

# William & Mary Bill of Rights Journal

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Volume 23 (2014-2015)  
Issue 1

Article 11

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October 2014

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### Repository Citation

Ann Woolhandler, *Governmental Sovereignty Actions*, 23 Wm. & Mary Bill Rts. J. 209 (2014), <https://scholarship.law.wm.edu/wmborj/vol23/iss1/11>

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## GOVERNMENTAL SOVEREIGNTY ACTIONS

Ann Woolhandler\*

In *Arizona v. United States*,<sup>1</sup> the federal government sued to enjoin enforcement of Arizona's immigration laws on preemption grounds.<sup>2</sup> And in *Virginia ex rel. Cuccinelli v. Sebelius*,<sup>3</sup> the state attorney general argued that the state had standing to challenge the Affordable Care Act because it would unconstitutionally preempt a state law disallowing health insurance mandates.<sup>4</sup> In each case, the government plaintiff asserted that it had the power to regulate a particular subject to the exclusion of, or in addition to, the government defendant. These disputes may be characterized as seeking to vindicate sovereignty interests.

In a previous article, Michael Collins and I argued that the courts should be reluctant to countenance such government-initiated suits.<sup>5</sup> In addition to looking to the Court's traditional treatment of these cases as nonjusticiable, we argued—as had Alexander Bickel<sup>6</sup>—that disallowing intergovernmental suits to vindicate sovereignty

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<sup>1</sup> 132 S. Ct. 2492 (2012).

<sup>2</sup> *Id.* at 2498; *see also* *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) (entertaining a federal preemption challenge to Alabama's immigration laws).

<sup>3</sup> 702 F. Supp. 2d 598 (E.D. Va. 2010).

<sup>4</sup> *Id.* at 601 (indicating that the plaintiff alleged that the statute was beyond Congress's commerce power and interfered with state law, and entertaining the action), *rev'd*, 656 F.3d 253 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012).

<sup>5</sup> Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 396 (1995) (arguing, *inter alia*, that such suits should generally require legally protected interests—such as an injury like that which would allow a private party to sue, or statutory authorization); *see also* *Massachusetts v. EPA*, 549 U.S. 497, 536–37 (2007) (Roberts, C.J., dissenting) (arguing that relaxing the standing requirements for states is unwarranted); Alexander Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 85–90 (1967) (criticizing the Court's recognition of the state's standing in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)); Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75, 78–79 (2007) (arguing against easing standing requirements for states); Stephen I. Vladeck, *States' Rights and State Standing*, 46 U. RICH. L. REV. 845, 848–49 (2012) (arguing that Cuccinelli did not present a case where the state had an interest separate from its citizens that would allow for suit); *cf.* Kevin C. Walsh, *The Ghost That Slayed the Mandate*, 64 STAN. L. REV. 57, 65–66 (2012) (questioning whether Cuccinelli had a cause of action to challenge the Affordable Care Act, but assuming that the United States had an action against Arizona).

<sup>6</sup> Bickel, *supra* note 5, at 89 (allowing state suits to contest the constitutionality of federal statutes “would be a fundamental denial of the principle that the federal government

interests reinforced the federalism principle that state and federal governments should act primarily on the people rather than on each other.<sup>7</sup> We also argued that preference for suits between individuals and government enhanced the status of individuals as rights-holders against government, particularly with respect to structural claims.<sup>8</sup> Discouraging sovereignty-based claims would also help to avoid abstract judicial determinations of the validity of governmental action.<sup>9</sup>

Commentators have criticized restrictive views of government standing, including ours, as insufficiently taking into account that dual federalism has been displaced by overlapping federalism.<sup>10</sup> They argue that in sovereignty-based suits, the government is seeking to vindicate its own interests,<sup>11</sup> and that the government should even

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is a sovereign coexisting in the same territory with the states and acting, not through them, like some international organization, but directly upon the citizenry”).

<sup>7</sup> Woolhandler & Collins, *supra* note 5, at 439.

<sup>8</sup> *Id.* at 439–40, 503–04; *see also* Vladeck, *supra* note 5, at 873–74 (arguing that expanding state standing would crowd out individual suits); *cf.* Tyler Welti, Note, *Massachusetts v. EPA’s Regulatory Interest Theory: A Victory for the Climate, Not Public Law Plaintiffs*, 94 VA. L. REV. 1751, 1775 (2008) (arguing that the Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), based standing on the state’s regulatory interest in the federal government’s failure to act in an area where it had preempted state law, and that such standing may create a regime in which “state attorneys general have monopoly power over public law adjudication.”).

<sup>9</sup> *See* Woolhandler & Collins, *supra* note 5, at 440; *see also* Bickel, *supra* note 5, at 90 (arguing that allowing states to sue the federal government would aggrandize the judicial function, and bring abstract disputes before the Court); Vladeck, *supra* note 5, at 872 (arguing that expanding state standing risked converting federal courts into councils of revision); *cf.* Woolhandler & Collins, *supra* note 5, at 442–43 (arguing that expansion of the notion of a case did not suggest broad governmental standing).

<sup>10</sup> *See* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 8, 51–53 (2014) (arguing that separate spheres no longer accurately describes government and that governmental standing rules should be modified accordingly); *cf.* Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051 (2011) (arguing against a popular sovereigntist argument that fails to recognize the separate interest of the states in vindicating their rights to govern). *See generally* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4, 17 (2007) (arguing that dual federalism notions are outdated, but favoring courts’ use of a clear-statement anti-preemption rule of construction, because state regulation will encourage Congress to be a more politically accountable regulator).

<sup>11</sup> *See* David Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2242 (2006) (in arguing for enhanced standing of cities to contest state laws in state and federal courts, suggesting that a government’s interests in maintaining its own capacity to serve as a forum for democratic contestation and policy should be preferred to the role of the government as a guardian of the rights of its own citizens); *id.* at 2249 (defending such standing when it is to preserve local policymaking rather than trying for a uniform solution); Crocker, *supra* note 10, at 2068 (stating that sovereignty interests are independent, while quasi-sovereign interests are derivative, such that states should generally be allowed to assert sovereignty interests but not *parens patriae* interests); Kenneth T. Cuccinelli, II et al., *State Sovereign Standing: Often Overlooked, But Not Forgotten*, 64

be treated as the best plaintiff to pursue structural claims.<sup>12</sup> They also claim that restrictive views of government standing reflect too narrow a view of causes of action, failing to take into account the regulatory aim of enforcing federal law, as distinguished from the aim of vindicating individual immunities and rights.<sup>13</sup> This Article takes up the question of government suits to vindicate sovereignty interests in light of succeeding scholarship and cases.

## I. BACKGROUND

### A. Governmental Standing and Implied Causes of Action

Issues of governmental ability to initiate suit typically arise when Congress has not clearly authorized suits by the state or federal government as plaintiff in the federal courts. Commentators have interchangeably addressed the issue as either one of standing or implied cause of action,<sup>14</sup> as will this Article. The terms standing and implied actions, however, require further delineation.

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STAN. L. REV. 89, 93 (2012) (“That the Attorney General of Virginia would bring a suit to defend the validity of a Virginia statute from a claim of federal preemption should not have been at all surprising.”); *id.* at 111 (disclaiming reliance on *parens patriae*); Davis, *supra* note 10, at 6, 67 (arguing there is no need to favor government actions when it is representing the interests of citizens, but that courts should favor such actions when government is vindicating “institutional interests” such as its claims to intergovernmental immunities and authority to regulate); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1073–74 (2010) (arguing that states should be able to challenge federal action that both preempts state law and provides no substantive regulation); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND USE & ENVTL. L. 273, 315 (2007) (arguing that states should be able to sue the United States to vindicate sovereignty interests, and thereby avoid some of the uncertainties surrounding suits for their quasi-sovereign interests).

<sup>12</sup> See Crocker, *supra* note 10, at 2085 (arguing that individuals are a “grossly inadequate substitute when it comes to asserting the structural constitutional protections underlying state sovereignty”); Davis, *supra* note 10, at 79–80 (arguing that governments are the most interested parties in structural litigation); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1440, 1465, 1490 (2013) (arguing that institutional litigants such as Congress, the Executive, and states should be preferred to individuals for litigating structural guarantees, given the large spillover effects on unrepresented parties in individual structural litigation, as well as private parties’ lack of incentives to pursue optimal enforcement).

<sup>13</sup> Davis, *supra* note 10, at 66 (arguing that implied governmental actions can serve the regulatory purpose of enhancing the enforcement of federal law).

<sup>14</sup> See Crocker, *supra* note 10, at 2052–54 (treating the problem as one of state standing); Davis, *supra* note 10, at 3–8 (discussing the problem as one of implied rights of action); Huq, *supra* note 12, at 1515 n.321 (indicating that he uses standing and cause of action interchangeably in his discussion of individual versus institutional constitutional challenges); Walsh, *supra* note 5, at 57 (arguing that there was no federal question cause of action for Cuccinelli’s challenge to the ACA).

Standing may be divided into constitutional and subconstitutional categories. A lack of constitutional standing generally means that Congress could not accord a claim to the party; the focus is often on injury in fact. By contrast, a lack of subconstitutional standing means that the plaintiff has not alleged a harm to the type of interest that gives her a cause of action in the particular circumstances, even if that party might be able to litigate that interest in other contexts or if Congress so provided. Most issues of government-initiated suits in the federal courts can be cured if Congress authorizes the action.<sup>15</sup> Thus “standing” as used herein refers to subconstitutional standing. In the context of government-initiated suits, this subconstitutional standing question is generally the same issue as whether the plaintiff should be accorded an implied action.

One needs, however, to divide up implied actions into those that are more strictly implied and those that are not. The Court’s current doctrine as to implied statutory causes of action requires that Congress in fact have created the cause of action, such that one may characterize the action as strictly sourced or implied from the statute. Some implied statutory actions, however, are less than strictly prescribed by statute and one may treat them as sourced in the court’s equitable (or possibly common law) discretion, combined with the statute.<sup>16</sup>

Similarly, some actions raising constitutional issues may be strictly implied or sourced in the Constitution in the sense that the Constitution requires them. While one may debate what falls into the constitutionally required category, it may be enough to say that a cause of action is constitutionally necessary if Congress could not substantially abrogate it. When not strictly constitutionally implied, an action may be treated as sourced in the equitable (or perhaps common law) discretion of the courts, combined with the Constitution.

“Implied” actions, as used herein, does not refer to strictly implied statutory or constitutional actions. Government parties initiating nonstatutory suits generally lack arguments that Congress actually intended to prescribe the particular action, or that the Constitution requires it. The plaintiff, therefore, is often appealing to the equitable discretion of the court to recognize the cause of action. As discussed below, it should count against the court’s use of its discretion to imply an action that alternative remedies already exist<sup>17</sup>—remedies that do not press the boundaries of

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<sup>15</sup> At least that is the assumption in this Article. *See, e.g.*, Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 793 n.36 (2009) (“Courts have doubted the Executive Branch’s standing to bring suit only when it *lacked* express congressional approval.”).

<sup>16</sup> *Cf. Lexmark Int’l v. Static Control Components*, 134 S. Ct. 1377, 1387 (2014) (indicating that the issue of standing for a statutory cause of action is whether the legislature conferred a cause of action encompassing a particular plaintiff’s claim).

<sup>17</sup> *See, e.g.*, *Gonzaga v. Doe*, 536 U.S. 273, 289–90 (2002) (reasoning that Congress’s providing mechanisms for the agency to address violations militated against a private right of action); *Preiser v. Rodriguez*, 411 U.S. 475, 489–90 (1973) (reasoning that Congress

executive and judicial power, and that do not undermine the role of individuals as rights claimants.

### *B. Categories of Government Interests*

Discussions of government-initiated suits have often broken down the discussion based on the interest that the government relies on in bringing a suit. A suit premised on one of the interests noted below, however, may often vindicate one of the other interests.

(1) *Enforcement interests*.<sup>18</sup> Generally, legitimate government litigation requires statutory authorization,<sup>19</sup> and most government suits to enforce statutes or regulations are statutorily authorized.

(2) *Interests similar to those of private parties*. When the government sues to vindicate interests that would give an individual<sup>20</sup> a lawsuit in similar circumstances, it is generally unnecessary that the legislature explicitly authorize the government to sue. The government in such situations, however, generally needs an injury in fact. Commentators have referred to this category as proprietary, common law, or corporate interests.<sup>21</sup>

(3) *Parens patriae interests*, also called quasi sovereign or substitute interests.<sup>22</sup> In such cases, the government sues to vindicate the interests of its citizens.

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intended that habeas rather than § 1983 suits would be used when a prisoner sought relief that questioned the fact or duration of confinement).

<sup>18</sup> Woolhandler & Collins, *supra* note 5, at 410; *see also* Davis, *supra* note 10, at 20 (using a similar category denominated “administrative interests”).

<sup>19</sup> *See* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1314–16 (2014) (indicating that federal institutions need affirmative authority to act, including to bring suit); *cf. id.* at 15 (discussing that the “executive branch has standing to assert the federal government’s interests in the ‘continued enforceability’ of its laws,” and to defend federal laws that it does not directly enforce, under its intervention powers under 28 U.S.C. § 2403); Edward Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251 (1999) (pointing out that government enforcement suits need not meet injury in fact requirements).

<sup>20</sup> “Individual” as used herein refers to private parties, including corporations and trade organizations.

<sup>21</sup> *See, e.g.*, Crocker, *supra* note 10, at 2053 (referring to proprietary interests); Davis, *supra* note 10, at 17 (using the term “corporate interests”); Woolhandler & Collins, *supra* note 5, at 410 (noting there is no particular problem with government standing when the state suffered injuries like those of individuals).

<sup>22</sup> Crocker, *supra* note 10, at 2053 (referring to quasi-sovereign or *parens patriae* interests); Davis, *supra* note 10, at 22 (referring to substitute interests).

(4) *Sovereignty interests*, also called governing interests and institutional interests, in which the government sues to vindicate its power to govern a particular subject matter.<sup>23</sup>

*C. Traditional Means for Raising Governmental Sovereignty Interests; and Modern Inroads*

The primary focus of this Article is on sovereignty interests, the fourth category. But a government's interest in exercising its power—particularly as a plaintiff—can normally be tested by the government's exercising its power, particularly through government enforcement actions in its own courts (category (1) above). If a government brings an enforcement action, the defendant can argue that the exercise of power is invalid for structural or nonstructural grounds. Damages actions by the targets of government enforcement, and injunctive actions against imminent enforcement may raise similar issues, although with the parties reversed.<sup>24</sup> These actions between government (or its officers) and private parties take traditional forms—for example, government's claim of power in an enforcement action is met with an individual's argument for immunity. In addition, suits between private parties may raise issues of governmental powers, as in tort claims where the defendant claims federal preemption.<sup>25</sup>

Over time, the expansion of injunctive and declaratory suits<sup>26</sup> has enhanced individuals' ability to bring actions based on the threatened impacts of illegal government action.<sup>27</sup> The Court has not, however, generally favored government

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<sup>23</sup> See Crocker, *supra* note 10, at 2053; see also *id.* at 2055 (stating that quasi-sovereign interests are representative, while sovereign interests are those central to the core of governing); Woolhandler & Collins, *supra* note 5, at 410–11 (calling these interests governing interests); Davis, *supra* note 10, at 18 (using a category of institutional interests that concerns “injuries to political powers and rights”). Davis's definition, however, would include instances where federal or state law “gives the government or its officials immunity from judicial process, taxation, or regulation.” *Id.* This Article treats those cases as involving instances where the government can sue on similar terms as a private party. See *infra* notes 44–49 and accompanying text.

<sup>24</sup> See, e.g., *Am. Trucking Ass'n v. City of L.A.*, 133 S. Ct. 2096 (2012) (upholding trucking organizations' preemption challenge to city regulations of trucks at the port); *Morales v. Trans World Airlines*, 504 U.S. 374 (1992) (upholding the airlines' preemption challenge in federal court after the Texas attorney general threatened enforcement of state consumer regulations with respect to fare advertising); *id.* at 377 (indicating that the federal government participated as amicus on the airlines' side).

<sup>25</sup> See Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 45–46 (2013) (discussing various ways preemption issues can arise). See generally Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007) [hereinafter Sharkey, *Preemption by Preamble*] (discussing product liability preemption issues, which frequently surface in tort actions).

<sup>26</sup> This Article refers to these as anticipatory suits.

<sup>27</sup> These suits have included instances where no government enforcement action is threatened. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (challenging

declaratory actions against citizens to obtain judicial determinations that government action is valid. The Court in *Franchise Tax Board of California v. Construction Laborers' Vacation Trust for Southern California*<sup>28</sup> reasoned that the state taxing authority, having available means to test state laws through enforcement actions in state court, could not file a federal declaratory action to have its tax collection efforts deemed non-preempted by ERISA.<sup>29</sup> The Court thus suggested that anticipatory actions were generally meant to give individuals an alternative to government enforcement, not to give the government as a plaintiff an additional means to test its powers against individuals.<sup>30</sup>

Just as a government may generally lack a declaratory action to have its laws declared valid by the federal courts in actions against individuals, so too were the state and federal governments traditionally unable to bring suits against each other to declare their interest in governing to the exclusion of the other.<sup>31</sup> Thus, southern

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a state law limiting the state's contracting with firms doing business with Burma). There is an ongoing debate about the extent of this expansion, addressed in the briefs in *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012) (declining to reach the issue of whether a Supremacy Clause action existed, or whether there was generally an anticipatory action when no enforcement was threatened). Compare Initial Brief: Appellee-Respondent at 29–30, 1a-11a, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (Nos. 09-958, 09-1158, 10-23) (including an appendix listing preemption suits alleged not to involve enforcement actions), with Initial Brief: Appellant-Respondent at 42–43, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (Nos. 09-958, 09-1158, 10-283) (characterizing preemption actions as falling primarily into cases where the Court at least implicitly recognized an individual right or where preemption was effectively defensive), and Reply Brief: Appellant-Petitioner at 29–32, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (arguing that the respondent's list of cases confirmed the State's categorizations).

<sup>28</sup> 463 U.S. 1 (1983).

<sup>29</sup> *Id.* at 20–21 (indicating that federal courts should not entertain “suits by the States to declare the validity of their regulations despite possibly conflicting federal law” because states “have a variety of means by which they can enforce their own laws in their own courts”); Walsh, *supra* note 5, at 57 (arguing that *Franchise Tax Board* indicates there was no statutory subject matter jurisdiction over Cuccinelli's ACA suit).

<sup>30</sup> 463 U.S. at 21–22 (“States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation . . . . The situation presented by a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction that informed [two previous declaratory judgment decisions].”).

<sup>31</sup> See *Woolhandler & Collins*, *supra* note 5, at 413–19 (discussing cases in which the Court treated interests in governing as nonlitigable); *id.* at 415–16 (indicating that while boundary cases were an exception, the Court entertained these cases in part because they resembled traditional property claims). *But cf.* Cuccinelli et al., *supra* note 11, at 92 (“The collision between the state and federal schemes also creates an immediate, actual controversy involving antagonistic assertions of right”); *id.* at 94 (arguing that a principal purpose of the federal courts was to resolve competing claims of state and federal power); Huq, *supra* note 12, at 1443–44 (seeming to assume that governmental institutions can readily raise structural constitutional claims in the courts).



states found themselves unable to challenge the legality of Reconstruction in *Georgia v. Stanton*.<sup>32</sup> Somewhat more recently, however, the Court began entertaining such power vs. power suits, such as when the state of Oregon sued the United States Attorney General to invalidate congressional legislation purporting to require states to allow eighteen-year-olds to vote in state elections.<sup>33</sup> The courts, however, have remained ambivalent about sovereignty-based actions,<sup>34</sup> as indicated by the Fourth Circuit's disallowing the Virginia Attorney General's challenge to the Affordable Care Act.<sup>35</sup> In *Arizona v. United States*,<sup>36</sup> however, the Supreme Court—without addressing the governmental standing issue—countenanced the United States' effort to have Arizona's laws declared preempted.<sup>37</sup>

## II. ARGUMENTS ABOUT SOVEREIGNTY-BASED ACTIONS

As noted above, some commentators have welcomed suits such as those brought by Virginia and the United States to vindicate their sovereignty interests. To the argument that preserving the traditional forms of suit promotes dual sovereignty, they respond that implied government suits better reflect the realities of modern federalism.<sup>38</sup> To the argument that traditional suits reinforce the status of individuals as rights holders, they respond that government has its own rights and may be the most interested party in structural claims.<sup>39</sup> To arguments that sovereignty-based suits strain judicial legitimacy and that *Ex parte Young* actions were meant to assist individuals in their claims against government, they respond that causes of action not only serve to protect private rights but also to promote enforcement of federal law.<sup>40</sup>

### A. Dual Sovereignty v. Overlapping and Cooperative Federalism

An arguable advantage of employing traditional actions between government and individuals to test governmental power is that the actions reinforce dual sovereignty

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<sup>32</sup> 73 U.S. (6 Wall.) 50, 77 (1868) (treating the case as an attempt to litigate “the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State”).

<sup>33</sup> *Oregon v. Mitchell*, 400 U.S. 112 (1970); *see also* *Missouri v. Holland*, 252 U.S. 416 (1920) (relying partly on sovereignty interests in allowing a state to challenge federal legislation enacted to implement a treaty).

<sup>34</sup> *Cf. Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923) (disallowing the state's suit to invalidate a federal spending statute alleged to exceed congressional powers).

<sup>35</sup> *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012).

<sup>36</sup> 132 S. Ct. 2492 (2012).

<sup>37</sup> *Id.*

<sup>38</sup> *See supra* note 10.

<sup>39</sup> *See supra* notes 11–12.

<sup>40</sup> *See supra* note 13.

principles—that state and federal governments take their power directly from the people and that they should govern principally by acting on the people rather than on each other.<sup>41</sup> Some who favor the expansion of sovereignty-based suits, however, see this not as an advantage, but rather as a failure to take into account the world of overlapping and cooperative federalism.<sup>42</sup>

No doubt the powers of the federal and state governments are not so clearly divided as in the past.<sup>43</sup> But such changes in federalism do not suggest that the existing remedial system does not adequately address such changes.

### 1. Government Interests Similar to Private Party Interests

Under overlapping and cooperative federalism, both the state and federal governments may be in more direct legal relationships with one another than under a more pristine dual federalism model. To the extent these governments are in direct relationships, however, they will generally have traditional remedies against one another.<sup>44</sup> For example, because private parties generally can challenge allegedly ultra vires governmental regulation, so too will governments, as regulated parties, have causes of action (under category (2) above). Thus, if a state purports to tax the federal government, the federal government can seek to enjoin that tax.<sup>45</sup> If a local government attempts to regulate military recruitment of minors, the federal government as regulated parties can seek an injunction against the statute.<sup>46</sup> And if the federal government seeks to force a state to legislate as in *New York v. United States*,<sup>47</sup> or is coercing state cooperation as in the Affordable Care Act case,<sup>48</sup> the state is in a position like a regulated party who can seek to enjoin ultra vires regulation.<sup>49</sup> These suits take the form of fundamental

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<sup>41</sup> See *supra* notes 6–7.

<sup>42</sup> See Davis, *supra* note 10, at 51–52 (arguing that theories that see federalism as “a problem of overlapping and mutually supporting policymaking networks rather than of separate spheres” support broader government standing to assert institutional interests).

<sup>43</sup> See, e.g., Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 570 (2012) [hereinafter Sharkey, *Inside Agency Preemption*] (describing cooperation between the Environmental Protection Agency and state regulators).

<sup>44</sup> Cf. *Woolhandler & Collins*, *supra* note 5, at 508 (indicating that courts should allow states standing to challenge federal legislation that directly regulates state administrative machinery).

<sup>45</sup> See, e.g., *United States v. District of Columbia*, 558 F. Supp. 213 (D.D.C. 1982) (holding, in a suit brought by the United States, that the Capitol Historical Society is a federal instrumentality and thus was not liable for D.C. sales tax). Private parties traditionally had actions to enjoin taxes, although the Tax Injunction Act, 28 U.S.C. § 1341, now directs them to state refund remedies.

<sup>46</sup> See *United States v. City of Arcata*, 629 F.3d 986, 989 (9th Cir. 2010) (holding that the United States had standing because the cities were seeking to regulate the government directly).

<sup>47</sup> 505 U.S. 144 (1992).

<sup>48</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>49</sup> See *id.* The original complaint by the states raised the coercion claim as well as a challenge to the individual mandate. Complaint at ¶¶ 21–24, 54–58, 63–67, *Florida v. U.S. Dep’t*

legal relations of one party seeking a determination of immunity from the claimed exercise of government power.

## 2. Administrative Review Actions

What is more, many cooperative federalism and conditional spending programs are administered through federal administrative agencies. States participate in federal agencies in a variety of ways, including by consulting as contemplated under executive orders and statutes, by submitting comments during rulemaking, and by seeking federal agency approval under conditional spending programs.<sup>50</sup> While most of these interactions do not result in lawsuits,<sup>51</sup> states may in many cases be considered parties aggrieved who can sue under the APA.<sup>52</sup> Discussions of government standing and implied rights tend to bracket APA and related suits because they are statutory,<sup>53</sup> but such suits are relevant to determining if the remedial system accommodates the realities of modern federalism.

*a. Administrative review suits similar to those of private parties.* In many instances, a state-plaintiff may be analogous to a private party aggrieved. For example, if the federal government threatens fund cut-offs under a conditional spending

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of Health & Human Servs., 780 F. Supp. 2d 1256, 1307 (N.D. Fla. 2011) (No. 3:10-cv-91). Amended complaints included as plaintiffs the business group and individuals, apparently to obviate the state standing issues with respect to the individual mandate challenge. See Amended Complaint at ¶¶ 26–28, 2010 WL 2114067. In addition, the bankruptcy of one of the individual plaintiffs led to the substitution of another party in the Supreme Court. See Heather Elliott, *Does the Supreme Court Ignore Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL RTS. J. 189, 205 (2014); see also *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986) (rejecting on the merits claims by states and subdivisions that a federal statute had abrogated contractual obligations when it ended the states' option of voluntary withdrawal from the social security system).

<sup>50</sup> See generally Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014) (describing the role of state organizations in the administrative process, including their roles under executive orders and specific statutes); Sharkey, *Inside Agency Preemption*, *supra* note 43, at 547 (describing improvements to consultation processes after the Obama administration directed more reluctance to preempt state law). The executive orders that direct consultation with agencies are not judicially enforceable. See generally Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 773–74 (2004) (discussing federalism executive orders).

<sup>51</sup> Cf. Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 441, 460 (2014) (indicating that “most of the important exchanges between states and agencies occur prior to the proposal of a rule”).

<sup>52</sup> “APA” suits, as used herein, can include review actions under statutes with their own review provisions and thus that are not necessarily under the APA.

<sup>53</sup> See, e.g., Davis, *supra* note 10, at 48 (indicating that “the tradition of nonstatutory review of federal official action has largely been supplanted by the [APA]”).

program, the state can seek review similarly to a private party threatened with withdrawal of a certification to participate in a program or to receive government funds.<sup>54</sup> And like private parties, states may be able to raise claims as regulatory beneficiaries, as in some environmental claims.<sup>55</sup>

*b. Administrative review suits that deviate from the private analogy.* Deviating from the private analogy, however, states have been able to use sovereignty interests as the basis for APA or related actions attacking agency determinations that purport to preempt state law. These state nonpreemption suits seem to have surfaced most frequently under statutory schemes in which Congress contemplated an ongoing role for state regulation that dovetails with federal regulation.<sup>56</sup> For example, the Transportation Act of 1920<sup>57</sup> provided that the Interstate Commerce Commission (ICC) could order changes in intrastate rates that were set by state agencies if the ICC found that such rates discriminated against interstate commerce.<sup>58</sup> The ICC was required to notify affected states, which could then participate in the proceedings,<sup>59</sup> and which, on occasion, sought review of orders changing the otherwise state-set rates.<sup>60</sup> Similarly, the

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<sup>54</sup> *Cf.* *Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010) (holding unripe a challenge under the APA to the Department of Education's refusal to approve plan amendments and waivers).

<sup>55</sup> *Cf.* *Massachusetts v. EPA*, 549 U.S. 497 (2007) (recognizing standing, relying in part on the state's proprietary interests).

<sup>56</sup> *Ohio ex rel. Celebrezze v. United States Dept. of Transp.*, 766 F.2d 228 (1985) (holding that the state had standing to seek review of an agency preemption determination where the statute provided a procedure for the agency to determine preemption); *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 374 (1999) (rejecting on the merits a state challenge to FCC regulation that the state alleged should have remained within the local domain under the statutory provision preserving state control of intrastate regulation); *cf.* Sharkey, *Inside Agency Preemption*, *supra* note 43, at 584 (indicating that state attorneys general, sometimes coordinated by the National Association of Attorneys General, have opposed agency preemption through amicus briefs).

<sup>57</sup> Act of Feb. 28, 1920, Pub. L. No. 66-152, Ch. 91, 41 Stat. 456 (repealed in 1933).

<sup>58</sup> *Id.* at § 416(4), 41 Stat. at 484.

<sup>59</sup> Whenever in any investigation under the provision of this Act . . . there shall be brought in issue any rate . . . made or imposed by authority of any State . . . the Commission, before proceedings to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission.

*Id.* § 416(3), 41 Stat. at 484; *see also* Seifter, *supra* note 50, at 455–62 (discussing both general and agency-specific requirements for consultation with states, as well as informal consultation methods).

<sup>60</sup> *See, e.g., Florida v. United States*, 282 U.S. 194 (1931) (reviewing, at the state's instance, ICC orders that increased certain intrastate rates as part of the ICC's authority to do so to prevent unjust discriminations against interstate commerce); *id.* at 208 (sustaining

1934 Communications Act provided that the Act should not be construed to give the FCC jurisdiction with respect to “charges[ ] . . . or regulations for or in connection with intrastate communication service,”<sup>61</sup> and the current Act provides a “jurisdictional separation” process for allocating authority.<sup>62</sup> State agencies have frequently challenged FCC orders as contrary to the reservation of intrastate authority.<sup>63</sup>

Such APA suits are not necessarily the principal means judicially to test agency preemption. Rather, enforcement actions by states and anticipatory actions by enforcement objects, as well as suits between private parties, remain important avenues to test agency preemption decisions.<sup>64</sup> Several administrative law scholars, however, have argued that administrative process, including judicial review, may offer the best mechanism for testing agency preemption, while reinforcing federalism in the process.<sup>65</sup>

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Florida’s objection that the statewide scope of the order was not supported by substantial evidence); *see also* *United States v. Louisiana*, 290 U.S. 70 (1933) (rejecting on the merits a state challenge to the ICC’s raising an intrastate rate as unjust discrimination); *cf.* *Texas v. ICC*, 258 U.S. 204 (1922) (involving both a removed state injunctive action against the railroad’s abandoning an intrastate road under ICC authority, and also the state’s injunctive action filed in federal court against the ICC and the railroad); *id.* at 212 n.1 (noting that the statute required ICC notice to governors and authorized equity actions by states to enjoin abandonments contrary to the statute); *id.* at 216–17 (holding, to avoid constitutional problems, that the statute did not allow the ICC to authorize abandonment of a wholly in-state road).

<sup>61</sup> 47 U.S.C. § 152(b)(1).

<sup>62</sup> 47 U.S.C. § 410(c); *see also, e.g.*, *Nat’l Ass’n of Util. Regulatory Comm’rs v. FCC*, 880 F.2d 422, 425 (D.C. Cir. 1989) (discussing “jurisdictional separations”).

<sup>63</sup> *See, e.g.*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (challenging FCC regulations, claiming that local competition provisions in the 1996 Act were to be administered primarily by the states, and citing the 1934 Act’s provision that the FCC was to regulate only interstate matters); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986) (arguing that an FCC order changing depreciation rules interfered with state control over intrastate service under the statute); *Nat’l Ass’n of Util. Regulatory Comm’rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) (challenging agency preemption as to inside wiring regulation).

<sup>64</sup> *Cf.* Meltzer, *supra* note 25, at 45–46 (indicating that no matter how the question of deference to agency preemption decisions is resolved, preemption decisions will arise in various contexts, including in state courts, where federal agency participation is unlikely).

<sup>65</sup> *See, e.g.*, Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1936, 1939, 1976–77 (2008) (arguing that because of comparative institutional competency, federal agencies should often be the preferred institutions to decide allocations of authority between the states and the federal government); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2028, 2068–69 (2008) (arguing that administrative law has appropriate mechanisms for considering federalism issues); Richard A. Pierce, *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607 (1985) (arguing that agencies are often best situated to determine preemption, but should notify states, and take into account federalism interests); *cf.* Sharkey, *Inside Agency Preemption*, *supra* note 43, at 526, 572–73 (arguing for changes to agency procedures and greater attention by state and local governments to agency rulemaking); Sharkey, *Preemption*

These proceedings, scholars argue, may encourage greater consideration of arguments against preemption—not only based on specific statutory provisions, but also based on arguments that agencies generally must give adequate consideration to federalism impacts.<sup>66</sup> But quite apart from whether the APA provides the best way to test regulatory preemption, APA proceedings, together with governmental enforcement actions and anticipatory suits accommodate overlapping federalism.<sup>67</sup>

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by *Preamble*, *supra* note 25, at 256–57 (arguing for measures to make agencies more attentive to federalism impacts). *But cf.* Seifter, *supra* note 50, at 60 (arguing that while state organizations that appear before agencies are good at resisting federal power, such organizations may not well serve goals of expertise and accountability).

There is ongoing discussion of the appropriate levels of judicial scrutiny of agency preemption decisions. *See, e.g.*, Galle & Seidenfeld, *supra* note 65, at 2001 (proposing an “amalgam of *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944)] deference and hard look review”); Mendelson, *supra* note 50, at 741–42 (arguing that while agencies have incentives not inferior to Congress’s to take state interests into account, *Skidmore* deference rather than *Chevron* [*v. Natural Resources Defense Council*, 467 U.S. 837 (1984)] deference is nonetheless appropriate for agencies’ preemptive interpretations of statutes); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730 (2008) (arguing that courts are the “least-worse” institutions ultimately to decide preemption issues arising from agency-administered regulatory statutes); *id.* at 760 (arguing that agency preemption should only occur by agency decisions having the force of law, that agencies need fairly explicit delegations if they are to displace state law by their own authority, and that courts should generally give a form of deference short of that prescribed by *Chevron*); Metzger, *supra* note 65, at 2105–06 (suggesting that rather than emphasizing *Chevron*, the courts should place a somewhat greater burden of explanation on agencies where states have traditionally played a substantial regulatory role); Seifter, *supra* note 50, at 58–62 (arguing that problems with state organizations suggest that courts should not adjust deference levels based on consultation with such organizations); Sharkey, *Preemption by Preamble*, *supra* note 25, at 256–57 (suggesting that the courts might condition deference on adherence to processes that encourage participation by states and various outside groups); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 891–92 (2008) (suggesting a form of *Skidmore* deference, customized to the context of agency interpretation statutes); *cf.* Hills, *supra* note 10, at 57 (arguing for a non-preemption rule for state law that gives a form of *Chevron* deference to state lawmakers); Meltzer, *supra* note 25, at 143–46 (summarizing the debate).

<sup>66</sup> *See, e.g.*, Metzger, *supra* note 65, at 2054 (arguing that ordinary administrative law tools provide an appropriate way to consider federalism concerns by way of review of statutory authority, adherence to procedural mandates, and requirements of adequate justification); Pierce, *supra* note 65, at 663–64 (viewing agencies, when using notice and comment rule-making, as institutionally suited to resolve preemption issues, particularly based on a standard looking to substantial and disproportionate interstate spillovers).

<sup>67</sup> *Cf.* *United States v. Locke*, 529 U.S. 89 (2000) (indicating that the tanker association brought suit against state and local officials alleging that the state regulations were preempted, indicating that the United States intervened on appeal); *id.* at 116–17 (holding several regulations preempted and indicating that others should be considered in light of a fuller record that could be developed with the United States now as a party); *id.* at 117 (indicating that the statute directed the Coast Guard to consult with state and local governments).

### 3. Implied State Non-Preemption Actions by Analogy to APA Actions?

It might be argued, however, that the existence of state non-preemption claims under the APA suggests that governments should be able to bring claims, challenging each others' statutes on preemption or non-preemption grounds, even without statutory authorization. But, as noted above, a party's ability to litigate a particular interest in one context does not answer the question of whether she can bring a cause of action in another. To rein in delegated power, administrative review allows for an expanded universe of complainants and arguments than is true for implied rights of action. For example, a regulatory beneficiary can complain that an agency in rulemaking has insufficiently regulated another, raising issues such as the agency's failure to follow notice and comment processes, failure to give adequate consideration to important objections, as well as failure to adhere to statutes under varying levels of deference. It does not follow from the regulatory beneficiary's APA cause of action against the agency, however, that the beneficiary has an implied action directly against the regulated party for violations of the organic statute. Rather, beneficiaries' actions directly against regulated parties generally require explicit statutory authorization. Nor does a regulatory beneficiary have a viable cause of action when Congress exercises its nondelegated<sup>68</sup> power to regulate less than the beneficiary would like.<sup>69</sup>

Similarly, allowing states to question agency preemption decisions arguably provides a check on agencies' somewhat anomalous and controversial power to make explicit determinations that state regulation poses an obstacle to achievement of the goals of federal regulation.<sup>70</sup> It does not follow from states' ability to bring APA non-preemption claims that a state should be able to bring actions challenging Congress's legislation that the state claims unlawfully preempts state law and treads on reserved powers.<sup>71</sup>

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<sup>68</sup> Congress does exercise power delegated from the people.

<sup>69</sup> See Huq, *supra* note 12, at 1505–06 (noting that relief is not available because of Congress's failure to enact a law, such that there is a deregulatory slant in private structural constitutional litigation).

<sup>70</sup> See, e.g., Sharkey, *Inside Agency Preemption*, *supra* note 43, at 526 n.14 (referring to debate about the "ascendency of federal agencies in the preemption realm"); Young, *supra* note 65, at 878 (arguing that the political and procedural safeguards of federalism are absent when the Executive rather than Congress preempts state law). While agencies' making of regulations that may directly conflict with state law is inevitable, agencies' determinations of obstacle preemption is a somewhat more jarring exercise of delegated power. See Merrill, *supra* note 65, at 731 (indicating that most disputes about preemption focus on displacements rather than trumping state law).

<sup>71</sup> Cf. Walsh, *supra* note 5, at 71 (indicating that states' APA suits were statutorily authorized and involved agency interference with some particular activity of the state); Metzger, *supra* note 65, at 2086 ("The states' constitutional significance alone seems sufficient ground on which to require that agencies consider and justify the impact of a proposed

Attorney General Cuccinelli's challenge to the Affordable Care Act argued that the Act trenching on reserved state powers, including by its preemptive effect on a state law that forbade requirements to buy insurance—a statute enacted in reaction to the ACA.<sup>72</sup> Many of the cases Cuccinelli cited, however, were suits in which the APA or a similar statutory review provision was a basis for the claim.<sup>73</sup> For example, in *Alaska v. Department of Transportation*,<sup>74</sup> states challenged an agency order preempting state regulation of airline advertising for lack of notice and comment and reasoned decisionmaking.<sup>75</sup> And in *Ohio ex rel. Celebrezze v. Department of Transportation*,<sup>76</sup> the state challenged the agency's preemption of state regulation of transportation of nuclear materials—a determination made under an explicit statutory procedure for agency preemption determinations.<sup>77</sup>

In *Cuccinelli*, the Fourth Circuit distinguished these cases—not because they were based on the APA—but because the plaintiff-states had active regulatory programs that would be affected by the challenged federal agency preemption determinations, unlike the bare-bone Virginia statute that Cuccinelli relied on.<sup>78</sup> But even if Virginia had a more active state program concerning health insurance obligations, the question would remain as to whether a state's conflicting sovereignty claim states a cause of action for challenging congressional legislation, as distinguished from a challenge to agency action under the APA. Better established causes of action were readily

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regulation on the states' regulatory role, at least absent indication that Congress intended agencies to ignore this factor. But at a minimum, statutory provision for a state regulatory role—for instance, in cooperative regulatory schemes or savings clauses limiting preemption—provides a firm basis for requiring that agencies take seriously the impact a proposed regulation will have on the states.” (footnote omitted)).

<sup>72</sup> Complaint, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10CV188).

<sup>73</sup> See *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (relying on the APA to challenge the Bureau of Alcohol, Tobacco, and Firearm's decision that the state's expungement did not meet the federal statutory requirements that would allow removal of federal firearms disabilities); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 408–09 (5th Cir. 1999) (complaining, inter alia, as to the FCC's allocation of certain costs and claiming encroachment on state authority); *Ohio v. United States Dept. of Transp.*, 766 F.2d 228, 230–31 (6th Cir. 1985) (reviewing DOT preemption of state rules as to shipping nuclear materials); *Alaska v. United States Dept. of Transp.*, 868 F.2d 441 (D.C. Cir. 1989) (challenging DOT orders as to airplane advertising). See generally Appellee's Opening and Response Brief at 6, 18, 20, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058) (citing these decisions).

<sup>74</sup> 868 F.3d 441 (D.C. Cir. 1989).

<sup>75</sup> See *id.* at 442–43 (indicating that states as bodies politic were within the ambit of the Aviation Act).

<sup>76</sup> 766 F.2d 228 (6th Cir. 1985).

<sup>77</sup> See *id.* at 230–31 (referring to provisions regarding state hazardous material regulation).

<sup>78</sup> *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269–70 (4th Cir. 2011); *id.* at 268 (reasoning also that Virginia was not directly regulated by the individual mandate).



available to challenge the federal statute. Individuals could challenge the individual mandate—the target of Cuccinelli’s attack—based on the federal government’s lack of enumerated powers.<sup>79</sup> And states could challenge the program based on their undue coercion claim, similar to challenges by private parties who are directly regulated or coerced by government.<sup>80</sup>

#### 4. Reverse APA Actions by the Federal Government?

Federal agencies have sometimes brought implied actions to enforce the preemptive effects of federal regulation on state regulation. For example, the Federal Home Loan Bank Board sued a state agency claiming that federal law preempted a state law restricting the use of the word “bank” in advertising.<sup>81</sup> Already pending in state court was a state enforcement suit against a savings and loan company for violating the state advertising restriction.<sup>82</sup>

One could arguably treat these actions as reversals of the state APA non-preemption claims against the federal government. The federal government, however, is the party aggrieved rather than a “party aggrieved” under the APA, and thus lacks statutory authorization to bring such suits as a plaintiff. The need to rein in delegated power, moreover, provides a justification for allowing nontraditional claimants, including states, to bring certain challenges to agency action. By contrast, allowing non-statutory federal claims allows the executive to expand its delegated power.

#### *B. Arguments that Government Is Litigating its Own Rights*

Traditional claims between individuals and government reinforce the status of individuals as rightsholders even as to structural claims. Those favoring broader government standing, however, emphasize that government is asserting its own rights when it brings sovereignty claims.<sup>83</sup> Indeed, they even argue that governments have

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<sup>79</sup> See *Florida v. United States Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011) (not reaching the question of whether the states had standing to challenge the individual mandate because the government did not contest the standing of the NFIB and conceded the standing of an individual plaintiff); *aff’d in part, rev’d in part, sub nom. NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (not discussing standing issues). The district court, relying on the district court opinion in *Cuccinelli*, held that the states with legislation respecting insurance mandates did have standing to contest the individual mandate, but it did not reach the standing issue as to other states. *Florida ex rel. Bondi v. United States Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

<sup>80</sup> 648 F.3d at 1243 (noting that the federal government did not dispute states’ standing to challenge the Medicaid provisions).

<sup>81</sup> *Fed. Home Loan Bank Bd. v. Empie*, 778 F.2d 1447 (10th Cir. 1985).

<sup>82</sup> *Id.* at 1449–50 (citing *Okla. Bankers Ass’n v. Family Fed. Savings Bank, Creek Co.* Dist. Ct. No. C-83-181).

<sup>83</sup> See *supra* notes 11–12.

the primary interests in litigating structural claims, and should often be preferred to individual challengers.<sup>84</sup>

### 1. Interests Separate from Citizens?

Arguments that government has its own interest are meant in part to circumvent problems of *parens patriae* suits (category (3) above). Under the *parens patriae* rubric, governments rely largely on the interests of their citizens in bringing suit, thereby raising the obvious objection that individuals can bring their own claims.<sup>85</sup> While sometimes receptive to *parens patriae* actions, the courts have placed various and somewhat unpredictable restrictions on their use.<sup>86</sup> For example it is frequently said, based on *Massachusetts v. Mellon*,<sup>87</sup> that states cannot assert *parens patriae* standing against the United States.<sup>88</sup> And the United States itself faces restrictions

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<sup>84</sup> See Huq, *supra* note 12, at 1515 (preferring institutional to private litigants would conform to standing doctrine, which assigns “judicial enforcement of an interest solely to the entity that formally holds and directly benefits from that interest”); Crocker, *supra* note 10, at 2085 (arguing that states are better than individuals at protecting interests in state sovereignty); Davis, *supra* note 10, at 79 (“There are several reasons to prefer the United States over a private party when it comes to implying constitutional remedies for public rights that protect jurisdictional interests.”); cf. Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798 (2009) (arguing that government is the appropriate party to litigate with respect to “public goods”).

<sup>85</sup> See Crocker, *supra* note 10, at 2053 (disfavoring *parens patriae* suits, but favoring sovereignty-based claims); Davis, *supra* note 10, at 67 (same).

<sup>86</sup> See Vladeck, *supra* note 5, at 855–56 (describing the courts’ various requirements for state *parens patriae*); Larry W. Yackle, *A Worthy Companion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U. L. REV. 111, 141–43 (1997) (same); cf. Weinstock, *supra* note 84, at 827–28, 834–35 (arguing that the *parens patriae* interests of states should not have to meet the injury in fact requirement, and should not be distinguished from sovereignty interests).

<sup>87</sup> 262 U.S. 447 (1923).

<sup>88</sup> See Vladeck, *supra* note 5, at 857 (stating that the Court has largely held to *parens patriae* limitations on state suits against the federal government). Under certain statutes, particularly rate-making statutes, the states have been able to pursue administrative review in effectively a *parens patriae* role. See, e.g., *New York v. United States*, 331 U.S. 284 (1947) (contesting changes in regional rates); *Conn. Dept. of Pub. Util. Control v. FERC*, 593 F.3d 30 (D.C. Cir. 2010) (contesting a federal agency’s allowance of basis points for return on investments); see also Sharkey, *Inside Agency Preemption*, *supra* note 43, at 588 (describing provisions of financial regulation statute that allow a majority of states to force the Bureau of Consumer Financial Protection to take regulatory action). Commentators have seen *Massachusetts v. EPA*—although also based on proprietary interests—as expanding state *parens patriae* suits against the federal government. 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 (2008) (arguing that states should be able to file *parens patriae* suits against the federal government if the latter has failed to perform a statutory or constitutional duty); cf. Jonathan Remy Nash, *Standing and*

on its attempts to bring *parens patriae* suits to enforce the rights of citizens.<sup>89</sup> Governmental litigants such as the federal executive in *Arizona v. United States*<sup>90</sup> and the Virginia Attorney General in *Cuccinelli ex rel. Virginia v. Sebelius* thus have fashioned their claims as based on sovereignty interests rather than as based on *parens patriae*.<sup>91</sup>

While it may be analytically possible to separate out the interests of individuals from those of government, it is nevertheless worth noting the extent to which, as a practical matter, sovereignty based suits may resemble and substitute for *parens patriae* suits,<sup>92</sup> and by extension, for individual suits.<sup>93</sup> For example, federal governmental challenges to state taxation of individuals in federal enclaves, which the courts tend to justify by the United States' sovereignty interests, effectively operate as *parens patriae* suits for the individual taxpayers.<sup>94</sup> Federal agency suits to enjoin

*the Precautionary Principle*, 108 COLUM. L. REV. 494, 513–14 (2008) (arguing for state standing to pursue claims where there are uncertain but potentially large harms). *But cf.* Cass, *supra* note 5, at 78–79 (arguing against state standing in *Massachusetts v. EPA*).

<sup>89</sup> See, e.g., *United States v. Philadelphia*, 644 F.2d 187 (3d Cir. 1980) (holding that the United States could not sue for injunctive relief to address alleged Fourteenth Amendment violations by Philadelphia police); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 815 (1999) (indicating that provisions allowing the DOJ to sue were enacted after the Rodney King incident). While a few cases allowed states to sue localities under § 1983, see, e.g., *Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981), that result seems questionable in light of *Inyo County v. Paitue-Shoshone Indians*, 538 U.S. 701 (2003), which held that an Indian tribe is not a “person” entitled to sue under § 1983. See generally Davis, *supra* note 10, at 42–44 (describing varying results in *parens patriae* cases by the federal government).

<sup>90</sup> 132 S. Ct. 2492 (2012).

<sup>91</sup> *Cuccinelli et al.*, *supra* note 11, at 101 (distinguishing *Massachusetts v. Mellon* on the ground that the federal statute at issue in that case did not conflict with a state law); *id.* at 118–19 (arguing that Virginia was not asserting a quasi-sovereign interest in its ACA suit); see also Davis, *supra* note 10, at 82 (arguing that allowing governmental suits to vindicate their institutional interests would not turn into *parens patriae*, because such suits would be limited to claims under constitutional rules that allocate jurisdiction to the benefit of states as political communities).

<sup>92</sup> *Cf.* Weinstock, *supra* note 84, at 800 (arguing against a distinction between sovereign and quasi-sovereign interests in that both involve the government's litigating to protect public goods); Barron, *supra* note 11, at 2241–42 (arguing that *parens patriae* should include the government's interest in maintaining its own capacity to serve as forum for democratic contestation and policy).

<sup>93</sup> *Cf.* Sharkey, *Inside Agency Preemption*, *supra* note 43, at 566 (noting a recent instance when the Consumer Product Safety Commission told a trade group that the group could challenge an Illinois law on its own).

<sup>94</sup> *Compare* *United States v. Lewisburg Area School Dist.*, 539 F.2d 301, 306 (3d Cir. 1976) (declining to decide if the United States could sue based on interests of residents of federal enclave on whom the local government had imposed taxes because “the interest which the Government seeks to protect is its own exclusive rights as sovereign, and the injury it alleges is a trespass against those sovereign rights”), *with* *United States v. Ohio*, 614 F.2d

conflicting state regulation generally assist private regulated parties who are facing state enforcement actions.<sup>95</sup> Such suits, moreover, may effectively relieve the assisted parties of federalism based limitations on their own suits, such as the Tax Injunction Act<sup>96</sup> and *Younger*.<sup>97</sup> Similarly, the United States' suit to enjoin Arizona's immigration

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101, 105 (6th Cir. 1979) (abstaining in a case in which the state was suing certain federal contractors where the United States could intervene in state agency proceeding). Tax suits by the United States on behalf of certain parties may have a greater justification in traditional *parens patriae*, which protected particularly vulnerable parties who may have had difficulties protecting their own interests. *See, e.g.*, *United States v. Arlington County*, 669 F.2d 925, 928–29 (4th Cir. 1982), *cert. denied*, 459 U.S. 801 (1982) (allowing the United States to sue, based on its own interests, to stop taxes on a foreign mission and to obtain relief from a prior judgment against the German Democratic Republic); *cf.* *City of New York v. Permanent Mission to India*, 618 F.3d 172, 175 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (in a removed action in which the federal government appeared as an out-of-time amicus, indicating that the Foreign Missions Act gave the Secretary of State power to preempt state taxes, including retroactively); *Lewisburg*, 539 F.2d at 306 (citing suits on behalf of Indians).

<sup>95</sup> *See, e.g.*, *Federal Home Loan Bank Board v. Empie*, 778 F.2d 1447, 1450 (10th Cir. 1985) (allowing the United States to file an action to protect its own authority and the entities in its regulatory domain, as well as the general public, although suits were pending between the regulated bank and the state); *id.* at 1452 (rejecting the application of *Younger* because the United States' interests were sufficiently different from that of the bank subject to the state court enforcement action); *cf.* *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009) (reviewing cases where a banking group as well as the federal agency challenged the state attorney general's investigative request as preempted); *cf.* Sharkey, *Inside Agency Preemption*, *supra* note 43, at 555 (noting that the Office of the Comptroller of Currency had marketed itself to banks as aggressive on preemption, although Congress had recently imposed limits).

<sup>96</sup> 28 U.S.C. § 1341; *see also* *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 105 (1981) (holding that comity barred a federal action for monetary relief from state taxation).

<sup>97</sup> *See* *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (allowing the Board to seek an injunction, with respect to a matter as to which the Board claimed exclusive jurisdiction, against state court proceedings in which the state court at the employer's instance had limited certain union picketing); *id.* at 142 (holding that the action did not have to meet the narrow exceptions to the Anti-Injunction Act). *See generally*, *Younger v. Harris*, 401 U.S. 37 (1971). The lower courts have sometimes treated private party preemption claims as less subject to abstention than other claims. *See* Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 913, 957 (2007) (noting that some courts hold that preemption issues do not warrant *Pullman* abstention (*see* *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)), but arguing that preemption decisions should be seen as constitutional questions and subject to abstention); Daniel Jordan Simon, *Abstention Preemption: How the Federal Courts Have Opened the Door to the Eradication of "Our Federalism,"* 99 NW. U. L. REV. 1355, 1373, 1385 (2005) (arguing for application of abstention doctrines in preemption cases); Patrick J. Smith, *The Preemption Dimension of Abstention*, 89 COLUM. L. REV. 310, 314, 320, 331 (1989) (discussing different approaches of courts to abstention in preemption cases and arguing for a preemption exception to *Younger*); *cf.* *Sprint Commc'ns v. Jacobs*, 134 S. Ct. 584, 588 (2013) (where the pending state administrative review action was not a civil enforcement proceeding akin to a criminal prosecution and not initiated by the state, the federal court could proceed with an injunctive action against allegedly preempted state regulation).

regulations was in aid of those who would have been subject to the new law, some of whom were already challenging the statute.<sup>98</sup>

## 2. Government as the Most Interested Party in Sovereignty Claims?

One response of the broad-standing proponents to the argument for preferring suits involving individuals is that governments are perhaps the most interested parties in structural fights.<sup>99</sup> And because standing and cause of action doctrines often tend to allocate litigable interests to the parties most interested,<sup>100</sup> such rights should be allocated to government.<sup>101</sup>

It is not clear, however, that the federal government as opposed to the regulated party has the preeminent interest in challenging allegedly preempted state regulation.<sup>102</sup>

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Getting around state enforcement processes would be called for if the federal government claims irreparable harms to the government's interest in protecting national security information. *See, e.g.*, *United States v. Adams*, 473 F. Supp. 2d 108, 110 (D. Maine 2007) (allowing a United States suit to prevent Verizon's compliance with a state public utility commission's order investigating complaints by private parties that Verizon violated state and federal law by providing information to the National Security Agency); *cf.* *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976) (involving a suit by the United States, in which the House intervened, to stop AT&T from complying with a House subcommittee's subpoena).

<sup>98</sup> *See* CBS News, *Arizona Immigration Law Faces New Legal Fight*, CBS NEWS (May 18, 2010), <http://www.cbsnews.com/news/arizona-immigration-law-faces-new-legal-fight/> (noting five pending challenges).

<sup>99</sup> *See* Huq, *supra* note 12, at 1491 ("to the extent courts properly consider structural constitutional questions at all, it makes sense to close the door to all but institutional litigants."); Crocker, *supra* note 10, at 2085 (arguing that private parties' interests "do not align perfectly with those of the states, and they possess neither then incentives nor the resources to pursue sovereignty claims as effectively"); Davis, *supra* note 10, at 79–80 (arguing that the United States' institutional interests are their own and the government should control litigation as to them); *see also* Barron, *supra* note 11, at 2242–43 (arguing that municipalities and states have an interest in preserving their lawmaking powers against encroachments by higher levels of government, as well as an interest in protecting their citizens).

<sup>100</sup> *See, e.g.*, Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1194–95, 1211 (2014) (arguing that the standing doctrine often attempts to secure plaintiffs who have the greatest stake in obtaining the requested relief); *see also* Grove, *supra* note 15, at 809, 824 (discussing how the injury in fact requirement limits private prosecutorial discretion, and helps to protect private liberty against arbitrary encroachment); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 732–33 (2004) (summarizing multiple dimensions of standing doctrine, including preventing usurpation of private parties' rights).

<sup>101</sup> *See* Huq, *supra* note 12, at 1514 (individual standing in structural claims will "tend to destabilize the federal-state and interbranch balances"); Davis, *supra* note 10, at 79–80 (characterizing the federal government as the "real contestant" as to public rights to govern).

<sup>102</sup> *Cf.* *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (holding, on review of a tort suit, that FDA approval of a drug did not preempt state tort actions); Cass, *supra* note 5, at 78–79

While the government interest may be broader, the regulated party's interest is often more focused and concrete. For example, individuals detained under Arizona's immigration laws would seem to have the paramount interest in seeing those laws invalidated. By contrast, the interference that the United States alleged with its enforcement discretion was relatively amorphous<sup>103</sup>: that Arizona's policies interfered with the federal government's "careful and considered balance of national law enforcement, foreign relations, and humanitarian interests."<sup>104</sup> And tort litigants may often have the most concrete interests in whether federal agency action preempts common law claims.<sup>105</sup>

What is more, even if one were to assume that governments between themselves have the paramount interest in the results of preemption battles, it would not follow that governments should be able to pursue their claims as plaintiffs in non-statutorily authorized suits against each other. Congress and the President, for example, arguably had the largest stakes when the line item veto was in question.<sup>106</sup> So, too, one might argue that Georgia had a greater interest in challenging Reconstruction than did an

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(arguing that state attorneys general are often politically motivated, and that state suits should be viewed with a presumption that they represent political fights over policy).

<sup>103</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980, 1007 (D. Ariz. 2010) (finding irreparable harm "because the federal government's ability to enforce its policies and achieve its objectives will be undermined by the state's enforcement of statutes that interfere with federal law, even if the Court were to conclude that the state statutes have substantially the same goals as federal law"); *aff'd*, 641 F.3d 339, 366 (9th Cir. 2011) (stating that a constitutional infringement "will often alone constitute irreparable harm," and that "the interest of preserving the Supremacy Clause is paramount") (quoting *Assoc. Gen. Contractors v. Coal for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991); *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852–53 (9th Cir. 2009)), *aff'd*, *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (addressing the merits of the preemption claim).

<sup>104</sup> Complaint at ¶¶ 2, 4, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10CV01423) (alleging, inter alia, that the state law disrupted federal priorities "that focus on aliens who pose a threat to national security or public safety," imposed burdens on federal agencies, caused "detention and harassment of authorized visitors immigrants, and citizens," and would "ignore humanitarian concerns" such as protecting aliens with well-founded fears of persecution or who are victims of natural disaster). The most direct interference with the federal government may have been that Arizona might refer certain detained individuals to the federal system, although the federal government would not have exerted enforcement efforts towards those persons. The federal government, however, presumably could release those individuals, perhaps leading to political embarrassment to officials but not irreparable harm to the federal government.

<sup>105</sup> Cf. Sharkey, *Inside Agency Preemption*, *supra* note 43, at 571, 583 (noting that it was unclear who represents the state interest when federal regulation preempts state tort law); Sharkey, *Preemption by Preamble*, *supra* note 25, at 255–56 (noting trial lawyers' objections to certain agency preemption decisions). Relying on traditional suits between the government and individuals, moreover, could provide greater insight into whether state regulations do in fact pose an obstacle to the federal scheme, because such claims look to the actual effects on individuals.

<sup>106</sup> See *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (holding that members of Congress lacked standing to challenge the Line Item Veto Act).

individual incarcerated by a military commission such as *Lamdin Milligan*.<sup>107</sup> But such power vs. power disputes traditionally remain in the political realm until the law comes to bear on individuals who may bring claims of immunity or right.<sup>108</sup> At least as far as the judicial system is concerned, individuals remain the most interested parties in claims that a government has acted *ultra vires*.<sup>109</sup>

It is true, as proponents of broad standing claim, that intergovernmental suits allow for speedy and broad determinations,<sup>110</sup> as in *Arizona v. United States*.<sup>111</sup> But speed and breadth of decision have never been a primary aim of standing and cause of action rules. Rather, the legitimacy of a federal court's pronouncing on issues of governmental power has been premised largely on the necessity of deciding the rights and immunities of individuals who will suffer concrete injuries.

Michael Collins and I have previously argued, moreover, that recognizing broad governmental standing in sovereignty-based suits could undermine the role of individuals as rightsholders, particularly with respect to structural claims.<sup>112</sup> These concerns are not entirely fanciful, given that proponents of governmental sovereignty claims argue that intergovernmental suits are the best form of litigation for structural claims.<sup>113</sup> Indeed, one recent commentator argues that governmental suits should displace private suits as to structural claims.<sup>114</sup> He would extend his prohibition even to barring

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<sup>107</sup> Compare *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 70 (1868) (disallowing challenge), with *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866) (deciding an individual detainee's challenge to the jurisdiction of a military tribunal in Indiana).

<sup>108</sup> As Alexander Bickel stated in criticizing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966):

But it is altogether different for a state to be raising, as did South Carolina, nothing more than her interest in the execution of her own laws rather than those of Congress, and her interest in having Congress enact only constitutional laws for application to her citizens. A state is said to have no standing in such circumstances, not because the interests asserted are unreal or inadequately particular to the state, but because by hypothesis they should not, in such circumstances, suffice to invoke judicial action.

Bickel, *supra* note 5, at 88; cf. *Clinton v. City of New York*, 523 U.S. 417, 425 (1998) (including actions brought by individuals, associations, and New York City for loss of benefits due to the line item veto).

<sup>109</sup> But cf. Huq, *supra* note 12, at 1516 (characterizing criminal defendants' structural challenges to criminal statutes as "raising the interests of third-party institutions").

<sup>110</sup> Davis, *supra* note 10, at 75–76 (arguing that implied anticipatory governmental actions "permit regulated parties to determine *ex ante* whether their conduct is sanctionable," save private parties from anxiety, and "contribute to the development of constitutional law by encouraging relatively encompassing pronouncements as to its content"). But cf. *id.* at 76 n.408 (indicating that some might see this breadth as a vice).

<sup>111</sup> 132 S. Ct. 2492 (2012).

<sup>112</sup> Woolhandler & Collins, *supra* note 5, at 439–40, 503–04.

<sup>113</sup> See *supra* note 104.

<sup>114</sup> Huq, *supra* note 12, at 1514 (proposing that "[w]hen an individual litigant seeks to enforce a structural constitutional principle redounding to the benefit of an official institution,

criminal defendants from defending “on the ground that the criminal statute invoked exceeded Congress’s enumerated powers and thus trespassed on states’ authorities.”<sup>115</sup>

### *C. Private Rights v. Regulatory Model of Litigation?*

#### 1. Regulatory Purposes

Governmental standing proponents argue that such a private rights based view of causes of action is too restrictive. Proponents argue that courts, in implying rights of action, should take into account a regulatory role of helping to enforce federal law.<sup>116</sup>

Governments, however, can ordinarily test their powers by bringing against individuals statutorily authorized enforcement actions—the paradigmatic form of government-initiated regulatory litigation. And private parties’ actions against government or its officials enforce federal law norms, at the same time that the courts’ implying such actions is justified by their traditional role of protecting private rights. Arguments that the courts should imply additional causes of action for regulatory purposes need to take into account that statutorily authorized enforcement suits and individuals’ anticipatory actions already serve regulatory purposes.

The broad-standing proponents, however, argue that government implied suits are better than private-party actions, relying on standard arguments against implying rights of action in private parties to enforce statutes.<sup>117</sup> Implied private suits, it has been

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and there is no reason the latter could not enforce that interest itself, a federal court should not permit the individual litigant to allege and obtain relief on the basis of the separation of powers or federalism”); *id.* (indicating that in most cases this would prove a categorical bar to individual cases because the governmental institution would have standing—e.g., Congress, the executive, and the states).

<sup>115</sup> Huq, *supra* note 12, at 1516; *see also id.* at 1442, 1516. Huq disagreed with the Supreme Court’s decision in *United States v. Bond*, 131 S. Ct. 2355 (2011), reversing the Third Circuit’s decision that a criminal defendant who had attempted to harm her husband’s lover could not challenge on Tenth Amendment grounds her prosecution under a federal statute forbidding possession or use of any chemical where not intended for a “peaceful purpose.” Congress enacted the statute to implement an international chemical weapons convention. The federal government argued against Bond’s standing in the Court of Appeals, but changed its position in the United States Supreme Court. *See* 131 S.Ct. at 2361; *cf.* Davis, *supra* note 10, at 80 (assuming that the valid rule doctrine would persist to allow individuals to raise claims when protecting private rights).

<sup>116</sup> *See* Davis, *supra* note 10, at 66 (arguing *Ex parte Young* should be read in more regulatory rather than narrow adjudicatory terms).

<sup>117</sup> *See, e.g., id.* at 25–26 (discussing various advantages of public over private enforcement); Huq, *supra* note 12, at 1509–12 (arguing that the incentives of institutional litigants are better at producing optimal litigation, due to institutional actors’ repeat player status, whereas private parties are one-shot players representing “interest groups pursuing self-interested strategies orthogonal to the goals of preserving structural constitutional principles or maximizing overall social welfare”).



said, raise problems of accountability and overenforcement, particularly when layered onto (and compared to) governmental regulatory enforcement schemes<sup>118</sup>—schemes assumed to be provided for by statute.<sup>119</sup> Public officials have democratic accountability lacking in individuals. And as officers charged with representing the commonwealth who receive no direct private benefits from government suits, they are likely to rein in the overbreadth of statutes<sup>120</sup> and otherwise exercise a public-regarding discretion in allocating enforcement resources among the cases that the officials could potentially bring under their statutory authority.<sup>121</sup>

The proponents of governmental implied rights argue that these advantages of government suits persist when transferred to governmental implied rights of action.<sup>122</sup> The arguments based on accountability and balanced government enforcement discretion, however, lose much of their force when transferred to suits by government

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<sup>118</sup> See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 630–41 (2013) (addressing arguments for preferring public over private enforcement); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 704–07 (2011) (summarizing the scholarship and arguments as to the advantages and disadvantages of public and private enforcement).

<sup>119</sup> Cf. Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662, 667 (2013) (summarizing advantages and disadvantages of private enforcement vs. public); *id.* at 671–75 (discussing how legislatures should structure enforcement regimes).

<sup>120</sup> See, e.g., William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 15, 31–32 (1975) (discussing problems of overenforcement if private criminal prosecution were allowed, including that private enforcers would not rein in penal laws' overbreadth). *But cf.* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 856–57 (2014) (arguing that governments often have financial incentives if they retain a portion of financial rewards, and also because large recoveries may enhance officers' reputational interests); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 595 (2005) (arguing there should be no preference for governmental over private enforcement where the enforcement arguably restricts free speech).

<sup>121</sup> See, e.g., Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1290–93 (1983) (discussing problems of implying private rights of action, including disrupting legislative judgments as to appropriate enforcement levels and undermining congressional decisions to entrust regulation to agencies). See generally RICHARD H. FALLON, JR. ET AL., HART AND WECHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 708–10 (6th ed. 2009) (discussing arguments for and against implied private rights of action).

<sup>122</sup> See Davis, *supra* note 10, at 47–48 (arguing that the government will exercise prosecutorial discretion and has greater legitimacy than private enforcers); *id.* at 48 (public officials lack personal financial motivation and operate under resource constraints); *id.* at 28 (noting some problems as to political ambitions and desire to benefit state treasuries, but still assuming that differences are sufficient to treat public implied actions differently); Huq, *supra* note 12, at 1490 (arguing that institutional litigants are more likely to pursue appropriate institutional litigation, whereas private parties will tend to pursue litigation to obtain private goods they cannot obtain through the political process); *id.* at 1494 (arguing that structural claims involve institutional balancing and that institutional litigants can help ensure more stable equilibria).

that are not authorized by statute. The executive's accountability derives, after all, not only through the executive's election, but also from Congress's authorization of the executive's actions. Indeed, executive action generally, and particularly in initiating suits to vindicate federal law, presumptively requires congressional authorization. And in contrast to exercising discretion to rein in statutory overbreadth as to authorized suits, the executive, in bringing implied suits purports to cure the alleged underbreadth of statutes. Rather than using its discretion to allocate enforcement resources among statutorily authorized actions, the executive exercises discretion to expand available actions beyond what the legislature provided.<sup>123</sup>

The legitimacy problems are highlighted by broad-standing proponents' arguments that implied government suits not only are appropriate to vindicate sovereignty interests (this Article's principal focus), but also to vindicate "administrative interests" of government in implementing a statutory scheme.<sup>124</sup> Such implied suits are effectively implied enforcement actions against individuals.<sup>125</sup> The regulatory model that purports to advance the implementation of federal law, then, would put aside the federal statute's lack of authorization and the Constitution's requirement of such authorization for governmental enforcement actions.<sup>126</sup>

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<sup>123</sup> Huq argues that historically, institutions have not overlitigated. Huq, *supra* note 12, at 1513. Limits on governmental standing, however, may account for some of the presumed restraint of government litigants. *See generally* Lemos & Minzner, *supra* note 120 (discussing incentives of government plaintiffs). It is of course undeniable that there are fewer potential governmental than private litigants.

<sup>124</sup> *See* Davis, *supra* note 10, at 20 (arguing there was less worry about implied government suits outside of criminal enforcement). Some of the cases Davis discusses involve implying remedies, such as disgorgement, as part of an otherwise authorized enforcement suit. *Id.* at 4 n.5, 53–54; *United States v. Lane Labs*, 427 F.3d 219, 220 (3d Cir. 2005) (ordering restitution to customers who bought products advertised as having medical benefits); *cf.* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 *YALE L.J.* 2280, 2293 (2006) (while generally arguing for presidential authority to prescribe incidental details to complete a statutory scheme, discussing prosecutorial discretion only with respect to authorized civil and criminal enforcement actions).

<sup>125</sup> *See* Davis, *supra* note 10, at 6 (favoring implied rights when government of government sues "to vindicate administrative interests in the implementation of federal law"). Davis places some such implied enforcement actions under his category of "institutional interests." *Id.* at 50 (treating a federal suit to enforce a statute that restricted foreclosures against active service members as protecting institutional interests).

If the implied public action seems to be a necessary component of the scheme, then the Courts are likely to imply them as they would for private parties. At times, Davis seems to be favoring no more than not-quite-explicitly statutorily authorized actions. *Id.* at 32, 49. If that is all he is arguing for, however, he would effectively be putting implied public actions more or less on a similar footing with implied private actions, a conclusion he generally wants to avoid with respect to government suits to vindicate administrative and institutional interests. *See id.* at 25.

<sup>126</sup> *Cf.* Grove, *supra* note 15, at 834 (arguing that Article II is a restraint on government standing given, *inter alia*, potential intrusions on individual liberty).

## 2. Supremacy Claims?

Arguments that the Supremacy Clause itself creates a cause of action may bolster arguments that the United States is an appropriate plaintiff to seek an injunction against allegedly preempted state regulation. If the Supremacy Clause is the source of the claim, then the United States may look more like the proper party to pursue such an action against the states. Indeed, the United States relied on the Supremacy Clause as a source of its claim in *Arizona v. United States*.<sup>127</sup>

Individuals have sometimes characterized their suits to enjoin allegedly preempted state laws as implied in the Supremacy Clause, but the Court left the issue of a Supremacy-based action open in its recent decision in *Douglas v. Independent Living Center*.<sup>128</sup> In *Douglas*, Medicaid providers and recipients sought an injunction against a state statute that lowered payments to providers; they argued that the reduction violated a provision of the Medicaid statute directing state plans to provide payments “sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.”<sup>129</sup> The statute also required states to seek administrative approval of plan changes.<sup>130</sup>

Characterizing the action as constitutional had at least two potential advantages for the *Douglas* plaintiffs. (1) It suggested a presumptive entitlement to a cause of action to enjoin allegedly illegal government action under the *Ex parte Young* model,<sup>131</sup> rather than requiring the plaintiffs to show congressional intent to create private rights as is required for most implied statutory actions.<sup>132</sup> (2) Relatedly, it directed attention away

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<sup>127</sup> Complaint, *supra* note 104, at ¶¶ 61–63.

<sup>128</sup> *Douglas v. Indep. Living Center*, 132 S. Ct. 1204, 1210–11 (2012).

<sup>129</sup> 42 U.S.C. § 1396a(a)(30)(A).

<sup>130</sup> *Douglas*, 132 S. Ct. at 1208 (indicating that continued receipt of federal funds required approval of plan amendments).

<sup>131</sup> See David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 365–66 (2004) (showing that the Court has not generally required satisfaction of requirements for implied statutory actions in cases where a litigant challenges a state law on the ground that federal law occupies the field or that the state standard imposed a conflicting obligation); *id.* at 362 (arguing for a constitutional right of action to enforce statutory law); *id.* at 386 (indicating that Congress could negate such an action); Stephen I. Vladeck, *Douglas and the Fate of Ex parte Young*, 122 YALE L.J. ONLINE, 13, 15 (2012), <http://yalelawjournal.org/2012/04/39/vladeck.html> (favoring implied supremacy actions); *cf.* Dustin M. Dow, *The Unambiguous Supremacy Clause*, 53 B.C. L. REV. 1009, 1034–37 (2012) (arguing that the Court should treat equally cases where the plaintiff alleges preemption expressly and those in which they allege that a state policy violates federal law); Yackle, *supra* note 86, at 130 (arguing for greater ability of the United States to bring *parens patriae* suits, and relying on the presumptive availability of actions to vindicate constitutional rights). *But cf.* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 711 (2013) (giving example of implied actions as manifesting courts’ privileging constitutional over statutory claims); *id.* at 743 (arguing that constitutional privileging often runs counter to the canon of constitutional avoidance).

<sup>132</sup> In prior cases, lower courts had found no private right of action nor § 1983 action under the Medicaid provision at issue. See *Douglas*, 132 S. Ct. at 1211–12 (Roberts, C.J.,

from the remedial scheme provided by the allegedly preempting federal statute—in this case, agency procedures for approval of plan changes, with potential judicial review.<sup>133</sup>

While the majority did not reach the question of whether the Supremacy Clause created a cause of action, Chief Justice Roberts, in dissent, sensibly argued that the Supremacy Clause is not a source of rights, but rather enforced rights created by statutes.<sup>134</sup> His reasoning suggests that preemption actions derive from traditional equity claims that were available when alleged ultra vires government action threatened to bear on certain individual interests,<sup>135</sup> as well as from the federal statute that the plaintiffs argue should be interpreted to render the state regulation inoperative.

The characterization of most preemption actions as more traditional-equity-and-statute-based rather than Supremacy Clause-based, however, is not necessarily decisive as to whether a cause of action exists in particular circumstances. Even under an equity-and-statutory characterization, individuals may be able to bring anticipatory actions without having to satisfy the normal requisites for implied statutory actions—particularly with respect to (although not always limited to) threatened enforcement.<sup>136</sup> And even under a constitutionally implied characterization, existing alternative remedial schemes may count against recognizing such an injunctive suit.<sup>137</sup> Indeed, the majority and dissent in *Douglas* more or less agreed on this latter point: agency proceedings for agency approval of the state amendment to its plan, and in which Medicaid providers could contest the state payment scheme, suggested that the freestanding injunctive claim in that case should not proceed.<sup>138</sup>

When the federal government purports to bring a Supremacy-based claim, the government often seeks similar advantages as do private plaintiffs. (1) Characterizing the action as constitutional suggests that the government may rely on injunctive actions such as *Ex parte Young*, rather than on any explicit statutory authority; (2) and the Supremacy characterization directs attention away from the alternative remedies typically available for challenges to preempted statutes—actions where the United States may not be the appropriate initiating party.

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dissenting) (arguing it made no sense to provide a cause of action to providers to enforce their statutory rights when the statute provided no such right of action).

<sup>133</sup> *Cf. id.* at 1210.

<sup>134</sup> *See id.* at 1213 (Roberts, C.J., dissenting) (citing § 1983 cases that treated preemption claims as vindicating rights under the “laws” rather than the Constitution).

<sup>135</sup> *See id.* at 1213 (Roberts, C.J., dissenting) (emphasizing that equity actions like *Ex parte Young* actions raised defenses to enforcement actions).

<sup>136</sup> *See* John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989, 990–91 (2009) (arguing that *Ex parte Young* involved a traditional anti-suit injunction claim that raised a defense to an enforcement action); *see also supra* note 27.

<sup>137</sup> *Cf. Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247, 2260 (2013) (directing the parties to a commission when private parties challenged on preemption grounds state voter registration forms, which the state claimed it had constitutional authority to implement).

<sup>138</sup> 132 S. Ct. at 1210–11; *id.* at 1211–12 (Roberts, C.J., dissenting) (noting that the act vested in the agency responsibility for enforcement of the federal conditions on spending).

As to point (1), as noted above, individuals can often rely on *Ex parte Young* actions to enjoin preempted state law, without showing explicit statutory authorization. The frequent availability of *Ex parte Young* actions for individuals contesting state regulation, however, does not suggest that the federal government should have such an action.<sup>139</sup> The *Ex parte Young* suit is a means for individuals to test governmental power that threatens to bear on individuals, not an additional means for government to test its own power—whether against other governments or individuals.<sup>140</sup> Indeed, the *Ex parte Young* action between individuals and government officials provides part of the overall traditional remedial framework that makes intergovernmental suits superfluous.

It might be argued, however, that federal government suits serve the same purpose as *Ex parte Young* actions that individuals bring against preempted regulation: they help to rein in states' unlawful regulation of individuals.<sup>141</sup> But if the rationale for the government supremacy suit is that it achieves the same aims as individual suits, then one is left with the same question that bedevils *parens patriae* suits: Why not rely on individuals to vindicate their own interests? And, as noted above, treating government as the proper party is likely to undermine the role of individuals in making structural challenges.

#### CONCLUSION

Because sovereignty-based suits generally are neither statutorily authorized nor constitutionally required, the government-plaintiff is asking the court to exercise discretionary equitable powers to recognize the action. Proponents of sovereignty-based actions argue that the suits reflect modern federalism, that the government's interests are separate and perhaps stronger than those of individuals, and that recognizing such suits serves regulatory purposes. There are, however, ample reasons the courts should decline to use their discretion to recognize such actions. Existing remedies accommodate modern federalism; the judicial system traditionally sees private parties as having the paramount interest in contesting alleged governmental illegality; and the regulatory purposes of causes of action are served by traditional actions between government and individuals. In seeking recognition of sovereignty-based actions, moreover, the government-plaintiff effectively asks the courts to extend the boundaries of both judicial and executive power, while undermining the role of individuals in challenging government illegality.

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<sup>139</sup> *But cf.* Huq, *supra* note 12, at 1440 (arguing against most implied actions for individuals as to structural claims, and favoring institutional suits).

<sup>140</sup> *But cf.* Davis, *supra* note 10, at 5 (indicating that government suits are not founded on corrective justice, but manifest an understanding that federal courts “may elaborate the remedial implications of federal law in a regulatory mode in order to ensure an effective enforcement system”).

<sup>141</sup> *Cf. id.* at 77 (“From a federalist perspective, there are clear benefits to permitting the states to sue in federal courts to stop the federal government from taking unconstitutional enforcement actions.”).