the ancient public rights identified by Blackstone, such as enforcing the criminal law.¹⁵¹

But it is also true for the two quasi-sovereign interests identified by the Court—preserving the well-being of the state's populace and ensuring the state is "not . . . discriminatorily denied its rightful status within the federal system."¹⁵² Maintaining the well-being of the populace is an interest held collectively by the community; it is for this reason that the criminal laws, which exist to protect the well-being of the public, constitute public rights. Similarly, the residents of a state collectively have a shared interest in their state being treated equally. The community, as a whole, benefits when the community is treated equally by others. What this means is that disputes involving quasi-sovereign interests are of the sort that courts could historically address. They accordingly fit the definition of public rights that sovereigns could press in the courts.

Still, one might argue that this history does not support state standing insofar as courts did not historically hear claims involving the precise quasi-sovereign interests recognized by today's law. But it is unclear whether this is accurate. Governments did bring suits to protect the general welfare. Suits to address public nuisances, which affected the whole community, are an example. Those actions were to cure a "violation of a public right at common law."¹⁵³

147 See *United States v. Mundell*, 27 F. Cas. 23 (C.C.D. Va. 1795) (No. 15,834) (describing the authority of the Attorney General to prosecute).

148 Hessick, *supra* note 3, at 300.

149 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

150 See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 605–06 (1982) (discussing how only governments may assert those interests).

151 See 4 BLACKSTONE, *supra* note 44, at *2–3.

152 *Alfred L. Snapp*, 458 U.S. at 593.

153 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (Thomas, J., concurring).

To the extent that courts did not adjudicate disputes involving questions of sovereign powers, a major reason is that sovereigns often chose to resolve their claims through diplomacy and war instead of adjudication. Sovereigns could go to court to assert their interests, however, if they chose to do so.¹⁵⁴

But even assuming that courts could not hear those disputes in the past, this does not mean that they are incapable of doing so today. As noted earlier, the domain of public rights was not static. New rights could be created, and old rights abolished. Nothing prohibited the law from recognizing that the states had a public right in protecting their borders. Indeed, new rights of that sort were to be expected. As the Court has explained, the decision to extend federal jurisdiction to state suits expanded the range of justiciable actions to include “[s]ome things . . . which were not known as such at the common law.”¹⁵⁵

Consistent with this view, states have regularly sued in federal court to vindicate their sovereign interests.¹⁵⁶ The most common type of suits of this sort consisted of border disputes.¹⁵⁷ Historically, courts did not resolve those disputes.¹⁵⁸ But from the early nineteenth century, federal courts recognized their power to adjudicate them. These suits thus signify an expansion of justiciable public rights.

One might argue that those disputes are justiciable because they involve traditional property rights instead of newly recognized public rights. The Court espoused this view in *Georgia v. Stanton*, stating that federal courts could not resolve disputes “of a political character” and that boundary disputes were justiciable because they involved rights of property.¹⁵⁹ But that view is wrong on two fronts. For one, decisions before and after *Stanton* have recognized that border disputes are not simply property disputes. Instead, they present the question of which state has the right to regulate that terri-

154 See *Hullett v. King of Spain* (1828) 4 Eng. Rep. 1041, 1048; 2 Bliqh N.S. 31, 47–48 (holding justiciable an action by the king of Spain).

155 *Missouri v. Illinois*, 180 U.S. 208, 233–34 (1901).

156 An early example of the former type of suit is *Georgia v. Brailsford*, in which the Supreme Court entertained a claim by Georgia to recover a debt against individuals in South Carolina. 2 U.S. (2 Dall.) 415, 415 (1793).

157 *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 288 (1888).

158 See *supra* note 109 and accompanying text.

159 *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867). Although not discussed in terms of standing, the limitation on federal jurisdiction in *Stanton* appears to be one of standing. The reason that the Court refused to hear the case was that Georgia had not alleged a cognizable interest in seeking to enforce a so-called political right of whether it could be subject to military rule. See *id.* Subsequently, in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), the Court did resolve the issue. There, an individual sought a writ of habeas corpus on the ground that the military government was unlawful. *Id.* at 87–88. Unlike in *Stanton*, the Court concluded that the individual in *Yerger* had standing because he was seeking to enforce a judicially cognizable right. *Id.* at 102; see *Woolhandler & Collins, supra* note 142, at 421–22 (discussing this point).

tory.¹⁶⁰ Illustrative is *Rhode Island v. Massachusetts*, in which the dispute was whether Massachusetts's boundary claim had "prevent[ed] the exercise of the rightful jurisdiction and sovereignty of Rhode Island."¹⁶¹ For another, it is simply not true that political disputes were necessarily deemed nonjusticiable. The Founders recognized that state disputes would involve political matters. As James Madison put it in *Federalist* 39, "in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only."¹⁶²

B. Democratically Accountable Branches

A second role of standing is to ensure that the federal courts stay within the "proper—and properly limited—role of the courts in a democratic society."¹⁶³ In a democratic society, the people should ultimately set policy. The Constitution implements that goal by leaving policymaking to elected officials and not to the courts. Standing enforces this division of power. Permitting individuals to resort to court to challenge government activities undermines this political process. They accordingly may go to court only to redress injuries that they have suffered.

This theory underlies the restriction on the standing of individuals to bring suit to force the government to comply with the law. According to the Court, that injury is a "generalized grievance" that is "undifferentiated and 'common to all members of the public.'"¹⁶⁴ Thus, redressing that injury is not "the business of the courts" but is instead for "the political branches."¹⁶⁵ For an individual to have standing, she must suffer a distinct, concrete harm beyond that experienced by the general public.

But this logic does not translate to state standing. One of the functions of the states is to enforce compliance with the law, and they regularly sue for breaches of the law that do not harm the state in a distinct and concrete way.

More important, unlike individuals, states are democratically accountable bodies, and the officials who decide whether to bring suit on behalf of the state are elected themselves or are answerable to elected officials. 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.

160 See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 752–53 (1838) (Taney, C.J., dissenting) (complaining that the suits over which the Court found standing involved not property disputes, but instead jurisdictional disputes).

161 *Id.* at 716.

162 THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

163 *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (internal quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

164 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992) (internal quotation marks omitted) (quoting *United States v. Richardson*, 418 U.S. 166, 176–77 (1974)).

165 *Id.* at 576.

C. *Protecting the Executive*

A third function of standing identified by the Court is to protect the President's Article II duty to "take Care that the Laws be faithfully executed."¹⁶⁶ This theory played a central role in the Court's decision in *Lujan v. Defenders of Wildlife*.¹⁶⁷ There, the Court held that an individual who had not suffered a particularized injury lacked standing to force the government to comply with the Endangered Species Act. The Court explained that allowing anyone to sue to force the government to comply with the law would effectively transfer from the President to the courts the task of enforcing federal public laws and, accordingly, would result in courts overseeing the executive branch.¹⁶⁸

Lujan's rationale rests on shaky ground. The Take Care Clause does not confer power on the President; it imposes a duty on the President—a duty to "take care" that the laws be enforced.¹⁶⁹ The imposition of a duty does not carry with it exclusive power to perform that duty. Rather, it simply obliges the person to make sure that the designated task gets done. On that view, the Take Care Clause does not confer exclusive power on the President to enforce the law; instead it requires the President to see that the law is enforced if no one else does.

Decisions since *Lujan* are consistent with this view. Most notable is *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, in which the Court held that private individuals had standing to seek civil penalties paid to the United States against a factory that violated the Clean Water Act.¹⁷⁰ As Justice Scalia, the author of *Lujan*, noted in dissent, allowing private individuals to seek public remedies is inconsistent with the idea that the President alone has the responsibility for enforcing the law.¹⁷¹

More important for purposes of this Essay, the longstanding practice of the states illustrates that the Take Care Clause does not confer exclusive power on the President to enforce the law. States traditionally have enforced federal public laws. They regularly execute searches and seizures based on violations of federal criminal statutes,¹⁷² as well as for violations of federal immigration laws.¹⁷³

166 U.S. CONST. art. II, § 3.

167 *Lujan*, 504 U.S. 555.

168 *Id.* at 577 ("It would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, and to become virtually continuing monitors of the wisdom and soundness of Executive action." (citation omitted) (internal quotation marks omitted)).

169 U.S. CONST. art. II, § 3.

170 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–88 (2000).

171 *Id.* at 209–10 (Scalia, J., dissenting).

172 See *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928); Kerr, *supra* note 84, at 478.

173 See Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 282–84 (2011) (providing examples of state enforcement of immigration laws).

Nor is there any reason to think that, even if Article II permits states to enforce federal laws, it forbids them from enforcing laws against the federal government. Nothing in the text of the Take Care Clause suggests that the federal government has special immunity from suits alleging violations of federal law. If anything, the Clause supports state suits against the federal government. The Clause imposes a duty, and duties exist to be enforced.¹⁷⁴ And one cannot expect the President to always enforce federal laws against the federal government. Because the President is the head of the executive branch, he has incentives not to address the government's failure to comply with the law. States accordingly have a more important role in enforcing the law against the federal government.

V. STATUTORY LIMITATIONS

Although states should have Article III standing to bring suit against the federal government for disobeying the law, there are prudential reasons for restricting the ability of states to sue the federal government. For example, even if it does not raise constitutional problems, conferring standing on the states to bring those suits may result in undue interference with the federal government. States should not be permitted, for example, to sue the Department of Justice to enforce federal criminal law. It might also create additional friction between the federal judiciary and other branches of government. And permitting those suits may consume too many judicial resources or result in ill-advised judicial decisions. An influx of state suits might force the federal judiciary to resolve difficult disputes quickly and without adequate reflection.

These pragmatic considerations underlie the prudential restriction on states invoking *parens patriae* standing to sue the United States. Courts clearly have the authority to make prudential restrictions of this sort. The law has many judicially created doctrines limiting federal jurisdiction.¹⁷⁵

But that the courts have the power to create this type of restriction does not mean that they should. That is because limiting state standing disrupts the balance of power in the Constitution, and if that balance is to be disturbed, Congress is the appropriate body to make that determination.

The Constitution constrains government power by empowering the states to act as a check on the federal government. The primary check is that the states play a central role in filling the offices of the federal government. Under the Constitution, states draw districts for electing members of the House of Representatives, appoint presidential electors, and elect senators.

174 See *Miller v. Strahl*, 239 U.S. 426, 432 (1915) (“[H]e who assumes duties may be required to perform them.”).

175 Examples include third-party standing, abstention, and ripeness. See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 552 (1985) (listing these and other doctrines).

These provisions give the states considerable influence in the political branches where they can affect federal policy.¹⁷⁶

Another state check is the ability to bring suit against the United States. Through those suits, the states can ensure that the federal government does not exceed the law. Limiting state standing to sue the federal government interferes with this arrangement. It confers an immunity, protecting the federal government from the states.¹⁷⁷

Because it limits the power of the states to check the federal government, the states should play a role in deciding whether to limit their standing. The enactment of a federal law stripping states of standing to sue the government does this to some extent. Because of the states' role in Congress and the presidency, it signifies a decision at least indirectly supported by the states to protect the federal government.¹⁷⁸

By contrast, because of the salary and tenure guarantees in Article III, states have significantly less influence over federal judges.¹⁷⁹ Judicially created doctrines accordingly not only limit the power of the states; they do so without the states' consent.¹⁸⁰

To be sure, Congress can enact legislation overturning judicially created doctrines limiting state standing. But that is hardly the equivalent of leaving it up to Congress to limit jurisdiction in the first place. Enacting legislation is difficult to do. Political and resource hurdles would make it unlikely for Congress to abolish prudential limits on standing.

Proceeding by legislation instead of court-created doctrine would have other advantages. Congress is in a better position than the courts to assess most of the prudential considerations raised by state standing to sue the federal government. It can better determine whether those state suits consume too many resources or overly interfere with federal policy.

Moreover, proceeding by legislation would reduce confusion in state standing and improve the predictability of the law. Courts create doctrine

176 See THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961) (“[E]ach of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.”); Wechsler, *supra* note 101, at 547.

177 Other examples of intergovernmental immunity include the restriction on state taxation of the federal government and the inability of state courts to issue writs of habeas corpus to federal detainees.

178 See, e.g., Wechsler, *supra* note 101, at 560 (arguing that Congress, and not the courts, protects federalism).

179 See U.S. CONST. art. III, § 1.

180 As Professor Bickel argued, the Supreme Court should have the power to decline to hear some suits to avoid creating tension with the other branches of the federal government. See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). But this passive virtue theory does not support broad restrictions on state standing. The passive virtues support declining jurisdiction in particular cases that raise particularly fraught issues; it does not support a doctrine that applies to a breadth of cases.

through the development and application of principles.¹⁸¹ But the Court's standing decisions do not rest on a single principle. Instead, they often rest on other considerations, such as whether recognizing standing would interfere with an important federal program. Consider the discrepancy between the decisions recognizing state standing in border disputes and the decisions holding that states lack standing to challenge the establishment of military governments in a state. These discrepancies lead to doctrinal confusion and the creation of seemingly arbitrary distinctions.

Limiting jurisdiction by legislation avoids these pitfalls. Congress is not bound by principle or past legislation. It accordingly can fashion federal jurisdiction in ways that appear inconsistent, simply because Congress finds it desirable to do so. For another, proceeding by legislation would leave open the possibility of expanding the types of suits that states could bring, if it is determined that the existing rules are too narrow.

181 Charles Fried, Commentary, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1145 (1994) (discussing the role of "rules or principles" in the development of doctrine).