

NOTE

SECURING SOVEREIGN STATE STANDING

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INTRODUCTION

CONCERNS over protecting the authority of states as sovereigns against ever-expanding central government power have animated much Supreme Court constitutional and jurisdictional jurisprudence since the nation's infancy. In particular, the Rehnquist and Roberts Courts have sought to strengthen the walls of state sovereignty left crumbling by the Warren Court. Yet at the same time, the basic contours and meaning of state sovereignty remain contested and, some scholars argue, largely undefined outside of bare statements of principle.¹ This Note seeks to fill a modest but important niche in that gap.

Incoherence infects the practical application of federalism principles to many aspects of federal judicial jurisdiction. This Note ex-

¹ See, e.g., Timothy Zick, *Are the States Sovereign?*, 83 Wash. U. L.Q. 229, 230 (2005).

plores the lack of a consistent, tractable doctrinal framework underlying state standing theory—that is, the ability of states to sue other governments or private parties as plaintiffs in federal court. In particular, *sovereign* state standing determines when one government may sue another in disputes over the exercise of fundamental governing prerogatives. Sovereign state standing is vital for our federalist system—and the uncertainty surrounding it all the more troubling—because without it states are essentially unable to shield themselves from the expansionist thrusts of other sovereigns, particularly the federal government. By joining the Union, the states renounced their ability to parry such thrusts with force, and as Justice Holmes declared, “the alternative to force is a suit in this court.”²

This Note excavates a line of Supreme Court precedent that, buttressed by important normative considerations, points a way forward with regard to several aspects of this key issue. Part I delineates the heretofore uncertain boundaries separating the three main categories of interests upon which states can premise standing to sue in federal court—proprietary, sovereign, and quasi-sovereign interests. In particular, it seeks to lessen the pervasive confusion clouding the division between sovereign and quasi-sovereign interests, ultimately arguing that these classes are meaningfully distinct and should be treated differently.

Part II demonstrates the propriety of the divergent treatment of sovereign and quasi-sovereign interests in the context of the jurisdictional bar instituted by the Supreme Court in *Massachusetts v. Mellon*, which declared that states acting as *parens patriae* cannot sue in federal court to invalidate or shield their citizens from federal law. The problem, however, is that *parens patriae* standing is an under-theorized concept, which has led to questions over what types of state interests it encompasses—and what the “*Mellon* bar” thus prohibits. By exploring what *parens patriae* standing actually entails, this is the first scholarly work to argue that the *Mellon* bar applies only to suits seeking to vindicate *quasi-sovereign* interests and thus does not apply to purely *sovereignty*-vindicating claims—this Note’s central thesis. The few previous scholars to have

² *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

touched upon the issue uniformly imply that the bar applies to both.

Finally, Part III illustrates the practical importance of this argument, applying it to the most critical and polarizing federalism dispute of the new millennium: state challenges to the constitutionality of federal healthcare reform. Until very recently, few realized that such an esoteric issue of federal courts jurisprudence, whether the *Mellon* bar bans sovereignty-vindicating claims, could derail a primary suit in this much-hyped set of litigation. In analyzing the ability of states to defend their most basic sovereign interests against encroachments by the federal government, the argument advanced herein simultaneously addresses an immediate flashpoint and an enduring puzzle of American federalism, illuminating a solution supported by both precedent and policy.

I. BACKGROUND: UNDERSTANDING STATE STANDING

Section I.A outlines the policies behind standing and sketches the relevant doctrine. Section I.B then explores the history of state standing in federal courts in the context of three interests upon which it may be premised—proprietary, sovereign, and quasi-sovereign interests—in particular attempting to shore up the doctrinal boundary between the latter two.

A. Goals of Standing and Doctrinal Sketch

Standing is an elemental yet murky jurisdictional issue rooted in the Constitution's Article III "case or controversy" requirement: as the Supreme Court has stated, "Standing to sue is part of the common understanding of what it takes to make a justiciable case."³ Overall, "the gist of the question of standing" is whether petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination."⁴ Inherent in this goal is a strong separation of powers undertone: where disputes are not sufficiently adversarial or lack other integral factors, they are likely to implicate congressional or presi-

³ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); see U.S. Const. art. III, § 2, cl. 1 (extending the judicial power to certain cases and controversies).

⁴ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

dential—as opposed to judicial—functions.⁵ The classic definition of standing contains three requirements: injury in fact, causation, and redressability.⁶ One component of the injury inquiry is the “invasion of a legally protected interest.”⁷ As this Note explains, the bases upon which *states*, as distinct from individuals, can premise standing to sue in federal court include injuries to “proprietary,” “sovereign,” and “quasi-sovereign” interests (in addition to and sometimes overlapping with specifically granted statutory and constitutional interests). The Court has articulated the evolving sufficiency and boundaries of these interests in an intricate line of cases.

B. Evolving Interests: The Supreme Court’s Shifting State Standing Doctrine

First, common law or proprietary interests have always provided standing for state plaintiffs. Second, sovereign interests are those interests integral to a state’s core ability to govern; though the Supreme Court has never stated a comprehensive theory of sovereign standing, it has increasingly embraced it since the mid-nineteenth century. Third, quasi-sovereign interests, a nebulous class first formulated by the Supreme Court at the turn of the twentieth century, are representational and thus derivative: that is, states have an interest in protecting citizen welfare on a collective basis—as distinguished from proprietary and sovereign interests, which, this Note argues, states assert independently, on their own behalf. In addition to providing a necessary historical foundation for later arguments, this Section proposes a bit of revisionist history regarding the Court’s early attitude toward sovereign state standing.⁸

⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

⁶ See Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.1 (5th ed. 2007).

⁷ *Lujan*, 504 U.S. at 560.

⁸ To characterize the history discussed here as relating directly to what today is called “standing” may be anachronistic. Nevertheless, for conceptual clarity, this Note refers to this justiciability jurisprudence as part and parcel of the modern law of state standing and does not intend to wade into the debate concerning the doctrine’s constitutional foundation (or lack thereof). See generally Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *Mich. L. Rev.* 689, 689, 691 (2004) (noting that “academic critics insist that the law of standing is a recent ‘invention’ of federal judges” but arguing “that history does not defeat standing doctrine[, that] the notion of standing is not an innovation, and [that] its constitutionalization does not

1. Proprietary Interests

Like any other litigant, a state may sue to vindicate common law interests, such as those protected by tort or contract law. These interests are “proprietary” in that they are generally premised upon the state’s role as property owner. Existing scholarship teaches that these were essentially the only type of claim upon which states could bring a federal suit through the nineteenth century.⁹ As discussed below, however, early doctrine may not have been quite so exclusive. Regardless, states have always had standing to bring proprietary claims.

2. Sovereign Interests

a. What Are Sovereign Interests?

As Professors Ann Woolhandler and Michael Collins explain in their foundational article on state standing, sovereign interests, in short, are states’ interests in their core ability to govern.¹⁰ They underlie a state’s suit against another government “to establish its authority to exercise legislative, executive, or judicial power within a particular territory or over a particular subject matter.”¹¹ Sovereign

contradict a settled historical consensus about the Constitution’s meaning”). I am indebted to Professor Michael Collins for alerting me to this point.

⁹ See, e.g., Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 392–93 (1995). Article III clearly envisions states as parties in federal court, see U.S. Const. art. III, § 2, cl. 1, yet in the nation’s infancy, the Supreme Court explicitly questioned whether Georgia could serve as plaintiff or defendant in separate disputes over Revolutionary War debts and ruled affirmatively, see *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431–32 (1793); *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405 (1792). In doing so, the very early Court arguably appeared to limit states’ ability to act as litigants to traditional common law cases. See *Brailsford*, 2 U.S. (2 Dall.) at 405 (“If the State has a right to the debt in question, it may be enforced at common law . . .”). Scholars have thus declared that a state could initially bring suit only where it “looked like any other common-law rights-holding litigant who sought to enforce or defend her proprietary . . . rights.” Woolhandler & Collins, *supra*, at 406.

¹⁰ Woolhandler & Collins, *supra* note 9, at 411. Woolhandler and Collins classify three separate types of interests under the rubric of sovereign interests, see *id.* at 410–11: this Note treats the term “sovereign interests” as synonymous with what they call “governing interests”; “enforcement interests”—discrete policy goals chosen by the legislature as worthy of pursuing through executive action (such as by prosecuting murderers or penalizing speeding motorists)—fall outside of this Note’s domain; and “public interests” are more properly deemed quasi-sovereign.

¹¹ *Id.* at 411.

interests can thus be understood as a state's interests in its jurisdiction—in terms of both (1) the geographic scope over which a government exercises power and (2) whether it has authority to do so. Indeed, this two-part “jurisdictional” framing of sovereign interests aligns well with the constitutional underpinnings of state sovereignty.¹²

b. The Road to Supreme Court Acceptance

The Supreme Court first expressed unease with state attempts to litigate sovereignty in the famous case of *Chisholm v. Georgia*.¹³ In denying Georgia sovereign immunity (a separate issue from sovereign standing), the Court appeared to reject state sovereignty altogether, instead subscribing to a theory of pure popular sovereignty.¹⁴ The Court's next occasion to consider the litigation of state sovereignty (and here, sovereign standing in particular) arose in *Fowler v. Lindsey*, in which two states attempted to join a private property suit out of concern that the decision would affect their jurisdictional boundaries.¹⁵ The Court rebuffed the attempt,

¹² The Constitution does not include the word “sovereignty” or any variant thereof. In the structure of the government it sets up, however, it says a great deal about the relationship between states and the federal government. Because our federal system is necessarily one of dual sovereigns, the powers that the Constitution provides states do not amount to full sovereignty in the classical sense but are nevertheless meaningful. As summarized by Professor Timothy Zick, these structural state sovereignty protections include the “rule of sovereign self-preservation” (protecting the existence of states from destruction by the federal government as necessary components of our constitutional plan), the “rule of separateness” (holding that the federal government has no authority to interfere with the internal orderings of state governments), the “rule of participation” (granting states certain roles in national governance), and the “rule of interpretive independence” (allowing states to interpret their own laws and constitutions without federal interference except as provided by the Supremacy Clause). Zick, *supra* note 1, at 288–93. The “jurisdictional” understanding of sovereign interests interweaves with these structural constitutional protections. For example, for the federal government to interfere too extensively with the jurisdictional purview of a state—either geographically or regarding its scope of authority—threatens the very existence of the state, implicating the rule of self-preservation. Likewise, for the rule of interpretive independence to have meaning, states must have the jurisdiction to promulgate and interpret laws in the first place.

¹³ 2 U.S. (2 Dall.) 419, 470–73 (1793).

¹⁴ See *id.* at 471 (“[A]t the Revolution, the sovereignty devolved on the people . . .”). The backlash to this opinion famously resulted in the Eleventh Amendment, which grants states broad sovereign immunity.

¹⁵ 3 U.S. (3 Dall.) 411, 411–12 (1799).

declaring the “right of jurisdiction” an issue of sovereignty, not property (the “right of soil”), and thus not actionable at law.¹⁶ The property decision, it said, would not affect the states’ boundary line.¹⁷

Next, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, Pennsylvania argued that a bridge over the Ohio River, authorized by another state, would interfere with interstate commerce by obstructing large steamboats.¹⁸ The Court granted Pennsylvania standing because it alleged injury to its rights as a property holder (such as through loss of tolls from public works), declaring that the Commonwealth was thus “not a party in virtue of its sovereignty.”¹⁹ The Court thereby purposely avoided a more definite ruling on the propriety of sovereign standing as a general matter.²⁰ Contrary to suggestions,²¹ therefore, the decision admits only of skepticism toward, not outright proscription of, sovereign state standing.²²

Cherokee Nation v. Georgia occasioned the Court’s next discussion of sovereign standing.²³ The United States had granted the Cherokees certain areas by treaty, but Georgia enacted laws usurping the tribe’s authority over those lands.²⁴ The Court disposed of the suit by holding that the Cherokees were not a foreign nation capable of invoking original Supreme Court jurisdiction, but it also hinted—while expressly declining to decide the issue—that matters of sovereignty were political questions beyond its jurisdictional purview.²⁵ At the same time, *Cherokee Nation* and subsequent

¹⁶ See *id.* at 412.

¹⁷ *Id.*

¹⁸ 54 U.S. (13 How.) 518, 522–24 (1851).

¹⁹ *Id.* at 559–60.

²⁰ A state’s “sovereignty is not involved in [its] business,” the Court explained, “[a]nd so in the present case, the rights asserted and relief prayed, are considered as in no respect different from those of an individual.” *Id.* at 560. “The sovereign powers of a State are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases,” the Court stated—without elaborating what those specified cases might be. See *id.* at 559.

²¹ See Woolhandler & Collins, *supra* note 9, at 444.

²² See *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) (characterizing *Wheeling & Belmont Bridge Co.* as “treat[ing] the suit as brought to protect the property of the State of Pennsylvania”).

²³ 30 U.S. (5 Pet.) 1, 16–20 (1831).

²⁴ See *id.* at 15.

²⁵ *Id.* at 16–17, 20 (“The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the

cases indicated that the Court was in fact comfortable adjudicating sovereign claims incidental to proprietary ones²⁶ or those brought by private parties,²⁷ despite its suggestion that such issues constituted non-adjudicable political questions. It appears, therefore, that it was the prospect of governments acting as litigants of their own sovereignty rather than courts adjudicating issues of sovereignty more generally that concerned the Supreme Court. The Court was inhospitable to political plaintiffs, not political questions.

The Supreme Court next addressed this Note's central issue— attempts by states to fight federal invasions of their sovereign interests. According to Woolhandler and Collins, *Mississippi v. Johnson*²⁸ and *Georgia v. Stanton*²⁹ both “present applications of the principle that suits to vindicate sovereignty were nonjusticiable.”³⁰ *Johnson*, however, actually says nothing about state standing. There, Mississippi sought to enjoin President Johnson from executing the Reconstruction Acts, which temporarily replaced the governments of former rebel states with federal military rule.³¹ The State argued that “[t]he acts in question annihilate the State and its government, by assuming for Congress the power to control, modify, and even abolish its government—in short, to exert sovereign power over it.”³² The Court, however, explicitly confined its ruling

proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.”)

²⁶ See, e.g., *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 73 (1867) (attempting to re-characterize *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), as involving sovereignty only incidental to proprietary claims); *Cherokee Nation*, 30 U.S. (5 Pet.) at 51 (Thompson, J., dissenting) (arguing that the injury was cognizable as to property and that the case was therefore justiciable); see Woolhandler & Collins, *supra* note 9, at 414.

²⁷ See, e.g., *Cherokee Nation*, 30 U.S. (5 Pet.) at 20 (suggesting that the sovereignty issue “might perhaps be decided by this court in a proper case with proper parties”); see Woolhandler & Collins, *supra* note 9, at 414. For example, the Court soon declared a law of the type at issue in *Cherokee Nation* (a Georgia law derogating Cherokees' sovereign interests) unconstitutional where the sovereignty argument was raised by an individual on a criminal appeal. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

²⁸ 71 U.S. (4 Wall.) 475 (1866).

²⁹ 73 U.S. (6 Wall.) 50 (1867).

³⁰ Woolhandler & Collins, *supra* note 9, at 416–17.

³¹ See *Johnson*, 71 U.S. (4 Wall.) at 475–76.

³² *Id.* at 476.

to the separate question of whether *any* party could sue the President, addressing neither the fact that a state was plaintiff nor that sovereignty was at issue.³³

Stanton accords more directly with Woolhandler and Collins's characterization. Like in *Johnson*, the state plaintiff challenged the Reconstruction Acts on sovereignty grounds.³⁴ The Court found no subject matter jurisdiction, though, declaring that "the rights of sovereignty, of political jurisdiction, of government" are purely political questions.³⁵ Admittedly, this constituted an out-and-out refusal to grant sovereign state standing. Yet, significantly, it also represents the first and only time that the Court ruled thusly in an outcome-dispositive manner.

Moreover, with *Rhode Island v. Massachusetts* in 1838, the Court began freely to recognize standing for states litigating border disputes—perhaps the paradigmatic example of the state versus state suits contemplated by the authors of Article III—despite such claims involving only a "right[] of jurisdiction and sovereignty" rather than a "right of property in the soil."³⁶ As Woolhandler and Collins explain, "Boundary issues involve disputes over the power to make and apply law within a particular territory. Thus, . . . such cases presented issues of jurisdiction or sovereignty."³⁷ The Court defended its vindication of states' sovereign interests in this context by "fram[ing] state ratification of the Constitution as one sovereign ceding dispute-resolving power to another," a theory that has since become known as the "sovereignty-ceding rationale."³⁸ The Court's

³³ See *id.* at 498 ("We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?").

³⁴ See *Stanton*, 73 U.S. (6 Wall.) at 50.

³⁵ *Id.* at 77.

³⁶ See 37 U.S. (12 Pet.) 657, 752–53 (1838) (Taney, C.J., dissenting).

³⁷ Woolhandler & Collins, *supra* note 9, at 415.

³⁸ Robert A. Weinstock, Note, The Lorax State: *Parens Patriae* and the Provision of Public Goods, 109 Colum. L. Rev. 798, 803–04 & n.30 (2009) ("[T]his Court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified." (quoting *Rhode Island*, 37 U.S. (12 Pet.) at 720) (internal quotation marks omitted)). Woolhandler and Collins attempt to mitigate what they call "the primary and largely exclusive example of the early Court's willingness to allow states to vindicate sovereignty interests" by contending that these suits could be decided

recognition of sovereign standing in this context presaged its later general acceptance, cutting against scholarly overstatements of the early Court's antipathy toward such standing.

As discussed below in Subsection I.B.3, in addition to boundary cases, the Court soon "quietly began allowing" states to bring suits premised upon injuries other than traditional proprietary claims in the public nuisance context,³⁹ evidence of the rapidly fading salience of its earlier declarations against sovereign standing. Indeed, the Court has heard boundary disputes with nary a word of protest since *Rhode Island*, and, all in all, "[b]y the early twentieth century the Court was actively and openly engaged in litigating sovereignty-based claims of states."⁴⁰ The start of the twentieth century was, not coincidentally, also the point at which quasi-sovereign interests arrived on the jurisprudential scene, serving as an analytical bridge linking the Court's previous skepticism toward sovereign state standing with its eventual embrace. Before turning to quasi-sovereign interests, though, the next Subsection briefly confirms the general availability of sovereign state standing today.

c. The Modern Validity of Sovereign State Standing

Admittedly, *Stanton* provides what would appear to be strong precedent against the validity of sovereign state standing and thus against a necessary premise of this Note—that such standing is available to states today. Though the Supreme Court has never expressly overruled *Stanton*'s holding concerning sovereign state standing, at least five types of evidence seem to demonstrate persuasively that it has cast that holding aside, repudiating it in practice if not in words.

First and most conspicuously, a high profile Supreme Court concurrence harshly criticizes the broadness of *Stanton*'s formulation of the political question doctrine, admitting that the case's "question was no more 'political' than a host of others we have enter-

under traditional property and equity principles and that they might have involved proprietary interests after all. See Woolhandler & Collins, *supra* note 9, at 415–16 & n.99.

³⁹ Woolhandler & Collins, *supra* note 9, at 446.

⁴⁰ Weinstock, *supra* note 38, at 806.

tained.”⁴¹ In thus undermining the strength of *Stanton* moving forward, the opinion notably cited, inter alia, state-as-plaintiff suits.⁴²

Second, scholars have assumed that *Stanton* no longer holds water. Though none appears to have focused specific attention on the case’s continuing legitimacy, several have implicitly treated it as invalidated by later doctrinal shifts by asserting the modern viability of sovereign state standing.⁴³ Even scholars (particularly Woolhandler and Collins) who advocate returning to the anti-sovereign-standing theory underlying *Stanton* recognize that such a maneuver would be precisely that: a return to a paradigm from which the Court has since moved far away.⁴⁴

Third, the Supreme Court has spoken enthusiastically about the importance of federal courts opening their doors to state parties where sovereignty is at issue in related contexts—for example, granting original Supreme Court jurisdiction⁴⁵ and allowing intervention by states in lawsuits challenging the enforceability of their statutes.⁴⁶ The Court’s eagerness for federal court adjudication of such state sovereignty questions runs directly counter to, and thus militates against, any continuing salience of the *Stanton* doctrine’s overt and blanket inhospitality to states’ sovereign interests.

⁴¹ *Baker v. Carr*, 369 U.S. 186, 246 n.3 (1962) (Douglas, J., concurring).

⁴² See *id.* (citing *Alabama v. Texas*, 347 U.S. 272 (1954); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)).

⁴³ See, e.g., 13B Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.11.1 (3d ed. 2008) (“It is accepted that states . . . have standing to protect proprietary and sovereign interests”); Weinstock, *supra* note 38, at 803, 806 (stating that “[t]he categorical rule against the adjudication of sovereign interests became untenantable” and that “[b]y the early twentieth century the Court was actively and openly engaged in litigating sovereignty-based claims of states”).

⁴⁴ See Woolhandler & Collins, *supra* note 9, at 504–05 (“The analogy of governmental standing to individual standing once supplied a limiting principle for gover[n]mental suits. . . . [But u]nder the Supreme Court’s current injury-in-fact inquiry, any interest that government might legitimately pursue or protect could, if interfered with, provide a basis for standing”).

⁴⁵ For instance, the Court has cited boundary disputes as “supporting an inference that issues of sovereignty, far from being nonjusticiable, present the most appropriate questions for the Supreme Court’s original jurisdiction.” *Id.* at 415 & n.98 (citing *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981); *id.* at 766 n.3 (Rehnquist, J., dissenting)).

⁴⁶ See, e.g., *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (stating, in recognizing standing, that “a State clearly has a legitimate interest in the continued enforceability of its own statutes”).

The Supreme Court has also demonstrated its contemporary recognition of sovereign state standing directly—sometimes openly, sometimes implicitly. Illustrating implicit acceptance, the fourth type of evidence, the Court has granted sovereign standing without comment on several occasions, apparently assuming that, *Stanton* notwithstanding, grievances based on sovereign interests are now adjudicable.⁴⁷ A fundamental tenet of jurisdictional doctrine holds that a court cannot consider the merits of a case if it does not possess subject matter jurisdiction, which includes standing.⁴⁸ Moreover, it is the court's responsibility to raise such jurisdictional defects *sua sponte* if the parties fail to do so.⁴⁹ Thus, for a court to advance to a case's merits without addressing standing likely represents strong (if not conclusive) evidence that standing indeed exists.

Fifth and most compellingly, as expounded more fully in the next Subsection, the Court has explicitly established that sovereign interests today form a valid basis for state standing. In particular, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, it included "sovereign interests" as one "kind[] of interest[] that a State may pursue" through standing in federal court.⁵⁰ Moreover, no recent counterexamples reflecting any continuing wholesale ban on sovereign standing appear to exist.

In sum, the Supreme Court was initially wary of sovereign state standing, yet only once, with the whole of Reconstruction at stake in *Stanton*, did it expressly deny a state standing to vindicate its sovereign interests. Previous cases spoke only in dicta, rendering

⁴⁷ For examples outside of the boundary context, see *South Carolina v. Katzenbach*, 383 U.S. 301, 323–29 (1966) (allowing sovereign Tenth Amendment and state equality claims where the state alleged no proprietary injuries), discussed more fully *infra* Part II, and *New York v. United States*, 505 U.S. 144, 187–88 (1992) (ruling for New York on a Tenth Amendment claim asserting sovereign injury only—though it likely could have pled proprietary injury as well).

⁴⁸ See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (citation omitted)).

⁴⁹ See, e.g., *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (raising question of subject matter jurisdiction *sua sponte*).

⁵⁰ 458 U.S. 592, 601 (1982); see also, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) ("Massachusetts' well-founded desire to preserve its sovereign territory [supports jurisdiction].").

statements against sovereign standing largely immaterial. The doctrine declaring sovereign interests non-litigable, therefore, appears to have been weaker than previous scholarship has claimed, and several pieces of evidence show that the Court has since effectively rejected it, now recognizing states' sovereign interests as enforceable in federal courts.

3. *Quasi-Sovereign Interests*

At common law, governments could bring public nuisance suits either as criminal prosecutions or equitable demands for injunctions.⁵¹ Because states might allege nuisance to protect their citizenry and land generally as opposed to state-owned property specifically, state proprietary interests were not exclusively or even necessarily at stake. Thus, the question arose whether states had standing to bring equitable nuisance actions in federal court.⁵² To the extent that these suits stem from the state's role as "protect[or of] its citizens' general interests," they can be seen as raising questions related to sovereignty.⁵³ As discussed more fully below, however, these interests are meaningfully distinct from true sovereign interests. The Supreme Court has thus placed them in a separate category called "quasi-sovereign interests." Woolhandler and Collins maintain that the Court initially found state public nuisance actions cognizable only where they alleged injury to state-owned property in addition to citizen welfare.⁵⁴ But just as the purported general bar against non-proprietary claims was perhaps not so definite, neither, it appears, was this permutation.⁵⁵ In any case, by

⁵¹ Woolhandler & Collins, *supra* note 9, at 432.

⁵² *Id.* at 432–33.

⁵³ *Id.* at 411, 432–33.

⁵⁴ *Id.* at 432–33.

⁵⁵ The three cases that Woolhandler and Collins cite arguably support alternate, even conflicting, interpretations. See *id.* at 433 & nn.176–79. First, *Mayor of Georgetown v. Alexandria Canal Co.* dealt with a city, not a state. See 37 U.S. (12 Pet.) 91, 99 (1838). Quite separate from the constitutional issue of state sovereignty, the Court stated that the plaintiff city and its officials did not "even pretend[] that . . . they have any power or authority . . . to take care of, protect, and vindicate, in a court of justice, the rights of the citizens of the town." *Id.* Second, as explained above, *Wheeling & Belmont Bridge Co.* deliberately avoided ruling on sovereign standing as a general matter by simply specifying that proprietary interests conferred standing in that case. See 54 U.S. (13 How.) at 561–62. Third, *South Carolina v. Georgia* explicitly denied

the year 1900, the Court had decisively abandoned any such requirement.

In *Missouri v. Illinois*, the Supreme Court allowed Missouri to bring a public nuisance action against Illinois for polluting the Mississippi River, expressly noting that state proprietary interests were not at stake but that “it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.”⁵⁶ This statement echoed one of a year earlier. In *Louisiana v. Texas*, Louisiana claimed that a Texas quarantine amounted to a discriminatory embargo.⁵⁷ Though the Court dismissed the suit for other reasons,⁵⁸ it recognized Louisiana’s interest as litigable despite the lack of claimed proprietary injury, accepting that “the State is entitled to seek relief in this way because the matters complained of affect her citizens at large.”⁵⁹

The term “quasi-sovereign” soon emerged to describe these interests. Justice Holmes originated the label in *Georgia v. Tennessee Copper Co.*, in which Georgia sought to enjoin the emission of noxious gases across the state line.⁶⁰ He explained that the State’s litigable “quasi-sovereign interest” existed “independent of and behind the titles of its citizens, in all the earth and air within its domain.”⁶¹ The Court again adopted the sovereignty-ceding rationale, which thereafter became a fixture in state standing jurisprudence, declaring that “[w]hen the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce . . . their still remaining *quasi-sovereign* interests; and the alternative to force is a suit in this court.”⁶² Justice Holmes thereby “conceived of state-as-party suits as substitutes for the use of force or diplomacy—as an alternative avenue for the exercise of

expressing any opinion on the standing of states not alleging proprietary injuries. 93 U.S. 4, 14 (1876).

⁵⁶ 180 U.S. 208, 241 (1901).

⁵⁷ 176 U.S. 1, 4–5 (1900).

⁵⁸ *Id.* at 22–23.

⁵⁹ *Id.* at 19.

⁶⁰ See 206 U.S. 230, 236 (1907).

⁶¹ *Id.* at 237.

⁶² *Id.*

state power.”⁶³ The Court thus held that the federal judiciary has a responsibility predicated on structural constitutional grounds to allow states to vindicate their sovereignty.

Early state public nuisance suits were transitional, facilitating the Court’s shift away from its initial skepticism of sovereignty-related claims.⁶⁴ With *Tennessee Copper*’s declaration that state standing provided a constitutionally mandated avenue for state power, though, a seismic shift became evident. The Court now saw litigable state interests as “deriving not merely from common-law proprietary interests but also from the state’s ‘police power’ to regulate . . . for the public good. Injury to the state’s generalized interest in protecting its citizens, which previously could have been vindicated (if at all) only through [legislation], now provided a basis for standing”⁶⁵

Quasi-sovereign interests thereafter became a robust foundation for state standing,⁶⁶ yet they remained poorly understood, with the Court waiting until 1982 to clarify the doctrine. In *Alfred L. Snapp*, the plaintiff Territory sued Virginia apple growers for failing to provide benefits due Puerto Rican workers pursuant to federal statute, claiming discrimination against Puerto Ricans and injury to the Territory’s economy.⁶⁷ The Court found these to be litigable quasi-sovereign interests.⁶⁸ Writing for the Court, Justice White undertook the formal delineation of the above-identified bases for state standing—proprietary, sovereign, and quasi-sovereign interests.⁶⁹ A quasi-sovereign interest is “a judicial construct that does not lend itself to a simple or exact definition,” he stated, but at bottom, “[q]uasi-sovereign interests . . . are [neither] sovereign interests [nor] proprietary interests.”⁷⁰

Of particular significance is the Court’s description of sovereign interests. The above statement clearly indicates that quasi-

⁶³ Woolhandler & Collins, *supra* note 9, at 450–51.

⁶⁴ *Id.* at 450.

⁶⁵ *Id.* at 451 (specifically analogizing the regulation of property to states’ public nuisance suits, though the principle can certainly apply more broadly).

⁶⁶ See *Alfred L. Snapp*, 458 U.S. at 603–06 (collecting cases).

⁶⁷ *Id.* at 594, 597–98.

⁶⁸ *Id.* at 608 & n.15.

⁶⁹ *Id.* at 601–02. States can also serve as “nominal part[ies]” in suits vindicating private interests, Justice White noted. *Id.* at 602.

⁷⁰ *Id.* at 601–02.

sovereign interests are not a subset of sovereign interests but a separate doctrinal entity accorded separate treatment. The Court proceeded to define sovereign interests by example: “Two sovereign interests are easily identified: first, the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code . . . ; second, the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders.”⁷¹ This formulation fairly precisely matches—and indeed helps form the basis of—this Note’s two-part “jurisdictional” framing of sovereign interests.

Quasi-sovereign interests, in contrast, “consist of a set of interests that the State has in the well-being of its populace.”⁷² They are generalized interests in citizen welfare, not collections of discrete private party interests for which the state serves as a nominal plaintiff.⁷³ Two “general categories” are discernible: “the health and well-being—both physical and economic—of [a State’s] residents in general” and its “interest in not being discriminatorily denied its rightful status within the federal system” by being excluded from benefits flowing from such.⁷⁴

⁷¹ Id. at 601.

⁷² Id. at 602.

⁷³ See id.

⁷⁴ See id. at 607–08. The Court’s most recent extended consideration of quasi-sovereign standing came in *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007), in which Massachusetts challenged the EPA’s decision not to address global warming under the Clean Air Act. The Commonwealth blamed decreasing land mass on rising sea levels, but because this injury was not confined to state-owned property, the classification of the underlying interest was in question. See id. at 522–23. Justice Stevens’s majority opinion failed to provide a clear answer, instead intimating that all three classes of interests were at stake. See id. at 518–21; see also Weinstock, *supra* note 38, at 817. At base, though, EPA’s main standing issue (whether states should receive “special solicitude” in standing analysis relative to private parties), largely left undecided, is only tangentially relevant here. See *EPA*, 549 U.S. at 536–40 (Roberts, C.J., dissenting) (outlining and arguing the issue). The Court reconsidered the standing portion of *EPA* in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011), another global warming case, last term. The eight participating Justices divided equally over the question, thereby affirming the lower court’s grant of standing with no precedential effect. Id. The Justices opposing standing relied in part upon arguments from Chief Justice Roberts’s *EPA* dissent. Id.

4. Summary, Significance, and a Word on Popular Sovereignty

To summarize, there are three main classes of interests to which states can claim injury as plaintiffs in federal court—proprietary, sovereign, and quasi-sovereign interests. Proprietary interests implicate the state's role as property owner; sovereign interests implicate its core ability to govern—its jurisdiction; and quasi-sovereign interests implicate the general, collective welfare of its citizens.

Some practical distinctions are immediately observable. First, states will generally claim sovereign standing only vis-à-vis other governments, not private parties, because such suits involve competing jurisdictional claims. Second, because a state's quasi-sovereign interests appear to be essentially coextensive with the scope of its police power, their universe is potentially almost boundless. Finally, states may choose to premise complaints upon one class of interests to the exclusion of others for strategic reasons.⁷⁵ This Note returns to these observations below.

The most significant distinction to emerge is conceptual. In short, quasi-sovereign interests are *derivative*, whereas proprietary and sovereign interests are *independent*. A state's quasi-sovereign interests are derivative of its citizens' interests because, to quote Justice Holmes, they lie "behind" them.⁷⁶ Quasi-sovereign interests are collective, representational. In contrast, truly sovereign interests (like proprietary interests) are fully independent in that they are held by states qua states; they advance the ability of states to govern generally rather than advancing citizen welfare in any particular matter.⁷⁷

⁷⁵ For instance, proprietary injuries may be the easiest to prove if the goal is simply to secure a federal forum. States may choose to emphasize sovereign or quasi-sovereign injuries, in contrast, for symbolic or political reasons—such as, respectively, taking a strong stance against a rival government or appearing as a white knight vindicating the grievances of otherwise powerless citizens.

⁷⁶ See *Tenn. Copper*, 206 U.S. at 237; see also Weinstock, *supra* note 38, at 805.

⁷⁷ See Chemerinsky, *supra* note 6, § 2.3.7 (“[A] distinction can and has been drawn between instances where the government is protecting its own sovereign or proprietary interests and where it is suing on behalf of interests of its citizens.”); see also *EPA*, 549 U.S. at 520 n.17 (emphasizing the “critical difference between allowing a State to protect her citizens from the operation of federal statutes (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)” (citation omitted)). This is not to argue that a state has *no* independent interest underlying a quasi-sovereign claim, which would contradict the statement in *Tennessee Copper* that quasi-sovereign interests are “independent of *and* behind

This conclusion is subject to the counterargument from strong popular sovereigntists that the state neither should nor can act independently of its citizens—that all state power and property derive from the populace that vests it with authority. A meaningful exploration of the centuries-old political theory debate between government sovereigntists and popular sovereigntists lies outside the domain of this Note. In short, popular and government sovereignty—in their purest forms—are mutually exclusive models. Yet in practice, even strong adherents of state sovereignty must acknowledge that the “sentiment that the people who consented to the social contract are the only ‘true’ sovereign is an accurate statement of political theory so far as it goes.”⁷⁸ The problem, however, is that this sentiment does not, in fact, go very far. Sovereignty retains meaningful content—its ontological core—only when it resides at least partially in governments, not solely in the hands of the people themselves, because “the people” have no efficient method of expressing or enforcing their “sovereignty” in response to the real challenges regularly faced by political actors on the national stage.⁷⁹ In contrast, states do: “In pragmatic terms, the concept of sovereignty can only serve its purposes if we accept that the states are the institutions that exercise ‘sovereign’ powers.”⁸⁰

This Note therefore declines to adopt pure popular sovereignty—but does not intend to minimize or dismiss the healthy debate surrounding this issue. Rather, it simply recognizes that, all in all, popular sovereignty in its absolute form is beset by flaws both practical, as illuminated here, and constitutional—in terms of the Framers’ careful inclusion of structural scaffolding for state sovereignty⁸¹ and the Supreme Court’s continuing recognition of such in a variety of jurisprudential contexts. Finally, to the extent that this Note challenges certain aspects of Woolhandler and Collins’s wide-ranging and valuable article *State Standing*, it is because they advocate a strong popular sovereigntist approach.⁸²

the titles of its citizens.” See 206 U.S. at 237 (emphasis added). Rather, the state’s interest is not *wholly* independent as in sovereign and proprietary claims.

⁷⁸ Zick, *supra* note 1, at 334–35.

⁷⁹ See *id.* at 335.

⁸⁰ *Id.*

⁸¹ See *supra* note 12.

⁸² See Woolhandler & Collins, *supra* note 9.

II. THE PRESENT ISSUE: SOVEREIGN STANDING IN THE FACE OF THE *MELLON* BAR

This Part brings into focus the issue at the heart of this Note: the intersection—or lack thereof—of sovereign and *parens patriae* standing. Section II.A presents an overview of *parens patriae* standing, including the rule against state suits challenging federal law formulated in *Massachusetts v. Mellon* and thus dubbed “the *Mellon* bar.” It proceeds to expose the jurisprudential and scholarly incoherence underlying *Mellon*’s interpretation. Section II.B summarizes the Supreme Court’s application of the *Mellon* bar to date, and Sections II.C and II.D propose and defend a theory for curing the doctrinal confusion infecting this area.

A. Introducing *Mellon*’s *Parens Patriae* Bar: Interests and Incoherence

“*Parens patriae* means literally ‘parent of the country,’” the Supreme Court has explained.⁸³ Traditionally, the term referred, *inter alia*, to the role of the state “as sovereign and guardian of persons under legal disability,”⁸⁴ a function stemming from the “royal prerogative.”⁸⁵ The judicially created doctrine at issue here derives from this traditional meaning in that “underlying the concept of *parens patriae* is the notion that the sovereign, as parent, must protect its citizenry.”⁸⁶ An injury litigated under *parens patriae* standing, therefore, must be so diffuse as to invade the citizenry’s collective interests; states cannot act as *parens patriae* in the nominal representation of private plaintiffs.⁸⁷

Before further exploring what such standing entails, an introduction to the *Mellon* bar, which prohibits state *parens patriae* suits in certain circumstances, is in order. The Supreme Court articulated the bar in the 1921 case *Massachusetts v. Mellon*, in which Massachusetts sued various federal officials on the ground that the Maternity Act of 1921 violated the Tenth Amendment by invading ar-

⁸³ *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

⁸⁴ *Black’s Law Dictionary* 1003 (5th ed. 1979).

⁸⁵ See *Alfred L. Snapp*, 458 U.S. at 600–01 (providing a general historical overview).

⁸⁶ See Gary Igal Strausberg, *The Standing of a State as Parens Patriae to Sue the Federal Government*, 35 *Fed. B.J.* 1, 4–5 (1976).

⁸⁷ See *Alfred L. Snapp*, 458 U.S. at 600, 602.

eas of exclusive state control.⁸⁸ The Commonwealth brought suit both on its own behalf and as representative of its citizens.⁸⁹

Justice Sutherland first relied upon *Georgia v. Stanton* and *Cherokee Nation v. Georgia* to dispose of the independent Tenth Amendment claim, holding that asserted injuries to sovereign interests automatically constitute non-litigable political questions,⁹⁰ a position that the Court has (and even then largely had) abandoned.⁹¹ The Court then (and only then) asked “whether the suit may be maintained by the State as the representative of its citizens.”⁹² The answer, it held, was no, instituting *Mellon’s* jurisdictional bar with the following key passage:

It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof [I]t is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*⁹³

This central principle has become settled law.⁹⁴ Its on-the-ground application, however, remains clouded in confusion.

Mellon thus instituted the rule that a state cannot sue to protect its citizens from the proper implementation of federal law when acting in its *parens patriae* capacity. The logical next step, therefore, is determining when—in pursuing which set or sets of interests—the state functions as *parens patriae*. This issue plays out on two levels of generality. The more abstract is the question of *parens patriae* standing generally. As this Section demonstrates, all agree that states act as *parens patriae* when vindicating *quasi-sovereign* interests; the stumbling block is whether they also act as

⁸⁸ 262 U.S. 447, 479 (1923).

⁸⁹ *Id.*

⁹⁰ See *id.* at 483–85.

⁹¹ See *supra* Subsection I.B.2.c.

⁹² *Mellon*, 262 U.S. at 485.

⁹³ *Id.* at 485–86.

⁹⁴ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966) (refusing standing to assert, *inter alia*, citizens’ due process rights against enforcement of federal anti-discrimination statute); see also *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (reaffirming the rule in dicta); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (same).

such when asserting injury to *sovereign* interests. Conceptually, the answer should turn on whether sovereign interests are merely derivative of citizens' personal interests or whether states hold them independently as asserted above. The more particularized question is how the larger matter maps onto *Mellon*: does its jurisdictional bar prohibit only suits premised upon quasi-sovereignty or also sovereignty?

There is strong evidence that, from the beginning, state *parens patriae* and quasi-sovereign standing have been inextricably and exclusively intertwined, even synonymous. Both are representative of citizens' general interests—as opposed to interests that are fully independent and pursued for the state itself. As one scholar explains, therefore, when invoking *parens patriae* standing, “the government entity sues not to protect its sovereign or proprietary interests, but instead litigates as a representative for its citizens.”⁹⁵ Another commentator puts the point even more directly: “A state may institute suit in its *parens patriae* capacity for injuries to its quasi-sovereign interests only.”⁹⁶

Many courts, including the Supreme Court, appear to agree. For instance, the U.S. Court of Appeals for the First Circuit has explained *parens patriae* doctrine in precisely these terms, characterizing its rationale as “creat[ing] an exception to normal rules of standing [as would be] applied to private citizens in recognition of the special role that a State plays in pursuing its quasi-sovereign interests.”⁹⁷ Most critically, the Supreme Court confirmed this reading in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, its most sustained and coherent explanation of *parens patriae* doctrine to date, by expressly and exclusively linking such standing with the vindication of quasi-sovereign interests, stating that “[i]n order to maintain [a *parens patriae*] action, the State . . . must express a quasi-sovereign interest.”⁹⁸ The *Alfred L. Snapp* Court relied upon several precedents in formulating this characterization—for example, describing *Louisiana v. Texas* as “distinguishing [the state's *parens patriae* interest] from [its] sovereign and proprietary inter-

⁹⁵ Chemerinsky, *supra* note 6, § 2.3.7.

⁹⁶ Strausberg, *supra* note 86, at 9.

⁹⁷ *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 335 (1st Cir. 2000).

⁹⁸ 458 U.S. at 607.

ests.”⁹⁹ *Louisiana*, of course, is also the point in the case law that has been labeled the origin of quasi-sovereign standing, as discussed above.¹⁰⁰ Moreover, Supreme Court applications of the *Mellon* bar, to which the next Section turns, appear amply, if implicitly, to confirm the proposition that *parens patriae* doctrine encompasses only quasi-sovereign claims.

It would appear that *Alfred L. Snapp*'s exposition of the matter should be controlling. The problem, however, is that neither courts nor scholars have consistently followed its example of making the synonymous relationship of *parens patriae* and quasi-sovereign standing so explicit. *Parens patriae* doctrine and the *Mellon* bar in particular thus remain frustratingly muddled. Specifically, many continue to conflate the distinct classes of quasi-sovereign and sovereign interests, contributing to doctrinal incoherence by suggesting that *parens patriae* standing underlies both.

For example, one year prior to *Alfred L. Snapp*, the Third Circuit characterized *parens patriae* standing as an appropriate vehicle to vindicate Pennsylvania's so-called “sovereign interests” in preventing lawlessness and the violation of citizens' constitutional rights¹⁰¹—though at least the latter claim would appear to be quasi-sovereign. Before *Alfred L. Snapp*, even the Supreme Court suggested that *parens patriae* standing embraced both sovereign and quasi-sovereign claims—for instance, denying such standing because “[n]o sovereign or quasi-sovereign interests of [the State] are implicated.”¹⁰² The issue has persisted even after *Alfred L. Snapp*,

⁹⁹ Id. at 602–03.

¹⁰⁰ See supra Subsection I.B.3. Specifically, the *Louisiana* Court stated that the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large.

Louisiana v. Texas, 176 U.S. 1, 19 (1900). *Alfred L. Snapp* also cited *Missouri v. Illinois* and *Georgia v. Tennessee Copper Co.* as further examples of early state *parens patriae* suits vindicating quasi-sovereign interests. See *Alfred L. Snapp*, 458 U.S. at 603–04. Moreover, in *Hawaii v. Standard Oil Co. of California*, the Court explicitly recognized “the right of a State to sue as *parens patriae* to prevent or repair harm to its ‘quasi-sovereign’ interests”—excluding other interests by clear negative implication. 405 U.S. 251, 258 (1972). And just as the scope of quasi-sovereign interests has expanded commensurate with the judicial understanding of police power, so has *parens patriae* standing. See Woolhandler & Collins, supra note 9, at 474–78.

¹⁰¹ See *Pennsylvania v. Porter*, 659 F.2d 306, 315–16 (3d Cir. 1981).

¹⁰² *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976) (per curiam).

with district courts recently proclaiming that “[t]o maintain [a *parens patriae*] action, the state must assert a sovereign interest”¹⁰³ and that “[a] State has standing to sue [as *parens patriae*] only when its sovereign or quasi-sovereign interests are implicated.”¹⁰⁴ Even a 2010 Supreme Court opinion illustrates the issue, quoting (in peripheral dictum) a 1953 declaration that “when a State is ‘a party to a suit involving a matter of sovereign interest,’ it is *parens patriae* and ‘must be deemed to represent all [of] its citizens.’”¹⁰⁵

Scholarship reflects the same misperceptions. “Basically,” one early commentator claimed, “the types of cases in which a state has capacity to sue have been classified as proprietary suits and *parens patriae* suits”—with both sovereign and quasi-sovereign claims apparently falling into the latter category.¹⁰⁶ A more recent work proclaims that “*parens patriae* standing serves to permit the state-led litigation of injuries to what judges label ‘sovereign’ or ‘quasi-sovereign’ interests.”¹⁰⁷ Likewise, Woolhandler and Collins write that the *Mellon* bar signifies the partial survival of the Court’s early prohibitions against states vindicating both “public” and “governing” interests, their respective labels for quasi-sovereign and sovereign interests, implying that the bar acts upon both.¹⁰⁸

B. Supreme Court Interpretations of the Mellon Bar

Mellon does not explicitly state which interests its *parens patriae* bar prevents states from vindicating through suit. It is thus worth examining any clues that the opinion and its later interpretations might provide to determine whether the bar prohibits only suits seeking to vindicate quasi-sovereign interests or those asserting in-

¹⁰³ *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 265 (E.D.N.Y. 2004).

¹⁰⁴ *United States v. Olin Corp.*, 606 F. Supp. 1301, 1305 (N.D. Ala. 1985) (quoting *Pennsylvania v. New Jersey*, 426 U.S. at 665).

¹⁰⁵ *South Carolina v. North Carolina*, 130 S. Ct. 854, 863 (2010) (alteration in original) (quoting *New Jersey v. New York*, 345 U.S. 369, 372–73 (1953)) (internal quotation marks omitted).

¹⁰⁶ See William MacNider Trott, Note, Federal Jurisdiction—Suits by a State as *Parens Patriae*, 48 N.C. L. Rev. 963, 963 (1970).

¹⁰⁷ Weinstock, *supra* note 38, at 799. Weinstock later repeats this classification, contrasting both quasi-sovereign and sovereign interests to others not supported by *parens patriae* standing. See *id.* at 807.

¹⁰⁸ Woolhandler & Collins, *supra* note 9, at 435.

jury to sovereign interests as well. This Section seeks chiefly to describe the relevant precedent, to which Subsection II.D.1 returns for analysis.

Florida v. Mellon represents an early exercise of the jurisdictional bar (in favor of the same federal defendant sued in *Massachusetts v. Mellon*).¹⁰⁹ There, the State sought leave to file a complaint against federal officials to enjoin enforcement of a statute discounting a federal tax on individuals by the amount paid in state inheritance tax.¹¹⁰ Florida's constitution prohibited it from imposing such a tax.¹¹¹ The State alleged injury on three separate grounds. First, Florida claimed proprietary injury because the statute would "cause the withdrawal of property from the state with the consequent loss to the state of subjects of taxation."¹¹² Second, it alleged sovereign injury by claiming that the statute was meant to coerce the State to impose an inheritance tax in contravention of its constitution.¹¹³ Finally, it sued as *parens patriae*, alleging unconstitutional discrimination under the Uniformity Clause.¹¹⁴

The Court easily disposed of the *parens patriae* claim under the *Mellon* bar.¹¹⁵ Yet its ruling as to the State's claimed proprietary and sovereign injuries was entirely distinct:

The act assailed was passed by Congress in pursuance of its power to lay and collect taxes, and, following the decision of this court in respect of the preceding act of 1916, *New York Trust Co. v. Eisner*, 256 U.S. 345 [(1921)], must be held to be constitutional. . . . The act is a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land, the constitution or laws of the states to the contrary notwithstanding.¹¹⁶

The Court thus denied Florida leave to file by refusing it both *parens patriae* and sovereign standing. It analyzed the two, however, both separately and using different theories.

¹⁰⁹ 273 U.S. 12, 18 (1927).

¹¹⁰ *Id.* at 15.

¹¹¹ *Id.*

¹¹² *Id.* at 16.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 18.

¹¹⁶ *Id.* at 17 (paraphrasing the Supremacy Clause, U.S. Const. art. VI, cl. 2).

Another well-known application of the bar blocked South Carolina's attack on the constitutionality of the Voting Rights Act of 1965 in *South Carolina v. Katzenbach*.¹¹⁷ The State advanced several arguments: (1) that the statute encroached upon a legislative area reserved to the states, (2) that it violated the principle of state equality, (3) that it denied due process, (4) that it constituted a forbidden bill of attainder, and (5) that it impaired the separation of powers.¹¹⁸ The Court declared that the latter three constitutional claims "may be dismissed at the outset" because they could be made by individuals only, not states.¹¹⁹ That is, the *Mellon* bar prohibited them.¹²⁰ The first two arguments, however, were premised upon sovereign interests. The Court proceeded to adjudicate their merits directly, implicitly recognizing standing.¹²¹

The line's final case proves frustratingly opaque. In 1970, Massachusetts enacted a statute providing that no citizen serving in the military could be required to engage in foreign combat not authorized by Congress under the War Powers Clause.¹²² The act's express purpose was to force a federal judicial determination of the Vietnam War's constitutionality.¹²³ Under the statute, the attorney general was to sue "in the name and on behalf of the commonwealth and on behalf of any inhabitants thereof."¹²⁴ As bases for standing in the resulting suit, *Massachusetts v. Laird*, Massachusetts cited what it claimed were proprietary injuries—loss of the services and taxes of citizens killed in battle, federal funding diverted to the war effort, and so on—as well as its *parens patriae* capacity to protect

¹¹⁷ See *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966).

¹¹⁸ *Id.* at 323.

¹¹⁹ *Id.* at 323–24.

¹²⁰ See *id.* at 324; Robert David Jacobs, Note, Standing of States to Represent the Interests of Their Citizens in Federal Court, 21 *Am. U. L. Rev.* 224, 237 (1971) ("[T]he Court noted that [these aspects of] South Carolina's claim [were] brought as *parens patriae* of its citizens rather than in its own sovereign interest and reiterated the principle articulated in *Mellon* . . .").

¹²¹ See *Katzenbach*, 383 U.S. at 324.

¹²² Act of Apr. 2, 1970, ch. 174, § 1, 1970 Mass. Acts 77, cited in Jacobs, *supra* note 120, at 224–25.

¹²³ See Jacobs, *supra* note 120, at 225.

¹²⁴ Act of Apr. 2, 1970, ch. 174, § 2, 1970 Mass. Acts 77, quoted in Jacobs, *supra* note 120, at 225.

its citizens from the war's deleterious effects.¹²⁵ The Court denied leave to file the complaint summarily and without comment,¹²⁶ leaving the standing question open.¹²⁷ Justice Douglas's impassioned dissenting plea to reconsider *Mellon*, however, strongly suggests that its jurisdictional bar provided a basis for the denial.¹²⁸

In sum, though the Supreme Court has never expressly identified what sort of claims the *Mellon* bar prohibits, it appears to have treated alleged injuries to sovereign and quasi-sovereign interests quite differently. Subsection II.D.1 analyzes the significance of this disparity.

C. Mellon's Inapplicability to Sovereign Standing: The Basic Argument

The argument from popular sovereignty—because it does not view sovereign interests as held independently by states and thus distinct from quasi-sovereign interests—would urge that the *Mellon* bar apply to both sorts of state challenges to federal law:

To allow the states to litigate [the validity of federal law] . . . would be a fundamental denial of perhaps the most innovative principle of the Constitution: the principle that the federal government is a sovereign coexisting in the same territory with the states and acting . . . directly upon the citizenry For the national government is fully in privity with the people it governs, and needs, and should brook, no intermediaries.¹²⁹

As explained above, however, this Note declines to adopt pure popular sovereignty, instead arguing that states hold sovereign interests independently—that they are not mere proxies for ultimately popular power.¹³⁰ But for reasons of ideology or simple un-

¹²⁵ See Petitioner's Brief at 7, *Massachusetts v. Laird*, 400 U.S. 886 (1970) (No. 42, Orig.), cited in Jacobs, supra note 120, at 238.

¹²⁶ See *Laird*, 400 U.S. at 886.

¹²⁷ Jacobs, supra note 120, at 229.

¹²⁸ See *Laird*, 400 U.S. at 887–91 (Douglas, J., dissenting).

¹²⁹ Alexander M. Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 89 (discussing Supreme Court original jurisdiction but equally relevant here).

¹³⁰ See supra Subsection I.B.4; see also Chemerinsky, supra note 6, § 2.3.7 (“But a distinction can and has been drawn between instances where the government is protecting its own sovereign or proprietary interests and where it is suing on behalf of interests of its citizens.”).

certainty given the subject's esoteric nature, several courts and commentators have failed to distinguish between quasi-sovereign interests as derivative and sovereign interests as independent when discussing *parens patriae* standing. The issues of federalism hinging on this distinction are sufficiently consequential to demand further exploration and, if possible, resolution.

This Note proceeds to bring the historical background and judicial doctrines outlined above to bear on its ultimate argument that the *Mellon* bar is inapplicable to states' sovereignty-vindicating suits. Instead, the doctrine should exclusively block quasi-sovereign claims. The present Section concretizes this thesis with a simple example and lays out its basic logic. Subsection II.D.1 then argues that the principle that *Mellon* is inapplicable to sovereign standing both comports with and clarifies Supreme Court precedent, helping to untangle the incoherence identified above. Subsections II.D.2 through II.D.4 buttress this descriptive, precedential argument with a sampling of the principle's policy merits, arguing that the inapplicability of *Mellon* to sovereign standing is a normatively desirable rule.

In order conceptually to sharpen the argument that *Mellon* is inapplicable to sovereignty-vindicating claims, imagine a stylized situation. Congressional Statute *A* institutes a federal policy directive. State Statute *B* directly conflicts with it. The state concedes that, if Congressional Statute *A* is constitutional, State Statute *B* is invalid under the Supremacy Clause, yet it disputes the constitutionality of Congressional Statute *A*. Can the state bring suit against the federal government (or one of its officials) in order to vindicate its sovereign interest in—to quote *Alfred L. Snapp*—"the power to create and enforce a legal code" as embodied by State Statute *B*?¹³¹

¹³¹ See *Alfred L. Snapp*, 458 U.S. at 601. Whether the state has a litigable sovereign interest even absent the existence of State Statute *B* presents a fascinating further question—albeit one that this Note does not directly confront. I am indebted to Professor Kevin Walsh for alerting me to the point that a potentially unconstitutional federal statute may arguably infringe a state's interest in creating (as opposed to enforcing or defending) a legal code regardless of whether a conflicting state statute is on the books. Cf. Brad Joondeph, *Why the States Lack Standing to Challenge the Minimum Coverage Provision, ACA Litig. Blog* (Feb. 2, 2011, 10:05 AM), <http://acalitigationblog.blogspot.com/2011/02/why-states-lack-standing-to-challenge.html> ("[I]f the states have standing here, they *always* have standing, at

The Supremacy Clause establishes that the “Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹³² By its own terms, therefore, the Supremacy Clause is inapplicable to statutes *not* made in pursuance of the Constitution. Yet if *Mellon* prohibits the state’s challenge in the above example, an unconstitutional federal statute could invalidate a constitutional state statute—a result manifestly inconsistent with the clause’s text. Taken to the logical extreme, such instances (where the *Mellon* bar might preclude a sovereignty-vindicating claim against the federal government) threaten to destroy the state’s essential lawmaking or other jurisdictional prerogatives, potentially violating the Constitution’s rule of sovereign self-preservation¹³³ and the Supreme Court’s pronouncement that “neither government may destroy the other.”¹³⁴

Each step in the logical argument advanced by this Note has now been laid out. Sovereign and quasi-sovereign interests are different: the first are held by the state independently, the second in its representational capacity for the protection of its citizens. *Parens patriae* and quasi-sovereign standing are interchangeable in this context; they are synonymous. A state thus sues as *parens patriae* only when it pursues quasi-sovereign claims, not sovereign ones. The *Mellon* bar, which by definition addresses only *parens patriae* suits, is therefore wholly inapplicable to claims premised upon sovereign interests. Were *Mellon* to apply to such, states would be left essentially unable to defend the most basic aspects of their sovereignty against ever-expanding federal power.

every moment, in every case, to challenge *any* federal statute that is regulating *any* conduct within their borders. Why? . . . By enacting a federal regulatory scheme that regulates . . . in a different way than the state does, the federal government is now interfering with the state’s ability to ‘enforce’ its own law—which may be no regulation whatsoever.”).

¹³² U.S. Const. art. VI, cl. 2.

¹³³ See *supra* note 12.

¹³⁴ See *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

D. Merits of Mellon's Inapplicability

Existing Supreme Court rulings support the inapplicability of *Mellon* to sovereign standing, as do powerful normative arguments.

1. Comporting with and Clarifying Supreme Court Precedent

Mellon does not state outright to which interests—sovereign, quasi-sovereign, or both—its *parens patriae* bar applies, nor are its progeny outlined in Subsection II.B.2 any more explicit. Careful analysis of these opinions, however, supports the proposition that the bar prohibits quasi-sovereign standing only.

Mellon itself endorses this principle through unstated but important indicators.¹³⁵ In particular, it declared that Massachusetts's Tenth Amendment claim on its own behalf involved “not rights of person or property, not rights of dominion over physical domain, *not quasi-sovereign rights* actually invaded or threatened, but abstract questions of political power, *of sovereignty*, of government”—thus expressly separating quasi-sovereign from sovereign interests.¹³⁶ Prior to articulating the *parens patriae* bar, it disposed of this sovereign claim under *Stanton*'s dwindling political question rule,¹³⁷ implying that the remaining, representative interests were something other than sovereign—quasi-sovereign.¹³⁸ It is to these interests only that the *parens patriae* bar applied.¹³⁹

Cases applying *Mellon* follow the same pattern, using its jurisdictional bar to prohibit quasi-sovereign claims only and considering alleged sovereign injuries separately. In the subsequent *Florida* case, for example, the Court expressly exercised the bar against the State's asserted *parens patriae* claims.¹⁴⁰ But it took up Florida's sovereignty-based claims separately, ruling that sovereign interests

¹³⁵ See *Mellon*, 262 U.S. at 484–86.

¹³⁶ *Id.* at 484–85 (emphases added).

¹³⁷ See 73 U.S. (6 Wall.) at 77–78.

¹³⁸ See *Mellon*, 262 U.S. at 485 (applying *Stanton* and then turning to “whether the suit may be maintained by the State as the representative of its citizens”).

¹³⁹ See *id.* at 485–86. Moreover, in explaining *parens patriae* standing, the Court stated that “the State, under some circumstances, may sue in that capacity for the protection of its citizens.” *Id.* at 485 (citing *Missouri v. Illinois*, 180 U.S. 208, 241 (1900)). *Missouri*, of course, is considered a classical statement—and indeed a point of origin—of quasi-sovereign standing. See *supra* text accompanying note 56.

¹⁴⁰ See *Florida*, 273 U.S. at 18.

do not afford a basis to challenge a federal law *previously ruled constitutional*.¹⁴¹ In thus addressing constitutionality, the Court reached the merits of the sovereignty-based claim, implicitly granting standing. Consequently, if a determination has not been made as to whether a congressional statute qualifies as “a law of the United States made in pursuance of the Constitution and, therefore, the supreme law of the land”¹⁴²—if this is the question at issue in the case at bar, such as in the stylized example in the previous Section—the supremacy question remains open.

In interpreting *Florida*, it is of critical importance that Justice Sutherland, paralleling his *Mellon* majority opinion, treated the questions of sovereign and *parens patriae* standing separately: he did not simply apply the *Mellon* bar to both. Similarly, in *Katzenbach*, the Court dismissed the State’s three *parens patriae* claims under *Mellon* but proceeded to the merits of its two sovereignty-vindicating claims, clearly indicating that standing existed.¹⁴³ As in *Florida*, this disparate treatment signaled that a state does not act as *parens patriae* when pursuing purely sovereign interests.

In *Laird*, Massachusetts did not even attempt to allege sovereign injuries, raising only proprietary and quasi-sovereign claims.¹⁴⁴ The former appear to have collapsed into the latter, making the *Mellon* bar applicable in toto. As one commentator reasons, in claiming that its economy and fisc would suffer from the war, “the State is in fact discussing the injuries suffered by its citizens, a circumstance which only indirectly affects the State. . . . Massachusetts’ argument for standing is based in actuality upon the rights of its citizens.”¹⁴⁵ Even if that argument does not mesh seamlessly with this Note’s rejection of pure popular sovereignty, the Commonwealth here simply did not attempt to assert a sovereign interest in making and enforcing the statute at issue. Thus, as in *Florida* and *Katzenbach*, the *Mellon* bar did not operate upon sovereign interests (assuming, based on the Douglas dissent, that *Mellon* was indeed the basis for this unexplained decision).

¹⁴¹ See *id.* at 17.

¹⁴² See *id.*

¹⁴³ See *Katzenbach*, 383 U.S. at 323–29.

¹⁴⁴ See Jacobs, *supra* note 120, at 238.

¹⁴⁵ *Id.* at 239.

Cementing this argument is the fact that the Supreme Court has neither exercised nor even mentioned the *Mellon* bar in several cases raising claims indubitably sovereign in nature.¹⁴⁶

One cannot close a discussion of *parens patriae* doctrine without looking to *Alfred L. Snapp*, though it references the *Mellon* bar only in dictum: “A State does not have standing as *parens patriae* to bring an action against the Federal Government.”¹⁴⁷ What is significant, of course, is that the same opinion unequivocally defines *parens patriae* standing as applying exclusively to quasi-sovereign claims, plainly indicating that *Mellon*’s jurisdictional bar precludes only such suits.¹⁴⁸ As asserted above, this decision should remain controlling as precedent directly demarcating the general ambit of *parens patriae* standing.

Since the mid-nineteenth century, the scope of sovereign state standing has continually widened. To retract it now would be not only unwarranted but, in the face of such strong contrary precedent, especially dubious. In sum, the rule should be that the *Mellon* bar applies to quasi-sovereign interests only, not sovereign interests; this principle both comports with and clarifies a long line of Supreme Court precedent.

2. Analogizing to the Supremacy Clause

The logic underlying the Supremacy Clause also supports the applicability of *Mellon* to quasi-sovereign standing only. To the extent that a state’s assertion of quasi-sovereign standing constitutes an exercise of its police power, it can be conceptualized as fitting within the margins of the state’s legislative jurisdiction or at least being analogous to it. The Supreme Court has lent credence to this proposition, suggesting that a “helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely at-

¹⁴⁶ See, e.g., *New York v. United States*, 505 U.S. 144, 187–88 (1992) (accepting argument that congressional enactment violated the Tenth Amendment despite New York’s failure to allege proprietary injury); *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (accepting argument that the Constitution gives states control over election procedures despite Oregon’s failure to allege proprietary injury).

¹⁴⁷ *Alfred L. Snapp*, 458 U.S. at 610 n.16.

¹⁴⁸ See *id.* at 600–01.

tempt to address through its sovereign lawmaking powers”—that is, legislatively.¹⁴⁹

To the extent that the assertion of a quasi-sovereign interest resembles the assertion of a policy interest through legislation, therefore, it is perfectly appropriate that, where the policy-making powers of federal and state governments overlap, federal law will stand supreme. The *Mellon* bar can thus be seen as producing the same result as the Supremacy Clause—or, from a high level of abstraction, as springing directly from it. This result does not follow in the case of sovereign interests, however, which states hold as a matter of fundamental constitutional law.¹⁵⁰ Unlike in the realm of legislative-like policy choices, the federal government has no constitutional authority to preempt the state’s basic sovereign functions.

3. *Removing Needless Formalism*

As suggested above, where a state alleges that sovereign interests are at stake, it will often be able also to declare proprietary injuries and/or join other plaintiffs with stronger claims to standing.¹⁵¹ Even in its early days, the Supreme Court proved willing to adjudicate issues of sovereignty incidental to more traditional claims.¹⁵² Arguably, therefore, all the fuss over distinguishing the litigability of various classes of state interests often represents needless formalism. Professor Henry Monaghan makes this point while praising the trend toward embracing sovereign standing—characterizing as “extraordinary” the initial rejection of federalism claims raised by states themselves, such as in *Stanton*, but simultaneous sanction of the litigation of such issues between private parties: “Surely the reasoning of these decisions is wholly unsatisfactory,” he declares, because “the real contestants were Congress and the states.”¹⁵³

Thus, for courts to insist upon the addition of otherwise unnecessary plaintiffs or claims to ensure the presence of a proprietary injury each time a state alleges sovereign injury against the federal

¹⁴⁹ See *id.* at 607.

¹⁵⁰ See *supra* note 12.

¹⁵¹ See *supra* note 75 and accompanying text.

¹⁵² See *supra* notes 26–27 and accompanying text.

¹⁵³ Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363, 1367–68 (1973); see also Woolhandler & Collins, *supra* note 9, at 436 & n.192.

government would often be overly formalistic, wasting the time and resources of the courts, the states, and the ancillary plaintiffs. Additional parties and claims change little about the way such suits are actually litigated—as federalism contests between states and the federal government. Likewise, this reasoning holds when proprietary claims are unavailable. Where an important question of federalism implicating an independent state interest arises, the state should be able to litigate it directly, regardless of whether the injured interest is proprietary or sovereign. To hold otherwise may elevate form over substance to a dangerous degree.

While shifts in the law from formalism to functionalism are not necessarily unqualified goods, for this particular issue the benefits far outweigh the costs given the substantial federalism values at stake. To rebuild toppled formalist walls in the context of the *Mellon* bar would be an unfortunate regression.

4. Responding to Counterarguments

Because they approach the matter from a popular sovereigntist viewpoint, Woolhandler and Collins advocate scaling back sovereign standing across the board, accordingly contending that the *Mellon* bar should prohibit both quasi-sovereign *and* sovereign claims in all but the most egregious incidents. Defending the Supreme Court's early hostility to sovereign state standing (which accords with their popular sovereigntist stance), they argue that directing disputes over state sovereignty "to suits between individuals and government rather than to suits between governments" was a "normative[ly] attracti[ve]" approach.¹⁵⁴ Specifically, they assert that the Court's early doctrine of allowing individuals only—not states—to litigate critical issues of state sovereignty reinforced federalism values, individual rights, and the separation of powers.

a. Federalism Values

As Woolhandler and Collins explain, the early Court considered individuals "the proper parties to challenge legislation, and it refused to consider suits between . . . two governments based solely

¹⁵⁴ Woolhandler & Collins, *supra* note 9, at 435, 439.

on their regulation of the same individuals. Stated differently, the Court found no legal relationship between the two competing governments.”¹⁵⁵ This, they claim, “reinforced the systemic federalism principle that the federal and state governments acted primarily on the people directly rather than upon each other.”¹⁵⁶ This argument rings with a clear popular sovereignty tone. But if governments have interests independent of their citizens’ interests, as argued here, there is no reason why they should be unable to invoke them defensively qua governments.

Moreover—and arguably the strongest policy argument supporting the inapplicability of *Mellon* to sovereign standing—federalism issues will be litigated most aggressively by states themselves. Individuals are a grossly inadequate substitute when it comes to asserting the structural constitutional protections underlying state sovereignty. Their interests do not align perfectly with those of the states, and they possess neither the incentives nor the resources to pursue sovereignty claims as effectively. As the Supreme Court stated in a slightly different context, “[b]ecause the State alone is entitled to create a legal code, only the State has the kind of ‘direct stake’ [necessary for] defending” it.¹⁵⁷ It is thus largely counterproductive for Woolhandler and Collins to argue on federalism grounds for a result that will likely hurt the possibility of achieving full, fair, and forceful litigation of federalism disputes.

b. Separation of Powers

Woolhandler and Collins further argue that the previous non-litigability of sovereign interests reinforced the separation of powers component of Article III’s “case or controversy” requirement by “closely track[ing] the prohibition on litigating questions of the constitutionality of statutes *simpliciter*.”¹⁵⁸ That is, “[a]n abstract decision on the legality of a state or federal legislature’s exercise of power would have lacked the traditional components of a cause of action: damage or threatened injury to what the Court would have considered a litigable interest.”¹⁵⁹ Prohibiting sovereign standing,

¹⁵⁵ *Id.* at 439.

¹⁵⁶ *Id.*

¹⁵⁷ *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (citation omitted).

¹⁵⁸ *Woolhandler & Collins*, *supra* note 9, at 440.

¹⁵⁹ *Id.* at 440–41.

they claim, thus serves to “minimiz[e] direct clashes between the judiciary and other branches of government,” reinforcing the separation of powers.¹⁶⁰

This argument is both circular (essentially stating that certain interests were not litigable because “the Court would [not] have considered [them] litigable”) and proves too much. The doctrine against litigating the constitutionality of statutes *simpliciter* already does the work for which Woolhandler and Collins advocate. Declaring additional sovereign interests non-litigable is thus overinclusive, particularly given that the injury component of the case or controversy requirement retains content protective of the separation of powers in addition to its subsidiary interest inquiry.¹⁶¹

Finally, the Court’s previous practice of labeling issues of sovereignty “political questions” only for state plaintiffs (while allowing individuals to pursue them) was largely disingenuous, simply insulating the judiciary from political actors rather than serving separation of powers principles on a deeper level.¹⁶²

c. Individual Rights

The Court’s early refusal to grant sovereign standing forced adjudication of the constitutionality of statutes into the individual enforcement realm.¹⁶³ That is, a statute’s constitutionality could only be questioned by an individual against whom the government attempted to enforce it, with the government acting defensively. Applied to the scenario hypothesized above, the state would simply have to wait for an individual against whom the federal government attempted to enforce Congressional Statute *A* to challenge its constitutionality and then hope that he or she effectively raised structural federalism arguments.

Woolhandler and Collins argue that allowing only individuals to raise sovereignty arguments “expresses that individuals are the[ir]

¹⁶⁰ *Id.* at 441.

¹⁶¹ That is, there is more to proving a cognizable injury than simply asserting the violation of a litigable interest; one must also prove, for instance, that the injury is sufficiently “concrete” and “particularized.” See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁶² See Monaghan, *supra* note 153, at 1368 n.29.

¹⁶³ Woolhandler & Collins, *supra* note 9, at 439.

intended beneficiaries.”¹⁶⁴ Consequently, they continue, permitting state standing outside of the proprietary context dilutes claims of individual rights by equating state power with right: “The freedom of government thus spar[s] with the freedom from government.”¹⁶⁵ First and most critically, while this argument may be relevant for quasi-sovereign suits against private defendants, it is largely inapplicable to sovereign suits, which, by definition, are brought vis-à-vis other governments. Second, leaving aside the question whether states can have “rights” in the same manner as individuals, the Constitution’s structural constitutive rules do protect states qua states, imparting them sovereign interests.¹⁶⁶

In order to preclude this alleged dilution of individual rights, Woolhandler and Collins propose limiting sovereign standing to a very narrowly defined group of state interests.¹⁶⁷ Interests that derive from the Constitution must emanate from an explicit provision—not from the general structural protections discussed above,¹⁶⁸ which they insist “ordinarily belong to [the] people.”¹⁶⁹ Moreover, where individuals have incentives to sue, states generally should not be able to do so, they claim.¹⁷⁰ They therefore characterize the *Mellon* bar as allowing sovereign state standing only where either a rare constitutional provision explicitly protecting state authority is involved¹⁷¹ or where a federal statute, on its face, operates directly upon the states.¹⁷² Only then, they argue, do states assert their “own legally protected interests” instead of “generalized federalism claims.”¹⁷³

¹⁶⁴ Id. at 440. The Supreme Court bolstered this view last term in *Bond v. United States*, holding that a criminal defendant had standing to argue that a statute under which she was prosecuted was unconstitutional under the Tenth Amendment, which the United States argued could be invoked only by states. See 131 S. Ct. 2355, 2360 (2011). *Bond* does not resolve the question presented here, though, concerning whether and when states—apart from individuals—can themselves make state sovereignty-related claims.

¹⁶⁵ Woolhandler & Collins, *supra* note 9, at 482–83 (emphasis omitted).

¹⁶⁶ See *supra* note 12.

¹⁶⁷ See Woolhandler & Collins, *supra* note 9, at 504–10.

¹⁶⁸ See *supra* note 12.

¹⁶⁹ Woolhandler & Collins, *supra* note 9, at 506–07.

¹⁷⁰ See *id.* at 507–08.

¹⁷¹ See *id.* at 492–94.

¹⁷² See *id.* at 508–10.

¹⁷³ *Id.* at 504–10.

This argument not only mischaracterizes *Mellon*, it is profoundly unfair to the states. First, it directly contravenes *Alfred L. Snapp*'s recognition of certain sovereign interests as independent based upon just such generalized federalism grounds.¹⁷⁴ Second, when it comes to asserting the structural protections underlying state sovereignty, individuals are simply not an equal substitute for states, as discussed above in Subsection II.D.4.a—an important concern where critical federalism issues may be involved.

All in all, the arguments that Woolhandler and Collins marshal for returning to the Supreme Court's long-abandoned early state standing regime are unpersuasive as applied to sovereign standing because they too easily disregard states' important sovereign interests and the constitutional provisions protecting them.

III. APPLICATION: THE VIRGINIA HEALTHCARE CHALLENGE AND BEYOND

Currently pending before federal courts across the nation are numerous suits seeking the invalidation of the "individual mandate" component of the federal healthcare reform package enacted in early 2010, the Patient Protection and Affordable Care Act ("PPACA"),¹⁷⁵ yet two state-initiated suits have commanded the bulk of media and scholarly attention.¹⁷⁶ This Part demonstrates the practical importance of this Note's thesis by applying it to the Virginia-instigated PPACA challenge, where the issues discussed here have been litigated with the most clarity and depth. Subsection III.A.1 outlines the sovereign standing dimensions of this dispute, and Subsection III.A.2 follows with an analysis of the arguments proffered by Virginia and the United States, applying the interpretation of the *Mellon* bar endorsed above to conclude that standing should be granted.¹⁷⁷ Finally, Section III.B scrutinizes the debate

¹⁷⁴ See *Alfred L. Snapp*, 458 U.S. at 601.

¹⁷⁵ Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242–49 (2010) (codified at 42 U.S.C. § 18091 (Supp. IV 2011), 26 U.S.C. § 5000A (Supp. IV 2011)).

¹⁷⁶ Because it was the first appellate decision on the matter, the Sixth Circuit opinion in *Thomas More Law Center v. Obama*, No. 10-2388, 2011 WL 2556039 (6th Cir. June 29, 2011), has also received a great deal of press.

¹⁷⁷ In arguing that Virginia has standing to pursue this challenge, this Part specifically focuses on the standing issue addressed throughout this Note—the interest component of the injury in fact requirement. Moreover, this is the justiciability question upon which the parties and courts have expended the most energy to date. Other jus-

surrounding courts' tolerance for such "manufactured" sovereign standing.

A. Sovereign Standing in the Virginia Healthcare Challenge

1. Introducing the Issue

Prior to a recent Fourth Circuit ruling discussed below, few realized that such a seemingly esoteric issue of federal jurisdictional jurisprudence as whether the *Mellon* bar bans sovereignty-vindicating claims could unceremoniously extinguish one of the most-hyped lawsuits of the new millennium. A handful of academics had begun to take note, uniformly coming to a conclusion on standing contrary to that advocated here.¹⁷⁸

The story began in March 2010. Virginia Attorney General Ken Cuccinelli stood at Governor Bob McDonnell's elbow as McDonnell signed into law the Virginia Health Care Freedom Act ("VHCFA"),¹⁷⁹ a direct response to the individual mandate component of PPACA, which was awaiting final passage in Congress at the time VHCFA cleared the state legislature. VHCFA provides that "[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual [health] insurance coverage."¹⁸⁰ Requiring individuals to maintain health insurance is, of course, precisely what PPACA's individual mandate does.¹⁸¹ Cuccinelli filed suit in federal court, demanding judicial declaration

ticiability issues are beyond the scope of the analysis here. For a variety of such arguments, see Kevin C. Walsh, *The Ghost That Slayed the Mandate*, 64 *Stan. L. Rev.* (forthcoming 2012), available at <http://ssrn.com/abstract=1748550>.

¹⁷⁸ See, e.g., Brief of Amicus Curiae Kevin C. Walsh in Support of Appellant Seeking Reversal at 12, 20–21, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 11-1057, 2011 WL 3925617 (4th Cir. Sept. 8, 2011) (relying upon *Mellon* as part of a more elaborate jurisdictional analysis concluding that Virginia's suit should be dismissed), petition for cert. filed, 80 U.S.L.W. 468 (U.S. Sept. 30, 2011) (No. 11-420); Brief of Amici Curiae Professors of Federal Jurisdiction in Support of Appellant at 2, *Virginia*, No. 11-1057, 2011 WL 3925617 [hereinafter Brief of Professors] (urging the court to apply the *Mellon* bar based on the popular sovereigntist argument that "the Constitution's structural guarantees exist to protect individuals, and not the sovereignty of the states as such"); see also Walsh, *supra* note 177, at 6–7.

¹⁷⁹ Va. Code Ann. § 38.2-3430.1:1 (West Supp. 2011).

¹⁸⁰ *Id.*

¹⁸¹ See Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242–49 (2010) (codified at 42 U.S.C. § 18091 (Supp. IV 2011), 26 U.S.C. § 5000A (Supp. IV 2011)).

that PPACA is “unconstitutional [as] exceed[ing] the enumerated powers conferred upon Congress.”¹⁸² Twenty-six other states did the same, seeking the invalidation of PPACA in federal district court in Florida. Both cases—*Virginia ex rel. Cuccinelli v. Sebelius*¹⁸³ (in which the defendant is Kathleen Sebelius, the Secretary of the federal Department of Health and Human Services) and *Florida ex rel. Bondi v. U.S. Department of Health & Human Services*¹⁸⁴—resulted in district court rulings declaring PPACA unconstitutional as exceeding Congress’s commerce power. The Fourth Circuit recently rejected the Virginia challenge on precisely the standing grounds discussed here, reversing the district court’s denial of the Secretary’s motion to dismiss, whereas the Eleventh Circuit affirmed the multi-state Florida challenge in the first appellate decision finding that PPACA indeed oversteps Congress’s constitutional bounds.¹⁸⁵ It is widely agreed that the Supreme Court will likely hear one or both this term (especially given the split now posed by the Sixth and Eleventh Circuits’ decisions on PPACA’s constitutionality¹⁸⁶).

While these state-as-plaintiff cases have raised a variety of standing issues, the propriety of sovereign state standing to challenge federal law has been a focal point in the Virginia suit.¹⁸⁷ Virginia’s argument for standing is precisely that explored in the stylized example set out in Section II.C: Congressional Statute *A* is PPACA; State Statute *B* is VHCFA. Virginia argues that an unconstitu-

¹⁸² Complaint at 6, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10CV188-HEH), rev’d, 2011 WL 3925617 (4th Cir. 2011) [hereinafter *Virginia Complaint*].

¹⁸³ 728 F. Supp. 2d at 768.

¹⁸⁴ 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

¹⁸⁵ See *Virginia*, 2011 WL 3925617; *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, Nos. 11-11021 & 11-11067, 2011 WL 3519178, at *66–68 (11th Cir. Aug. 12, 2011).

¹⁸⁶ Compare *id.* (invalidating PPACA under the Commerce Clause), with *Thomas More Law Ctr. v. Obama*, No. 10-2388, 2011 WL 2556039, at *1 (6th Cir. June 29, 2011) (upholding PPACA under the Commerce Clause).

¹⁸⁷ Though several states involved in the Florida suit also enacted statutes similar to VHCFA, they have played almost no role in that litigation. The reason seems to be that the state plaintiffs, in addition to raising sovereignty-vindicating claims, chose both to assert proprietary claims and to join individual plaintiffs with proprietary claims of their own, all but assuring themselves standing. See Amended Complaint at 14–19, *Florida ex rel. McCollum v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-91 RV/EMT).

tional federal law cannot invalidate an otherwise constitutional state law under the Supremacy Clause and that such would be inimical to Virginia's fundamental sovereign ability to make and enforce a legal code.¹⁸⁸ The Commonwealth thus insists that it has sovereign standing to challenge PPACA.¹⁸⁹

Before proceeding to assess this argument, it is worthwhile to clarify precisely what is and is not at stake in Virginia's claim to sovereign standing. It bears emphasis that the suit is not really about whether VHCFA, standing alone, is constitutional.¹⁹⁰ The question, rather, is whether it is invalid under the Supremacy Clause, which turns on whether PPACA is constitutional. Moreover, in making its case, Virginia raises sovereignty arguments on two entirely separate levels: standing and the merits.

Virginia first claims sovereign standing.¹⁹¹ If and only if standing exists is Virginia free to raise a variety of arguments regarding PPACA's constitutional merits. Appreciating the distinction between the standing and merits phases here is critical because Vir-

¹⁸⁸ See Virginia Complaint, *supra* note 182, at 3; *Virginia*, 728 F. Supp. 2d at 771–72.

¹⁸⁹ Virginia appears to have made a strategic and symbolic decision to hinge standing entirely upon sovereign interests, foregoing plausible proprietary claims based on changes to Medicaid and declining to join individual plaintiffs—notably, both strategies that the Florida suit's state plaintiffs have successfully pursued. See *Florida ex rel. Att'y Gen.*, 2011 WL 3519178, at *3 (recognizing that “the question of the state plaintiffs’ standing to challenge the individual mandate is an interesting and difficult one, [but] in the posture of this case, it is purely academic” and concluding that “[b]ecause it is beyond dispute that at least one plaintiff has standing to raise each claim here—the individual plaintiffs . . . have standing to challenge the individual mandate, and the state plaintiffs undeniably have standing to challenge the Medicaid provisions—this case is justiciable”). In contrast, the sole basis for standing asserted in Virginia's complaint was its “interest in asserting the validity” of VHCFA, which it argues “is valid despite the Supremacy Clause of the United States Constitution because . . . the individual mandate and PPACA as a whole are unconstitutional.” Virginia Complaint, *supra* note 182, at 3. Attorney General Cuccinelli, a darling of Tea Party “states’ rights” enthusiasts, has clearly signaled that he intends to make state sovereignty a central component of the lawsuit's legal and political messages.

¹⁹⁰ Virginia does, however, ask for a declaration of VHCFA's constitutionality, Virginia Complaint, *supra* note 182, at 6, which is perhaps unwise given the arguable ban against such declaratory rulings, see *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21–22 (1983).

¹⁹¹ See Plaintiff's Memorandum in Opposition to Motion to Dismiss at 11–12, *Virginia*, 728 F. Supp. 2d 768 (No. 3:10CV188-HEH) [hereinafter Plaintiff's Memorandum].

ginia does indeed argue issues of state sovereignty in both,¹⁹² potentially obscuring the fact that the two inquiries are distinct. Consequently, for a court to recognize Virginia's standing articulates relatively little—and nothing novel or politically inflammatory—about the general content of state sovereignty. It pronounces neither that PPACA oversteps Congress's enumerated powers, that the Tenth Amendment reserves the regulation of healthcare to the states, that states can nullify federal enactments, nor that VHCFA is even enforceable standing alone. Recognizing standing merely acknowledges that Virginia has a litigable sovereign interest in defending a duly enacted state code section against a federal statute that purports to invalidate it, simply allowing Virginia to obtain a ruling on whether that federal statute is in fact valid law.

2. Applying the Precedent

a. The District Court's Recognition of Standing

The first flashpoint for the issue of Virginia's sovereign standing was the motion to dismiss stage in the district court. Secretary Sebelius ("the Secretary") argued that Virginia had alleged no cognizable "injury to *its own* interests as a state" and is thus suing merely on behalf of its citizens as *parens patriae*.¹⁹³ Virginia's complaint does assert that "PPACA imposes immediate and continuing burdens on Virginia *and its citizens*."¹⁹⁴ Without more, this may have constituted a quasi-sovereign claim, an argument to which the Secretary clung in demanding that the court exercise the *Mellon* bar.¹⁹⁵

¹⁹² Its main merits contentions, that PPACA exceeds Congress's authority under the Commerce Clause and the Taxing and Spending Clause, assert state sovereignty indirectly on the theory that all powers not enumerated as congressional were retained by the sovereign states. See *id.* at 28–39. Virginia has even briefly advanced a "traditional state power[s]" theory, see *id.* at 15, apparently attempting to resurrect the Tenth Amendment interpretation abandoned by *Garcia v. San Antonio Transportation Authority*, see 469 U.S. 528, 531 (1985).

¹⁹³ Memorandum in Support of Defendant's Motion to Dismiss at 10, *Virginia*, 728 F. Supp. 2d 768 (No. 3:10CV188-HEH) [hereinafter Defendant's Memorandum].

¹⁹⁴ Virginia Complaint, *supra* note 182, at 2 (emphasis added).

¹⁹⁵ See Defendant's Memorandum, *supra* note 193, at 11–12.

Virginia responded by denying that it sought *parens patriae* standing, acknowledging that *Mellon* would prohibit such a claim.¹⁹⁶ Instead, Virginia asserted, it brought suit to vindicate its sovereign interests only: under *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, it argued, states have a litigable sovereign interest in creating and enforcing a legal code, and an injury to that interest occurs if a Virginia statute must give way to an invalid federal enactment.¹⁹⁷ Consequently, “[b]ecause the operation of PPACA violates Virginia’s sovereignty by purportedly invalidating a Virginia statute under the Supremacy Clause, Virginia has standing in this action.”¹⁹⁸ Though it did not phrase the matter in such a straightforward manner, the Commonwealth thus adopted this Note’s argument that sovereign claims fall outside the purview of *parens patriae* standing and, therefore, are untouched by *Mellon*.

The Secretary countered that questions of sovereignty are not adjudicable because they pose political questions, apparently relying on the Supreme Court’s abandoned *Georgia v. Stanton* doctrine.¹⁹⁹ She also argued that Virginia cannot manufacture sovereign standing by crafting a statute that conflicts with a congressional enactment, citing *Florida v. Mellon* for the proposition that state law “must yield” under the Supremacy Clause.²⁰⁰ As specified above, however, *Florida* declares only that state statutes must yield where congressional pronouncements are constitutional,²⁰¹ an open question of merit in the Virginia healthcare challenge. Virginia does not claim that VHCFA nullifies an otherwise valid federal law; it merely asserts that VHCFA provides standing to question whether PPACA is in fact valid.

Judge Hudson agreed with Virginia. Relying on *Alfred L. Snapp*, he separated sovereign from quasi-sovereign interests, indicated that *parens patriae* standing applies solely to the latter, and found

¹⁹⁶ Plaintiff’s Memorandum, *supra* note 191, at 12.

¹⁹⁷ See *id.* at 12, 15–16.

¹⁹⁸ *Id.* at 16.

¹⁹⁹ See Defendant’s Memorandum, *supra* note 193, at 14.

²⁰⁰ *Id.* (citing *Florida v. Mellon*, 273 U.S. 12, 17 (1927)).

²⁰¹ See *supra* note 141 and accompanying text. The Secretary’s other citations on this issue face the same problem. See Defendant’s Memorandum, *supra* note 193, at 14–15. In *Helvering v. Davis*, 301 U.S. 619, 644–45 (1937), and *New Jersey v. Sargent*, 269 U.S. 328, 337 (1926), the Court first held the congressional enactments constitutionally valid and only then declared their supremacy.

that Virginia's suit implicates sovereign interests only.²⁰² *Mellon* is therefore inapplicable, and the Commonwealth has standing to sue, he held.²⁰³

Finally, the Secretary attempted to resuscitate her argument for imposing the *Mellon* bar by claiming that VHCFA's sole purpose is to protect Virginians from PPACA, with Virginia thus smuggling a quasi-sovereign claim inside a sovereign one.²⁰⁴ Hudson was unmoved:

Although this lawsuit has the collateral effect of protecting the individual interests of the citizens of the Commonwealth of Virginia, its primary articulated objective is to defend the Virginia Health Care Freedom Act from the conflicting effect of an allegedly unconstitutional federal law. Despite its declaratory nature, it is a lawfully-enacted part of the laws of Virginia. The purported transparent legislative intent underlying its enactment is irrelevant.²⁰⁵

The court's rejection of the Secretary's argument reflects the fact that there is no precedent for looking behind a sovereign claim to the purpose of the code section that the state attempts to protect. Virginia seeks to vindicate its sovereign power to make and enforce a legal code at large, not the purpose or policies underlying the specific enactment at issue. Although the purposes of the conflicting state statute may become relevant at a later stage of preemption analysis,²⁰⁶ the Supremacy Clause is flatly inapplicable if the congressional statute at issue fails to qualify under its text as a "Law[] of the United States made in pursuance [of the Constitution]."²⁰⁷

²⁰² See *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 605–07 (E.D. Va. 2010), summary judgment granted, 728 F. Supp. 2d 768 (E.D. Va. 2010).

²⁰³ See *id.* at 607.

²⁰⁴ See Reply Memorandum in Support of Defendant's Motion to Dismiss at 3–5, *Virginia*, 728 F. Supp. 2d 768 (No. 3:10CV188-HEH).

²⁰⁵ *Virginia*, 702 F. Supp. 2d at 605.

²⁰⁶ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (articulating the test for implied conflict preemption as where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," which can turn upon the conflicting state law's own purposes).

²⁰⁷ See U.S. Const. art. VI, cl. 2.

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While the district court thus resolved Virginia's claim to sovereign standing in a manner generally consistent with the approach advanced in this Note, the rationale and rightness of its decision proved unclear to many, and *Mellon's* applicability remains hotly contested on appeal.

b. The Fourth Circuit's Reversal

With the most recent ruling in the Virginia healthcare challenge, the question of state standing has returned to the fore. A Fourth Circuit panel, speaking unanimously through Judge Motz, disposed of Virginia's suit on grounds addressed directly by this Note, holding that the Commonwealth lacks a sufficient sovereign interest and that *Mellon* thus forecloses its suit.²⁰⁸ While the opinion does not lack for rhetorical flourish, careful analysis shows its conclusions to be ill-supported.

The court rested its decision on three main points. First, apparently accepting the Secretary's unsubstantiated contention that states possess sovereign standing to challenge preemption only with regard to laws that constitute some sort of real "regulatory scheme,"²⁰⁹ the court held that "Virginia lacks standing to challenge the individual mandate because the mandate threatens no interest in the 'enforceability' of the VHCFA."²¹⁰ This conclusion, it asserted, springs from *Alfred L. Snapp's* explication of sovereign interests as involving "the power to create *and enforce* a legal code," with dispositive force placed upon the Supreme Court's inclusion of the word "and."²¹¹ That is, Judge Motz read *Alfred L. Snapp* as providing that "only when a federal law interferes with a state's exercise of its sovereign 'power to create *and enforce* a legal code'

²⁰⁸ *Virginia*, 2011 WL 3925617, at *3-5.

²⁰⁹ See Brief for Appellant at 29, *Virginia*, No. 11-1057, 2011 WL 3925617 [hereinafter Secretary's Brief]; see also audio recording: Oral Argument, *Virginia*, 2011 WL 3925617 (4th Cir. May 20, 2011), <http://coop.ca4.uscourts.gov/OAarchive/mp3/11-1057-20110510.mp3> (admitting that states generally have "sovereign interests in defending [their] own laws from federal preemption" and can thus "intervene by using [them]self[ves] as a shield against some federal law that is coming in and displacing some regulatory scheme they have" but claiming that "here what the state has done is very different").

²¹⁰ *Virginia*, 2011 WL 3925617, at *3 (emphasis added).

²¹¹ See *id.* at *4 (quoting *Alfred L. Snapp*, 458 U.S. at 601) (emphasis added by the Fourth Circuit).

does it inflict on the state the requisite injury-in-fact.”²¹² Because the VHCFA contains no obvious enforcement mechanism, the court found, its “mere existence” (in essence, Virginia’s reliance only upon its asserted sovereign power to *create* a legal code) is insufficient.²¹³

As a textual matter, making one conjunction in one snippet of one Supreme Court opinion bear so much weight produces a strained and thus suspicious reading. As a matter of general language and logic, we do not normally consider a person who exercises only one of two joint abilities unauthorized to do so. If parents tell a child that she can bake cookies and eat them, absent a clear admonition that she can bake if and only if she eats, we would not consider her to have acted rebelliously by doing only the former. Perhaps the cookies were inedible, but the child was not therefore disobedient. Moreover, the Fourth Circuit’s isolation of this single phrase from *Alfred L. Snapp* takes it entirely out of context. As this Note’s discussion of the case makes manifest, the *Alfred L. Snapp* Court yoked the separate but closely related powers of creating and enforcing law together not to require them in combination but to differentiate them from the distinct sovereign power of demanding recognition from other sovereigns.²¹⁴ A much more natural reading of the language views a state’s “power to create and enforce a legal code” as describing a lesser-within-the-greater situation in which a state’s ability to enforce its statutes flows from its elemental power to create them. Regulation of tangible programs or processes has never before been conceived as a prerequisite to every exercise of sovereignty.

Relatedly, the opinion demonstrates a fundamental failure conceptually to compartmentalize Virginia’s asserted sovereign interests from its merits arguments. As explained previously, Virginia does not purport to possess “sovereign authority to nullify federal law,”²¹⁵ nor does it argue that it holds a “sovereign interest in the judicial invalidation of th[e] mandate.”²¹⁶ Rather, the Common-

²¹² *Id.*

²¹³ See *id.* Query, however, whether Virginia filing this suit itself represents an atypical attempt at enforcement.

²¹⁴ See *supra* note 71 and accompanying text.

²¹⁵ See *Virginia*, 2011 WL 3925617, at *4.

²¹⁶ See *id.* at *5.

wealth contends that it has a sovereign interest merely in the promulgation of its own legal code, which here provides it standing to question the validity of the individual mandate *under the Constitution*. It is the Constitution, not the VHCFA, that renders the mandate's legitimacy suspect, Virginia claims.

Second, the court declared that “[g]iven that the VHCFA does nothing more than announce an unenforceable policy goal of protecting Virginia’s residents from federal insurance requirements, Virginia’s ‘real interest’ is not in the VHCFA itself, but rather in achieving this underlying goal.”²¹⁷ It therefore found its inquiry whether “the VHCFA serves merely as a smokescreen for Virginia’s attempted vindication of its *citizens’* interests”²¹⁸ satisfied, accepting the Secretary’s argument that the Commonwealth seeks to litigate as *parens patriae* and is thus barred by *Mellon*.²¹⁹

The complete absence of precedent supporting the proposition that the validity of a sovereign claim rests upon the rationale underlying the code section that the state attempts to protect fatally undermines this portion of the court’s analysis. As observed above, the initial applicability of the Supremacy Clause has never depended upon the policy purposes of conflicting state statutes; instead, it hinges solely upon whether the federal statute constitutes a “Law[] of the United States made in pursuance [of the Constitution].”²²⁰ The one case that Judge Motz cites for the declaration that a state cannot “escape th[e *Mellon*] bar merely by codifying its objection to the federal statute in question”²²¹ does not involve state codification at all. Rather, relying particularly (though not exclusively) upon *Stanton, New Jersey v. Sargent* dismissed a state’s challenge to the constitutionality of a federal statute founded upon an amorphous standing theory wholly unrelated to any actual state legislation.²²²

²¹⁷ *Id.*

²¹⁸ *Id.* at *3.

²¹⁹ See *id.* at *3, *5.

²²⁰ See *supra* text accompanying note 207.

²²¹ See *Virginia*, 2011 WL 3925617, at *5.

²²² See *New Jersey v. Sargent*, 269 U.S. 328, 330–31, 337–40 (1926). Though the Court did summarize *Mellon* in its exposition of the relevant case law, it was only at a very high level of generality and one that essentially begs the question presented in *Virginia*, stating that *Mellon* “dismiss[ed] a bill . . . not shown to affect prejudicially any . . . right of the State subject to judicial cognizance.” See *id.* at 334. There is no

Interestingly, as a centerpiece of its *parens patriae* argument, the federal government actually admitted that the case involves “not rights of person or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions . . . of sovereignty, of government,” quoting *Mellon* and arguing that its *parens patriae* bar precludes standing.²²³ The Secretary, however, clearly failed to appreciate a critical aspect of this passage. As discussed above,²²⁴ it comes from the portion of *Mellon* declaring the state plaintiff’s sovereign claims invalid under *Stanton*’s political question rule, which was entirely distinct from the Supreme Court’s separate dismissal of the discrete *parens patriae* claims under *Mellon*’s eponymous jurisdictional bar. The Secretary’s brief neglected to reveal that the passage expressly relies upon *Stanton* rather than the *parens patriae* bar—perhaps a tactical move given the Court’s marked turn away from that case. Unfortunately, the court likewise failed to make this distinction, employing a portion of the same quotation from *Mellon* when declaring Virginia’s challenge “an improper state *parens patriae* lawsuit.”²²⁵

Finally, the court expressed extreme (and likely overblown, as explored below) anxiety concerning the specter of manufactured sovereign standing, an issue addressed anon in Section III.B.²²⁶

While the Fourth Circuit’s decision is surely momentous for its novel take on state standing, it is universally believed that a final ruling on the individual mandate’s constitutionality will come from the Supreme Court.²²⁷ Less clear is when and how. Because the Supreme Court will have a variety of circuit court decisions among which to choose for review and because Virginia’s is the only suit in which sovereign state standing is a dispositive question, the

indication that the Court actually applied *Mellon*’s *parens patriae* bar in *Sargent*; if anything, the connection seems to have arisen from *Mellon*’s reliance upon *Stanton* outside of the *parens patriae* context. See supra notes 136–39 and accompanying text.

²²³ See Secretary’s Brief, supra note 209, at 26 (quoting *Mellon*, 262 U.S. at 484–85) (emphases added); see also Defendant’s Memorandum, supra note 193, at 14 (same).

²²⁴ See supra notes 136–39 and accompanying text.

²²⁵ See *Virginia*, 2011 WL 3925617, at *5.

²²⁶ See id. at *6.

²²⁷ See, e.g., *Thomas More Law Center v. Obama*, No. 10-2388, 2011 WL 2556039, at *23 (6th Cir. June 29, 2011) (Sutton, J., concurring) (“[W]e at the court of appeals are not just fallible but utterly non-final in this case.”).

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Court need not make any definite pronouncements upon this issue in order to decide PPACA's constitutionality. No one can predict, however, whether it will seek to decide the issue anyway—or at least issue strong clarificatory dicta. Specifically, the Court could choose to hear the Virginia healthcare challenge itself and thus consider sovereign state standing directly, or alternatively, it could simply suggest its views on the matter in deciding another PPACA challenge.

B. Manufactured Standing

It would be naïve to ignore the potential for abuse inherent in the type of standing that Virginia claims. Of course the sole purpose of VHCFA was to manufacture standing for the healthcare challenge (beyond, perhaps, some bare statement of principle), and arguably, as the Secretary alleges, “[i]f states could manufacture standing in the way Virginia attempts to do here, every policy dispute lost in the legislative arena could be transformed into an issue for decision by the courts.”²²⁸

The response is five-fold. First, the Secretary's argument is alarmist. In reality, states intent on obtaining standing will almost always be able to plead proprietary injury to themselves or to supplementary plaintiffs in addition to sovereign claims, as illustrated by the successful deployment of this exact strategy by the Florida healthcare challenge's state plaintiffs. Officials like Cuccinelli—apparently intent on asserting sovereign standing alone for symbolic political reasons at the risk of his entire case—are assuredly rare.

Second, even if allowing such standing does create a small uptick in suits, the constitutional benefits outweigh the practical costs: respecting states' fundamental constitutional sovereignty is surely sufficient justification for tolerating a minor strain on the judiciary.

Third, no Supreme Court case law points the way toward any workable distinction between statutes that states can defend against preemption and those that they cannot. Though VHCFA represents fairly obvious manufacturing, federal courts will rarely be able to divine legislative intent so clearly. A total lack of prece-

²²⁸ Defendant's Memorandum, *supra* note 193, at 15; see also Brief of Professors, *supra* note 178, at 27–30.

dent likewise undercuts the Fourth Circuit's conclusion that courts should somehow cull state laws that appear not to constitute part of a real "regulatory scheme."²²⁹

Fourth, "ought" does not imply "is": the fact that the Secretary's policy argument may have some merit does not change the contrary state of the law—that Supreme Court precedent appears to accord Virginia sovereign standing.

Finally, it bears emphasis that even if one is inclined to agree with the Secretary that manufactured sovereign standing is intolerable, the broader importance of recognizing *Mellon's* inapplicability to sovereign interests loses very little force because few cases that present this issue actually implicate such manufacturing. For instance, of the previous cases reviewed here, only *Massachusetts v. Laird* could raise similar misgivings.²³⁰

CONCLUSION

State sovereignty generally and sovereign state standing even more so are poorly understood ideas. This Note has sought to shed light and spark commentary upon previously unexplored intricacies of these concepts, arguing that sovereign state standing provides an important means by which states can claim their rightful position in the American constitutional scheme.

To that end, this Note has presented the first in-depth analysis and attempted resolution of the pervasive confusion underlying the application of *Massachusetts v. Mellon's* jurisdictional bar, which prohibits state *parens patriae* suits meant to shield citizens from federal laws. It has argued that sovereign and quasi-sovereign state interests are meaningfully distinct—the first independent and the second derivative—and that, for reasons of both precedent and policy, courts should apply *Mellon* only to quasi-sovereign claims. Virginia's challenge to federal healthcare reform sharpens and contextualizes these issues, revealing them simultaneously to represent immediate flashpoints and fundamental questions of American federalism. Ultimately, because Virginia asserts independent sovereign interests expressly recognized by Supreme Court precedent, the *Mellon* bar should not foreclose standing.

²²⁹ See supra notes 209–14 and accompanying text.

²³⁰ See supra text accompanying notes 122–28.

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The Supreme Court has declared that “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”²³¹ For states meaningfully to endure, it is crucial that they be able proactively to defend their jurisdiction—their sovereignty—in federal court.

²³¹ *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

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