STATE STANDING

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INTRODUCTION

It is commonly said that government has no constitutional rights. Rather, people have rights against government. When we think of constitutional litigation, the image that comes to mind is that of a lawsuit brought by private parties against government or its officers. The plaintiffs in such cases might be individuals, groups, or regulated enterprises; the government defendants might be local, state, or federal. Much attention has been paid to the difficult question of standing to sue in such public law litigation—that is, whether plaintiffs have suffered a harm that entitles them to litigate the underlying legality of the defendant’s conduct. The


2 This Article generally defines standing as the plaintiff’s right to judicial relief in any federal court. See Fletcher, supra note 1, at 229. The issue is substantially the same as
United States Supreme Court has identified both constitutional and prudential barriers to standing, which often frustrate particular plaintiffs' vindication of their constitutional rights.3

A less familiar image of constitutional litigation is that of a government entity or its officers suing other government entities or their officers to vindicate constitutional rights—once an almost unheard-of phenomenon. But recently, states have sued one another with increasing frequency over acts alleged to have infringed the constitutional rights of the plaintiff state itself or of its citizens. In addition, states have sued federal officials over alleged violations of the states' rights despite traditional barriers to state suits against the federal government to vindicate federalism limits on congressional action.4 Relatively little attention, however, has been paid to the problem of governmental standing to enforce the Constitution—to vindicate either the government's own constitutional interests or those of its citizens. Those who have addressed the problem of state standing have generally lauded the expansion of state standing in federal courts as a means to enforce federal law

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in lawsuits filed by or against the states. This Article, however,

5 A fair amount of ink has been spilled describing and generally applauding state parens patriae standing. See, e.g., William S. Barns, Suits Between States in the Supreme Court, 7 Vand. L. Rev. 494 (1954) (surveying original jurisdiction cases to evaluate efficacy of an international tribunal); C. Ferrel Headley, Jr., Suits by States Within the Original Jurisdiction of the Supreme Court, 26 Wash. U. L.Q. 61 (1940) (describing various categories of state-as-party original jurisdiction cases); Wienczyslaw J. Wagner, The Original and Exclusive Jurisdiction of the United States Supreme Court, 2 St. Louis U. L.J. 111 (1952) (surveying original jurisdiction); Jeffrey Baddeley, Note, Parens Patriae Suits by a State Under 42 U.S.C. § 1983, 33 Case W. Res. L. Rev. 431 (1983) (arguing that granting parens patriae standing under 42 U.S.C. § 1983 will encourage states to enforce civil rights); Robert D. Jacobs, Comment, Standing of States To Represent the Interests of Their Citizens in Federal Court, 21 Am. U. L. Rev. 224 (1971) (suggesting that states have insufficient interests apart from those of their citizens to contest legality of Vietnam War); William M. Trott, Note, Federal Jurisdiction—Suits by a State as Parens Patriae, 48 N.C. L. Rev. 963 (1970) (claiming that parens patriae has great potential to give the public a voice in important matters); Comment, Federal Jurisdiction: State Parens Patriae Standing in Suits Against Federal Agencies, 61 Minn. L. Rev. 691 (1977) (arguing that parens patriae suits are appropriate to challenge federal agency action); Note, Problems of Federal Jurisdiction in Actions Commenced by the United States Against a State, 17 Rutgers L. Rev. 620 (1963) (discussing United States suits against states); Comment, State Protection of Its Economy and Environment: Parens Patriae Suits for Damages, 6 Colum. J.L. & Soc. Probs. 411 (1970) (recommending increased use of parens patriae standing); Comment, State Standing To Challenge Federal Administrative Action: A Re-examination of the Parens Patriae Doctrine, 125 U. Pa. L. Rev. 1069, 1071 (1977) [hereinafter Comment, Re-examination] (characterizing state parens patriae suits as preserving flexibility by allowing states to protect significant interests, and favoring state parens patriae standing for administrative review). See generally Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, Hart and Wechsler’s The Federal Courts and the Federal System 299-344, 906-17 (3d ed. 1988) [hereinafter Hart & Wechsler] (discussing actions in which state is a party and civil actions by the federal government); Vincent L. McKusick, Discretionary Gatekeeping: The Supreme Court’s Management of Its Original Jurisdiction Docket Since 1961, 45 Me. L. Rev. 185 (1993) (surveying original jurisdiction docket and concluding that the discretionary rules the Court uses to deny jurisdiction make original jurisdiction practically equivalent to certiorari).

6 See James E. Pfander, Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555 (1994). Professor Pfander has elaborated a theory that Article III’s grant of original jurisdiction to the Supreme Court in state-as-party suits was primarily to “ensure judicial enforcement of states’ compliance with federal law” by way of “coercive federal claims” against states. Id. at 560, 618, 632, 647. He cites evidence that the Framers foresaw that federal courts could declare state statutes unconstitutional—an unexceptionable proposition. Id. at 600-02, 628. He sees original jurisdiction as necessary to fill a “remedial gap” that opened from the combined effects of the Constitution’s failure to mandate lower federal courts and the fact that it might be awkward to require state courts to hear federal question cases against the states. Id. at 597. He reasons that original jurisdiction was therefore required to enforce claims that states had violated federal constitutional and statutory norms.

In fact, there was no yawning remedial gap requiring suits directly against states, because there were adequate mechanisms for questioning the legality of state action both through
will address this expansion from a more skeptical perspective, using the history of state standing as a means to explore appropriate limitations on governmental suits.

State-as-party cases falling within the Supreme Court’s constitutionally conferred original jurisdiction⁷ have inherent interest as part of the Supreme Court’s docket, but they have deeper implications as well. The state is at once the most and the least common of litigants. When it prosecutes criminal and civil actions under its own laws in its own courts, no issue ordinarily arises as to its standing. But when a state litigates in the courts of another state or in the courts of the federal government, the litigating state’s role becomes problematic. These suits present questions concerning the extent to which a state is properly viewed as a rights-holder as well as whether it has stated a justiciable injury. Over time, the Court has responded to these questions differently, thereby creating an area of justiciability doctrine whose relationship to other aspects of standing has remained relatively unexplored.

Part I of this Article provides a revisionist history⁸ of state standing in the federal courts, a history illustrating that before this century states generally could pursue only their common-law interests. These interests included those that individuals could pursue, such as property or contract claims. By contrast, with the exception of traditional common-law or equity actions against officers as individuals and through defenses to state enforcement actions. Such cases would not require state courts to entertain suits directly against states, but rather were of a type that state courts traditionally entertained. In addition, Congress had the option to create lower federal courts if there were a need for them for suits against officers involving federal questions.

Furthermore, Pfander has failed to describe just what shape “coercive” lawsuits against states to enforce federal constitutional and statutory norms would take. To the extent he is referring to actions in which individuals were aligned against states, there was no need to depart from the traditional forms of private law actions against individual officers and defenses to enforcement suits. In addition, it is doubtful that many persons during the 18th and 19th centuries would have thought the federal courts or Congress had power to fashion “affirmative constitutional claims against the states.” See id. at 628-29. To the extent he is referring to suits brought by other states or the federal government to enjoin state statutes, see id. at 629, there is—as we discuss in this Article—a problem of the absence of a justiciable injury of the plaintiff government.


⁸ Cf. Pfander, supra note 6 (arguing that Framers intended original Supreme Court jurisdiction to serve as vehicle for coercive actions against states to enforce federal constitutional and statutory law).
boundary disputes, states could not pursue their interests in "sovereignty." Thus, states could not (in federal court) ordinarily litigate against the federal government or other states conflicting claims to regulate, nor could they seek to enforce their own legislation or to vindicate their extrastatutory interests in protecting their citizenry. Such sovereignty interests could be pursued only through state legislation and its enforcement in the courts of the legislating state. Such interests might also be indirectly considered, incident to judicial resolution of familiar common-law disputes, typically in cases not involving the state as a formal litigant.

Nevertheless, as we show in Part II, gradual but fundamental changes in the Court's treatment of state-as-plaintiff cases began to occur at the beginning of this century, during the *Lochner* era. During this period, the Court increasingly allowed states to depart from the common-law menu of litigable claims and to attempt to protect in federal courts their citizens' general interests. This transition reflected the beginning of a general change from a common-law, rights-based jurisprudence to a more positivist, interest-based one in which governmental power and private rights became increasingly commensurable. The expansion of state interests that became litigable during this period also highlights the evolution of the concept of "cases" and "controversies" and the transformation from a private law to a public law model of litigation.¹¹

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⁹ Sovereign interests as used herein can have three related meanings. One includes interests that a government has in exercising power—that is, in making and applying law as to a particular subject matter or within a particular territory. For example, a southern state that sues claiming that Reconstruction troops are usurping state rights to govern is attempting to vindicate a sovereign interest, an interest in governing. See, e.g., Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1868). Another meaning of sovereign interests is a state's interests in enforcing its own laws. This definition is reflected in criminal cases, where the complainant is the state. Underlying a state's sovereign interests in making and applying law in either a general or particular sense are those interests of its citizens that the state could seek to protect by legislation. For example, a state suing to enjoin a nuisance emanating from another state is seeking to vindicate the interests of its citizens similar to those the state may normally be expected to protect by specific legislation (e.g., the health and economic well-being of its citizens). A third meaning of sovereign interests therefore is any interests that a state could legitimately protect by legislation but that have not necessarily been crystallized by explicit legislation.


¹¹ "Public law" cases seek to vindicate statutory and constitutional norms rather than private rights. See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976). Other typical characteristics of public law litigation
Some scholars characterize the *Lochner* era as one in which the Court adhered to a "common-law baseline" of standing to the exclusion of more general interests. But the Court's allowance of state standing to vindicate non-common-law interests requires a recharacterization of this period—namely, as a dynamic one in which the Court began to allow standing in state-as-plaintiff cases based on a broader array of litigable interests. In addition, scholars have argued that to the extent the nineteenth-century Court employed precursors of modern standing law, it did not view the absence of an injury as implicating Article III's case or controversy requirement. Although it is true that the nineteenth century did not have a body of "standing" doctrine as such, the efforts of states to sue as common-law plaintiffs involved issues of whether the plaintiff had alleged an injury that would entitle it to litigate the underlying question of the legality of the defendant’s actions. And the Supreme Court clearly considered in such cases whether it was presented with a dispute in a form that was appropriate for judicial resolution.

Part III identifies several implications of these developments in state standing. The early twentieth-century expansion of state
standing foreshadowed the eventual expansion of individual standing, thereby shedding light on the reasons for the disarray of modern standing doctrine. As courts began allowing states to litigate certain sovereignty interests in addition to traditional common-law interests, any interest that a state might have pursued through legislation became a potential basis for state standing. Limitations on standing could have arisen from identifying a limited set of ends that governments could lawfully pursue, but attempts to maintain such limits fell away as the Lochner era came to a close. Individual standing followed a similar pattern, focusing first on common-law interests and later (in some contexts) on any interest government might legitimately seek to protect. This potential universe of interests is so broad, and the Court’s current focus on “injury-in-fact” so open-ended, as to render incoherent the prerequisite of an injury to a claim for relief. In addition, attempts by the Court to limit litigable injuries have proved arbitrary.

Finally, recognizing that states were early litigants of their citizens’ generalized interests exposes the connection between public law litigation and the potentially rights-diluting modern jurisprudence of “interests.” Allowing states to sue as plaintiffs to vindicate their general interest in protecting their citizens signaled that majoritarian interests in exercising power were considered to be the rough equivalents of individualized, common-law claims of right, at least insofar as standing was concerned. It was, as we argue, a predictable tendency of public law litigation to enhance majoritarian interests by recognizing as litigable the interests that opposed claims of right. The tendency of public law litigation to level rights and the interests opposing them suggests that special attention must be given to deciding which rights can trump others, or at least which ones carry heavier burdens of justification to overcome.

In Part IV, we ask whether meaningful limits can be imposed on state standing today. For a number of reasons, we believe that

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18 See Fletcher, supra note 1, at 231; Sunstein, Privatization, supra note 1, at 1449-52.
expansive state standing has a serious potential to undermine rather than complement individual standing in constitutional cases. In connection with these concerns, we examine efforts by the Supreme Court to use both standing doctrine and discretionary denials of jurisdiction to regulate its original jurisdiction in state-as-party cases. We conclude that the factors the Court uses to determine which cases it will hear have contradictory implications and therefore lead to unprincipled results. At times the Court harks back to earlier doctrines that prohibited the litigation of sovereignty interests and to a private law model of litigation—one in which the Court's pronouncements on the validity of statutes and other issues of broad political significance were incidental to the Court's case-deciding function. At other times it embraces a public law model in which the litigation of sovereignty interests and of the constitutionality of statutes is seen as its most appropriate role.20

Although we see an important public law role for the Court, we recommend limiting state standing. In the context of individual standing, many scholars have suggested that courts should pay closer attention to the common law or the positive law that creates the plaintiff's cause of action as the source of standing rather than to injury-in-fact—a suggestion that we believe has particular promise when applied to state standing. In keeping with these proposals, we recommend limiting states' access to federal court to those cases in which the states seek to vindicate their own common-law or constitutionally or statutorily protected interests. In addition, we suggest that the Court ordinarily should deny states an original Supreme Court forum when individuals have standing to litigate the underlying legal issues.22 Federal courts therefore

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21 See, e.g., Albert, Inadequate Surrogate, supra note 1, at 426, 474-75; Fletcher, supra note 1, at 229; Nichol, Rethinking, supra note 1, at 83, 87; Sunstein, After Lujan, supra note 1, at 235-36. This approach to standing implies a revitalized "legally-protected-interest" test to displace the current "injury-in-fact" test. See infra Part IV.B.1.

22 See Arizona v. New Mexico, 425 U.S. 794, 797 (1976) (per curiam) (declining original jurisdiction of case in light of ability of others to litigate in other forums). But cf. Wyoming v. Oklahoma, 502 U.S. 437, 452 (1992) (stating that even if mining companies were to bring...
should treat states as disfavored litigants when their claims involve questions concerning the legality of another government's legislation, state or federal. Admittedly, these suggestions look back in time to a more private law vision of standing and tend to limit states' pursuit of their sovereignty interests in the federal courts. But although a return to a private law version of standing might sometimes imply a restriction of judicial review, we believe our proposals make no significant incursions on judicial review and reinforce the principle that constitutional rights are held by people, not government.

I. STATE STANDING AND THE EARLY COURT

A. A Primer on the State as Litigator: Ordinary and Extraordinary Roles

Issues of state standing are highly dependent on the litigational role of the government in particular contexts. Some of those roles are more ordinary than others. The most ordinary role for the state as litigant is that of criminal prosecutor; indeed, government now has a prosecution monopoly. When enforcing its legislation in its own courts, the government litigant typically is not thought of as possessing "rights" even though it is the complaining party. Rather, it possesses power exercised on behalf of the public, and it uses litigation as an instrument to administer that power. Moreover, government administration through litigation in its own courts generally complies strictly with separation of powers principles. This is particularly apparent in criminal cases, in which all branches of government must ordinarily concur in the application of state power. First, a state legislature must pass a law; then the state's executive must bring a proceeding when a violation occurs; finally, the state's court system must determine whether the conditions that the legislature has prescribed for the exercise of state challenges to Oklahoma's requirement that utilities use 10% Oklahoma coal, "Wyoming's interests would not be directly represented").


24 See Ann Woolhandler, Judicial Deference to Administrative Action—A Revisionist History, 43 Admin. L. Rev. 197, 206 (1991) (noting that the court system was a primary tool for federal law enforcement in early Republic).
power have been met. Civil enforcement litigation follows a similar pattern.

When the state is enforcing its general powers as narrowed and defined by specific legislation, whether civil or criminal, the question of state "standing" is ordinarily irrelevant. Absent federal preemption or some constitutional prohibition, there are few restrictions on the interests the state can seek to vindicate as a litigant in enforcing its own laws. Where legislation clearly authorizes the role of the government as enforcer, the question whether the executive has sufficient interest to litigate merges into the question whether the legislature had sufficient interest to regulate.

Once the government moves away from enforcement of its own statutes, in its own courts, however, its position as a litigant becomes more problematic. One problem arises when the executive litigates in its own courts without specific statutory authority, for example, when the government seeks to prosecute a common-law crime. Because the executive litigant normally administers the general public interest as defined and narrowed by legislation, non-statutory executive litigation raises questions of legitimacy. A second, analogous problem arises when the executive brings a suit in the courts of another government, even if the executive has been authorized to sue by its own legislature. In such contexts, the state as enforcer of its own laws or other public interests may also have to obtain authorization from the courts of a different government.

Additional problems arise when the state is cast in the role of defendant. The state, like other collective enterprises, may cause actionable harms. Indeed, in exercising its power, the state is well situated to impose injuries. Nevertheless, sovereign immunity

25 See United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (establishing that federal courts lacked power to punish common-law crimes); cf. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (questioning Attorney General's power to proceed ex officio when he sought mandamus to compel the circuit court to pass on Hayburn's petition for a pension); David P. Currie, The Constitution in the Supreme Court: The First Hundred Years—1789-1888, at 7-9 (1985) (discussing Hayburn's Case and observing that reasons for the Justices' 3-3 decision are inconclusive); Maeva Marcus & Robert Teir, Hayburn's Case: A Misinterpretation of Precedent, 1988 Wis. L. Rev. 527, 535 (questioning prior interpretations of Hayburn's Case and arguing that crucial issue was not whether Attorney General could proceed ex officio but whether he could proceed without presidential authorization).

26 See U.S. Const. amend. XI; see also Hans v. Louisiana, 134 U.S. 1 (1890) (applying the doctrine of sovereign immunity in federal question cases brought by in-staters).
has required that most suits against the state and federal governments take the form of actions against the individuals who acted illegally under color of governmental power. As discussed below, these ordinary and extraordinary aspects of the state as a party have played a significant role in the history of state standing.

B. The Framers' Framework

The Framers of the Constitution clearly contemplated that states could be litigants in federal courts. Article III provides that the federal judicial power extends to several categories of state-as-party suits, including "Controversies between two or more States" and "between a State and Citizens of another State." In addition, the Constitution included within the Supreme Court's original jurisdiction those cases "in which a State shall be Party." The 1789 Judiciary Act further provided that the Supreme Court had "exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states . . . in which latter case it shall have original but not exclusive jurisdiction."

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27 The illegality could be at the individual officer's own instance or by her obeying either an illegal command of a superior or the command of an unconstitutional statute. See generally Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396 (1987) (discussing availability of suits against officers).
28 Article III provides in part:
   The judicial Power shall extend . . . to Controversies between two or more States;— between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.
29 Id. § 2, cl. 2.
30 Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.
31 Id. § 13, 1 Stat. at 80. The current provision states:
   (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.
   (b) The Supreme Court shall have original but not exclusive jurisdiction of:
       (2) All controversies between the United States and a State;
       (3) All actions or proceedings by a State against the citizens of another State or against aliens.

28 U.S.C. § 1251 (1988). Some might question the constitutionality of Congress' providing for nonexclusive Supreme Court jurisdiction in some cases where Article III had provided for Supreme Court original jurisdiction, but the first Congress had no apparent problem with it. See United States v. Ravara, 27 F. Cas. 713 (C.C.D. Pa. 1793) (No. 16,122), discussed in Hart & Wechsler, supra note 5, at 297; see also Ames v. Kansas ex rel. Johnston,
But just what kind of cases did the Framers contemplate a state would bring in the original jurisdiction of the Supreme Court? Although Confederation-era practice had provided for a cumbersome, legislatively initiated hearing procedure that extended to virtually any dispute between states, the Framers departed from that model. They understood the phrase "cases or controversies" to refer to matters appropriate for judicial resolution. Article III therefore could potentially include a variety of civil and criminal enforcement suits, actions enforcing statutory obligations, and private law civil actions. It seems, however, that insofar as state-as-party jurisdiction was concerned, Article III originally contemplated conventional common-law actions and excluded most suits seeking to enforce criminal and other public law norms. Although that limitation is not obvious, it seems to follow from Article III's structure, wording, and early implementation.

First, it may be inferred that the Supreme Court's state-as-party original jurisdiction excluded state criminal enforcement actions. The Court interpreted Article III's grant of original Supreme Court jurisdiction in state-as-party suits to include only such cases 111 U.S. 449, 469 (1884) (upholding constitutionality of nonexclusivity of Supreme Court original jurisdiction); Akhil R. Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 444 (1989) (arguing that Congress has power to restrict Supreme Court's original jurisdiction over state-as-party suits).

32 See Articles of Confederation art. IX, § 2 (describing procedures and providing that the "United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting... concerning boundary, jurisdiction or any other cause whatever").

33 See, e.g., 2 The Records of the Federal Convention of 1787, at 430 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (indicating that Article III was "limited to cases of a Judiciary nature").


35 See Daniel J. Meltzer, The History and Structure of Article III, 138 U. Pa. L. Rev. 1569, 1607 n.134 (1990) (suggesting that state-as-party cases in early Republic were likely to be common-law rather than constitutional actions); cf. Kansas v. Colorado, 206 U.S. 46, 95-97 (1907) (stating that even though Congress did not generally have power to promote reclamation of arid lands, Court could resolve dispute between states as to water rights in a nonnavigable river); Akhil R. Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1470 (1987) (arguing that Court applied general common law in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)).
as were included within Article III’s preceding general grant of federal power, a reading that would exclude most suits between a state and its citizens. Consequently, the Supreme Court’s state-as-party jurisdiction would have excluded most cases involving a state’s enforcement of its own laws. The drafters of the 1789 Judiciary Act reached the same conclusion and explicitly excluded such cases from the Supreme Court’s original jurisdiction.

Still, it was at least theoretically possible that criminal prosecutions against a state’s own citizens—if they raised issues of federal law—could have come within the Supreme Court’s original jurisdiction. Article III encompassed such cases based on the presence of federal questions, and the existence of a state as a party arguably gave the Court original jurisdiction. In *Cohens v. Virginia*, however, the Court held that its original jurisdiction included only those cases under Article III in which it had subject matter jurisdiction due to the character of the parties, as opposed to the presence of a federal question. A state’s prosecution of its own citizens,

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37 See supra text accompanying note 31.

38 19 U.S. (6 Wheat.) 264 (1821).

39 See id. at 398-99; see also California v. Southern Pac. Co., 157 U.S. 229 (1895) (holding that a federal question case between a state and one of its citizens would not be within original jurisdiction of the Supreme Court). Suits within such party-based grants giving the Supreme Court original jurisdiction may, however, still raise federal questions. In addition, suits between the United States and a state may be brought within the Court’s original jurisdiction. See 28 U.S.C. § 1251(b)(2) (1988) (providing for nonexclusive original jurisdiction); *Case v. Bowles*, 327 U.S. 92, 97 (1946) (upholding constitutionality of concurrent jurisdiction). Such suits come within the federal judicial power conferred in Article III because the United States is a party (as well as because there is a federal question). See United States v. West Virginia, 295 U.S. 463 (1935); United States v. Texas, 143 U.S. 621, 644-45 (1892). Nevertheless, the cases can be brought within the Supreme Court’s original jurisdiction based on the state’s being a party. See id. at 644. But see id. at 649 (Fuller, C.J., dissenting) (arguing that original jurisdiction for state-as-party suits should be limited to those Article III categories that enumerate the state as a party).

For a state to sue the United States in any court, the federal government must waive sovereign immunity. See *Louisiana v. McAdoo*, 234 U.S. 627, 628 (1914); see also California v. Arizona, 440 U.S. 59 (1979) (stating that the United States was indispensable party but could be joined in case in Supreme Court based on congressional waiver of sovereign immunity as to certain suits in federal district courts). Without a waiver, however, states may often sue an appropriate federal enforcement official for declaratory or injunctive relief. See, e.g., *South Carolina v. Regan*, 465 U.S. 367 (1984). So long as the
therefore, did not fall under the Supreme Court's original jurisdiction by virtue of the prosecution's presenting a federal question.

The party-based grants did, however, include controversies "between a State and Citizens of another State." This raised the possibility of a prosecution against an out-of-stater coming within the Court's original party-based jurisdiction, without regard to the existence of federal questions. But the Court in *Cohens* indicated that prosecutions of noncitizens were also outside of the party-based grants. Cases that could not be initiated in a federal court under a party-based grant, said the Court, included "every case between a State and its citizens, and, perhaps, every case in which a State is enforcing its penal laws."

Many reasons justified excluding state criminal prosecutions from the original jurisdiction of the Supreme Court (and perhaps from that of lower federal courts as well, at least as a matter of original filing). Apart from potential problems of volume and venue, the federal system implied that states would continue to

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official is a citizen of a different state, there is original, nonexclusive Supreme Court jurisdiction. See South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966).

40 U.S. Const. art. III, § 2, cl. 1.

41 See *Cohens*, 19 U.S. (6 Wheat.) at 399.

42 Id.

43 Although *Cohens* apparently excluded state criminal prosecutions from Supreme Court original jurisdiction, lower-federal-court federal question jurisdiction arguably could include state criminal prosecutions (given an appropriate congressional grant). Lower federal court jurisdiction was not limited by constitutional interpretation to the party-based grants as was Supreme Court original jurisdiction. Nevertheless, the Court's apparent interpretation of the State-Citizen Diversity Clause as excluding state enforcement of its penal laws suggests that the Court perceived difficulties with an original filing of state criminal prosecutions in any federal court. Although state prosecutions could not originate in federal courts, they could be removed to there. See *Tennessee v. Davis*, 100 U.S. 257, 260-62 (1879) (upholding constitutionality of federal law providing for removal of state criminal prosecution of officer acting under color of federal revenue law); infra notes 161-65 and accompanying text.

44 The Constitution contained venue (local trial) and vicinage (local jury) requirements. Article III provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const. amend. VI; see also Amar, supra note 31, at 490-93 (discussing Framers' concerns about distant trials).
Prosecute criminal cases in their own courts.\textsuperscript{45} In addition, there is some scholarly support for the idea that Article III's use of the word "controversies" rather than the word "cases" in the grant of state-as-party jurisdiction referred to civil actions only.\textsuperscript{46} Furthermore, the 1789 Judiciary Act explicitly provided for original Supreme Court jurisdiction for "controversies of a civil nature" in which the state was a party.\textsuperscript{47} And, as discussed more fully below, then-current theories of choice of law viewed a government's enforcement of the criminal laws of other governments as problematic.\textsuperscript{48} Similar reasoning would have excluded most of what we might now call state civil enforcement proceedings from the


\textsuperscript{46} See, e.g., William A. Fletcher, Exchange on the Eleventh Amendment, 57 U. Chi. L. Rev. 131, 133 (1990); Meltzer, supra note 35, at 1575-76 & 1575 n.18, 1576 n.22 (discussing this theory and also noting that the 1789 Judiciary Act arguably provided for criminal jurisdiction in cases against consuls); cf. Robert J. Pushaw, Jr., Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 Notre Dame L. Rev. 447, 449-50 (1994) (arguing that a dispute between parties was a necessary ingredient of a controversy but not of a case).

\textsuperscript{47} Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80.

\textsuperscript{48} See, e.g., \textit{Cohens}, 19 U.S. (6 Wheat.) at 398-99 (indicating that an original suit in federal court, under party-based grants, would exclude "every case between a State and its citizens, and, perhaps, every case in which a State is enforcing its penal laws"); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 432 (1793) (Iredell, J., dissenting) (indicating that grant of jurisdiction where state is party would not have included criminal cases, which are local in nature); Restatement (First) of Conflict of Laws § 427 (1934) ("No state will punish a violation of the criminal law of another state."); infra Part I.D.2.a; see also Meltzer, supra note 35, at 1576 n.22 (expressing uncertainty whether federal courts would have entertained a state law prosecution against an ambassador, given strong tradition that one sovereign will not enforce another's penal laws); Pushaw, supra note 46, at 462 & n.87 (noting established tradition that United States could not enforce criminal laws of states).

Some may argue that \textit{Cohens} established that the Supreme Court had power to review federal questions arising in state criminal cases and thus implies no prohibition on filing state enforcement suits in lower federal courts based on federal question jurisdiction. But \textit{Cohens} indicates otherwise. In some cases, the Court noted, the federal question appeared only in the course of the proceedings. \textit{Cohens}, 19 U.S. (6 Wheat.) at 394. In such circumstances, the Court could exercise appellate jurisdiction. See id. This perhaps suggests a well-pleaded complaint (or indictment) rule, which might preclude states from initially filing enforcement actions in a federal forum under federal question jurisdiction. And, as noted above, the Court read the state-as-party grants of federal jurisdiction as likely excluding cases in which a State was "enforcing its penal laws." Id. at 399. At their outset, then, state prosecutions ordinarily were not only outside of Supreme Court original jurisdiction but possibly outside the federal judicial power as well. Nevertheless, Chief Justice John Marshall's suggestions in \textit{Cohens} are difficult to square with some aspects of
Supreme Court’s original jurisdiction. Because most state enforcement suits were viewed as penal in nature, neither other states nor the federal government could bring them—as the Court later affirmed.\textsuperscript{49}

The presumptive exclusion of state enforcement suits from the Supreme Court’s original jurisdiction indicated that states could not normally invoke original jurisdiction for causes of action based directly on state statutes. Nor would federal statutory law ordinarily provide a basis for actions by states. Because Congress would not ordinarily have legislated rights of action for states and insofar as the federal government itself typically enforced federal law, state actions based on federal statutory law would have seemed odd at the time.\textsuperscript{50} Although early Congresses gave states some authority to prosecute federal penal actions,\textsuperscript{51} the extent of such a practice is questionable.\textsuperscript{52} Nor did it seem to be contemplated that states would be named defendants in federal statutory suits, because it was unclear at that time whether the federal government could in fact authorize such suits.\textsuperscript{53} The Eleventh Amendment’s explicit prohibition of suits against states by noncitizens and its fail-

\textsuperscript{49} See Huntington v. Attrill, 146 U.S. 657, 669 (1892); cf. Restatement (First) of Conflict of Laws § 610 ("No action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interests."); id. § 611 ("No action can be maintained to recover a penalty the right to which is given by the law of another state."). The prohibition on enforcement of penal laws under choice of law doctrines, however, presumably would not have applied with the same force as in an admittedly criminal case. Nor would the distinctions between "cases" and "controversies" have applied. See supra note 46 and accompanying text.

\textsuperscript{50} Justice James Iredell’s opinion in Chisholm, however, suggested that where states had different versions of the law, Congress might provide a rule of decision for state-as-party controversies. See Chisholm, 2 U.S. (2 Dall.) at 434, 436 (Iredell, J., dissenting).

\textsuperscript{51} See Charles Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 545 (1925) (noting the tradition of state prosecution of federal penal actions).

\textsuperscript{52} See Collins, supra note 45.

ure even to mention suits by a citizen against her own state suggest that federal question cases against states were not contemplated by the framers of the Eleventh Amendment and thus, perhaps, were not thought possible in federal court.\textsuperscript{54}

Absent state or federal statutory law as the main source of state-as-party suits, the source of actions under the state-as-party jurisdiction therefore would normally be the common law.\textsuperscript{55} Of course, that traditional common-law suits would be the ordinary stuff of state-as-party jurisdiction did not automatically preclude state or federal statutory law from providing the rules of decision in particular cases; common-law actions were the main vehicle for obtaining civil redress, even if the breach of duty derived from a statute. Nor did it preclude causes of action that derived more directly from federal or state statutory law from being litigated in state-as-party cases, provided those cases otherwise met the

\textsuperscript{54} See Hans v. Louisiana, 134 U.S. 1, 15 (1890) (stating that federal question suits by citizens against states was not contemplated by Framers); Calvin R. Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. Chi. L. Rev. 61, 66 (1989) (arguing that the 11th Amendment should be read literally, but that the 10th Amendment bars suits against states in federal question cases and Article III limitations bar remainder). Some federal courts scholars read the failure to contemplate federal question cases against states as indicating that there is no 11th Amendment bar to federal question jurisdiction. See, e.g., Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines (pt. 1), 126 U. Pa. L. Rev. 515 (1977); William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983). See generally Peter W. Low & John C. Jeffries, Jr., Federal Courts and the Law of Federal-State Relations 887-90 (3d ed. 1994) (discussing “diversity interpretation” of the 11th Amendment).

\textsuperscript{55} See Meltzer, supra note 35, at 1576. By reference to common-law actions, this Article generally includes traditional equity actions as well as actions at law. Equity actions generally protected similar interests in person and property as did common-law suits. See Woolhandler, supra note 27, at 419-20.

Justice Iredell’s opinion in \textit{Chisholm} refers to the Court’s congressional authorization to issue writs “agreeable to the principles and usages of law.” \textit{Chisholm}, 2 U.S. (2 Dall.) at 434-35 (Iredell, J., dissenting) (emphasis omitted). Such principles and usages could include those “of the particular laws of the State, against which the suit is brought” or “[p]rinciples of law common to all the States.” Id. at 434 (Iredell, J., dissenting). Justice Iredell then indicated that it might be problematic for the Court to apply different law in state-as-party suits based on differences in states’ laws and suggested that Congress might then provide a rule of decision. See id. at 434, 436 (Iredell, J., dissenting). He found no such conflict in \textit{Chisholm} and concluded that “[t]he only principles of law, then, that can be regarded, are those common to all the States.” Id. at 435 (Iredell, J., dissenting); see also supra note 35 (citing authorities indicating that original jurisdiction cases would likely be common-law actions).
requirements for party-based jurisdiction.\textsuperscript{56} But in the typical case, a state's ability to bring an original suit in the Supreme Court depended on its ability to plead a traditional common-law case, including the kind of injury that would give a private party a right of action.

\textbf{C. The Early State-as-Party Paradigm: The Common-Law Litigant}

Although state-as-party suits roughly resembled those that individuals could bring, states are not always easily conceptualized as rights-holders. This is particularly true of common-law rights in individual autonomy and freedom of movement—that is, rights to liberty. When states enforce legislation in their own courts, whether in criminal or civil cases, they typically are viewed as possessors of power exercised on behalf of the public rather than as rights-holders.

Nevertheless, some common-law "individual" rights could easily be "states' rights" as well. For example, states are capable of owning and suffering injury to property. Furthermore, states can be party to contracts with individuals who might breach those contracts. In early cases within the Supreme Court's state-as-party jurisdiction, the state indeed looked like any other common-law rights-holding litigant who sought to enforce or defend her proprietary or contractual rights. For example, in \textit{Georgia v. Brailsford},\textsuperscript{57} a state sued individuals claiming that it owned certain debts that a Georgia citizen had incurred to loyalists during the Revolution.\textsuperscript{58} The Court simultaneously entertained an ordinary debt action

\textsuperscript{56} See \textit{Chisholm}, 2 U.S. (2 Dall.) at 434, 436 (Iredell, J., dissenting) (discussing possibility that Congress might provide for uniform rules of decision in state-as-party suits).

\textsuperscript{57} 2 U.S. (2 Dall.) 402 (1792).

\textsuperscript{58} The original creditors had sued the Georgia debtor in a lower federal court. The state sought to intervene, but the lower court did not believe it could take jurisdiction of an action in which the state was a party, and proceeded to enter a judgment for the original creditors. Georgia then sued the creditors in the Supreme Court in equity. A majority of the Court decided that Georgia had a common-law action against the competing creditor. See id. The action was later tried before a special jury in the Supreme Court. \textit{Georgia v. Brailsford}, 3 U.S. (3 Dall.) 1 (1794).
against a state in *Chisholm v. Georgia*, discussed more fully below.

In a parallel development, the federal government brought common-law suits in the federal courts. In such cases, explicit statutory authorization for the suit was often lacking, and litigation was therefore problematic. Nonstatutory executive litigation raised questions about the legitimacy of executive—and judicial—action undertaken without legislative authorization. Despite some initial hesitation, the Supreme Court did not take long to forbid federal common-law criminal actions. In civil actions, however, the Court recognized the government's authority to sue if it was pursuing a common-law contract or debt action that a private party or corporate representative could bring. Thus, the common law legitimized civil litigant status for the federal executive litigating without specific congressional authorization just as it legitimized similar status for states outside of their own courts.

1. *The Effect of Sovereignty: State as Defendant*

Although the state resembled an individual common-law litigant when it brought cases as a plaintiff alleging a breach of contract or an injury to its property, the characteristics of a state as a sovereign often detracted from its resemblance to a common-law litigant—both as a plaintiff and as a defendant. The most familiar way that sovereignty could bar litigation was in limiting, through the doctrine of sovereign immunity, the ability of individuals to sue the state as defendant. Although government can cause harms that would be actionable if committed by private persons, the sovereign or Crown was not traditionally suable at common law without its consent. Absent such consent, the courts enforced limits on government through the mechanism of citizens’ suits against govern-

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59 2 U.S. (2 Dall.) 419 (1793).
60 See supra note 25.
61 See, e.g., United States v. Tingey, 30 U.S. (5 Pet.) 115, 126-28 (1831) (suit against surety of navy purser); United States v. Buford, 28 U.S. (3 Pet.) 12, 13 (1830) (action of assumpsit); Dugan v. United States, 16 U.S. (3 Wheat.) 172, 179-80 (1818) (suit to recover on bill of exchange); see also Hart & Wechsler, supra note 5, at 910-11 (discussing contract and property cases brought by the federal government).
ment officials who could be sued personally for their common-law wrongs.62

When a South Carolina citizen brought an original Supreme Court suit against the State of Georgia on a debt in Chisholm v. Georgia, the Justices agreed that the Court should look to the common law to determine whether the state was suable.63 The common law, however, pointed in two directions.64 The majority was unimpressed by state claims to sovereignty and held the case justiciable because it fit the mold of a traditional contract action that would have been litigable between individuals.65 On the other

63 Chisholm, 2 U.S. (2 Dall.) at 435 (Iredell, J., dissenting); id. at 465 (opinion of Wilson, J.) ("We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages."). Scholars disagree on whether the Justices generally, and Justice Iredell in particular, relied on general common law in Chisholm. Professor Akhil Amar maintains that the majority used the general common law of assumpsit as the rule of decision in Chisholm, but that Justice Iredell anticipated Erie R.R. v. Tompkins, 304 U.S. 64 (1938), by looking to antecedent state law. See Amar, supra note 35, at 1472. Although Justice Iredell did advert to the possibility of applying Georgia law, he seemed to rely on the general common law as to suits against sovereigns existing at the time Congress enacted the 1789 Judiciary Act. See Chisholm, 2 U.S. (2 Dall.) at 432-37 (Iredell, J., dissenting); see also Massey, supra note 54, at 108 (claiming that Justice Iredell's dissent took the position that the rule of decision was a federal one, given content either by local law when the Constitution and 1789 Judiciary Act were adopted or by general common law). Justice Iredell also referred to the possibility that Congress could provide uniform rules of decision for state-as-party cases, which could imply that Congress could provide for state liability. See Chisholm, 2 U.S. (2 Dall.) at 436 (Iredell, J., dissenting). Professor Amar sees the defect of Chisholm as "its displacement of the prevailing state common law of government immunity with a 'general' common law of state assumpsit liability in a case presenting no question of substantive federal law." Amar, supra note 35, at 1474 (emphasis omitted); see also Fletcher, supra note 46, at 133 (claiming that Chisholm majority did not distinguish between federal and nonfederal assumpsit actions although Justice Iredell did).
64 See generally Amar, supra note 35, at 1469 (noting that the Court in Chisholm mistakenly assumed that assumpsit would lie against state without considering that at common law no cause of action would lie against states for breach of contract).
65 Justice James Wilson, for example, saw the people and not the states as sovereign, see Chisholm, 2 U.S. (2 Dall.) at 454-55, and reasoned that the suit should be allowed along the same lines as it would be against a corporation or other "inferior contrivance of man," see id. at 455-56 (opinion of Wilson, J.) (emphasis omitted). Chief Justice John Jay's opinion was along similar lines. See id. at 471 (opinion of Jay, C.J.). The opinions of Justices John Blair and William Cushing followed a plain meaning approach to the Constitution in holding states suable. See id. at 450 (opinion of Blair, J.); id. at 467 (opinion of Cushing, J.).
hand, Justice James Iredell urged in dissent that Georgia was not suable, because the sovereign was not suable at common law without its consent.\footnote{66 See id. at 430, 436 (Iredell, J., dissenting); see also Hans v. Louisiana, 134 U.S. 1, 12 (1890) (purporting to use reasoning similar to Justice Iredell's).}

The Eleventh Amendment's prompt overturning of the result in \textit{Chisholm} meant that something closer to Justice Iredell's version of the common law, in which sovereigns could not be sued without their consent, would predominate when private parties later attempted to sue states as defendants.\footnote{67 See Massey, supra note 54, at 106 (stating that the axiom of both conventional and revisionist 11th Amendment doctrine is that the amendment implicitly incorporated Justice Iredell's dissent although interpretations of his dissent conflict). Justice Iredell's version did not necessarily mean that state sovereign immunity could not be overcome in federal question cases, however. See \textit{Chisholm}, 2 U.S. (2 Dall.) at 436 (Iredell, J., dissenting); see also Fletcher, supra note 54, at 1057-58, 1060 (dismissing the possibility of a "general state sovereign immunity protection from all suits by private parties").} Without states to sue, citizens were remitted to traditional common-law actions against individual officers who had inflicted trespasses or other cognizable harms without adequate legal justification. This remedy worked reasonably well when officers were sued for trespassory harms that were committed pursuant to illegal commands, but was of little efficacy for collecting debts from states. In such cases the officer was not suable as an individual at common law, on the theory that agents contracting for disclosed principals were not themselves liable.\footnote{68 See, e.g., David P. Currie, Sovereign Immunity and Suits Against Government Officers, 1984 Sup. Ct. Rev. 149, 153 (discussing use of agency principles to determine when officers were amenable to suit); Engdahl, supra note 62, at 15-17. Assumpsit actions were nevertheless available against customs collectors where there was payment under protest. See Woolhandler, supra note 27, at 414 n.87.} In short, the application of this version of the common-law model in state-as-defendant cases left some of those who dealt with the state without a remedy.

The \textit{Chisholm} majority would not have ignored the common law, but would have taken the private law analogy further by allowing direct suits against the government at the instance of individuals without according any special status to the state. Although a constitutional amendment overturned this result in individual-against-government suits, the common law otherwise remained the basis for state-as-party suits—that is, for suits by the state \textit{against} private individuals on claims of debt or contract. In addition, when
either another state or the federal government sued a state, sovereign immunity was not a barrier, and the state’s resemblance to a common-law defendant continued to make it suable along the very lines *Chisholm* had suggested. Thus, the Court unproblematically exercised original jurisdiction when states sued one another, for example, on debts and contracts.

2. *The Effect of Sovereignty: State as Plaintiff*

Although it might be thought that sovereignty would be a barrier to suit principally when the government is a defendant, a state’s sovereignty intrudes even when the state is a plaintiff. When a state attempts to collect debts and enforce contracts, its sovereign status causes no particular problem; collective entities can suffer injuries to proprietary and contractual rights as easily as individuals. But the common law was not generally thought to be an appropriate vehicle to vindicate interests in “sovereignty,” as opposed to proprietary or contractual rights.

A state can be characterized as suing to vindicate its sovereignty interests, as opposed to more run-of-the-mill, common-law interests, in three related situations:

69 See, e.g., Kentucky v. Indiana, 281 U.S. 163 (1930) (hearing suit to enforce contract to build bridge); cf. United States v. Louisiana, 123 U.S. 32 (1887) (involving a suit in Court of Claims by Louisiana to collect money from the United States under congressional statutes providing for certain payments from land sales).

70 See, e.g., South Dakota v. North Carolina, 192 U.S. 286 (1904) (holding that state that had taken title to defendant state’s bonds could sue).

71 See, e.g., *Kentucky v. Indiana*, 281 U.S. 163 (hearing suit to enforce contract to build bridge); see also *Oklahoma v. Texas*, 253 U.S. 465 (1920) (hearing suit to determine ownership of riverbeds).

72 The 11th Amendment did not comprehend suits between states either by its terms or by interpretation. See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 731 (1838); *Cohens*, 19 U.S. (6 Wheat.) at 405-07. The Court later held, however, that sovereign immunity barred a suit by a foreign sovereign against a state. See *Monaco v. Mississippi*, 292 U.S. 313, 330-32 (1934).

73 See, e.g., *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 559 (1851); *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411, 412-13 (1799) (alluding to problems of sovereignty issues in deciding that states were not necessary parties in suits between private parties claiming under grants of different states).

(1) When a state sues to establish its authority to exercise legislative, executive, or judicial power within a particular territory or over a particular subject matter ("Governing Interests"). A state might attempt to litigate its Governing Interests, for example, by claiming particular territory to the exclusion of another state or by claiming that Congress legislated in an area of exclusive state competency.\textsuperscript{75} The interest sought to be vindicated vis-à-vis another government is the state’s interest in governing.

(2) When a state enforces its laws against individuals, as in criminal prosecutions ("Enforcement Interests"). In enacting specific statutes, the state legislature chooses among the various interests that it might pursue to protect its citizens, selecting certain interests as sovereign. Prosecution then effectuates the sovereign interests that have been defined by the political process.

(3) When a state sues to protect its citizens’ general interests ("Public Interests"). Underlying the state’s interest in both governing generally and enforcing a particular statute is the state’s interest in protecting its citizens. Although ordinarily such interests in protecting its citizens would be defined statutorily by the legislature, sometimes a state might seek judicial vindication of interests that the legislature could have sought to protect by legislation but did not.\textsuperscript{76} For example, a state might seek to vindicate Public Interests by enjoining a public nuisance in the absence of a particular state statute on the grounds of harms to its citizens’ health, safety, and economic welfare.\textsuperscript{77}
State suits in federal court intended to vindicate the above sovereignty interests did not assert interests that an individual could vindicate at common law. Rather, such suits attempted to assert a right to exercise power, a kind of governmental liberty interest. Thus, to the extent that federal courts insisted on a common-law basis for suit, states' attempts to litigate such sovereignty interests were problematic. For example, as discussed more fully below, states were not allowed to contest the constitutionality of Reconstruction in lawsuits against the federal government, because such suits attempted to vindicate Governing Interests.

This is not to say that governments never litigated sovereignty interests. Indeed, states did so all the time (and continue to do so) by enforcing their own laws in their own courts. Less frequently, a state might sue to vindicate Public Interests in state courts, such as by initiating public nuisance suits. Although, at one time, such suits could not ordinarily have originated in federal courts due to the lack of a common-law interest similar to that possessed by an individual, such cases might reach federal courts by appeal or removal. Such governmental suits were ordinary judicial business and therefore "cases," but they did not seem to be treated as cases within the federal judicial power as an original matter. We examine these older limitations in the next Section and address their normative force in Section E.

also can be categorized as enforcement actions, traditionally prosecuted by indictment. See infra note 174 and accompanying text.

78 This is particularly true of Governing and Enforcement Interests. To the extent that Public Interests derive from the power to govern, they too indirectly encompass a right to exercise power. See infra Part I.D.3.a.

79 See infra text accompanying notes 110-14.

80 The Court in *Cohens* established that appeal or removal where federal questions were involved in a suit initially brought by a state would not be barred by sovereign immunity, nor would they be outside of the federal judicial power. See *Cohens*, 19 U.S. (6 Wheat.) at 264, 409.
D. The Nonlitigability of Sovereignty

1. Governing Interests

a. Cherokee Nation v. Georgia

An early example of the Court’s refusal to litigate sovereignty interests is Cherokee Nation v. Georgia, in which the Cherokee Nation attempted to challenge the State of Georgia’s enactment (and armed enforcement) of laws abrogating the tribe’s power to govern areas secured to it by treaty with the United States. At issue was the Cherokees’ power to make and enforce laws within a particular territory—that is, to exercise Governing Interests.

The Court had many reasons to avoid the question whether Georgia had infringed the Cherokees’ rights of self-government—not the least of which was the concern that its decrees might not be enforced. The Court held that the Cherokee Nation was not a foreign state capable of invoking the Supreme Court’s original jurisdiction. But the Court adverted to other reasons that influenced its decision, including President Andrew Jackson’s refusal to use federal forces to protect the treaty rights of the Cherokees from Georgia’s aggression. Thus, the question was “political,” in the sense that enforcement of a judicial decree depended on the willingness of the executive to take extraordinary affirmative steps directed toward enforcement. The practical sense in which the case presented a political question, however, coexisted with a respectable doctrinal one: the case presented a political question rather than a justiciable question because the Cherokees sought to vindicate an interest in their sovereignty. When a party sought to vindicate directly its power to make and apply law in a particular

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82 See generally Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500, 514 (1969) (discussing both the political climate in which Cherokee Nation was decided and Marshall’s ingenuity in avoiding threatened disobedience of the Court’s decree by dismissing for want of jurisdiction).
83 See Cherokee Nation, 30 U.S. (5 Pet.) at 16-17; id. at 21 (Johnson, J., concurring); see also Currie, supra note 25, at 122-26 (discussing Cherokee Nation).
85 Id. at 29 (Johnson, J., concurring).
86 See id. at 29-30 (Johnson, J., concurring).
87 See id. at 28 (Johnson, J., concurring).
territory, rather than to present a traditional claim of injury to person or property, the Court treated the case as nonjusticiable.\textsuperscript{88} And enforcement of a judgment that directly litigated such power to govern might require physical force beyond that usually required for enforcement of a judicial decree.\textsuperscript{89}

Nevertheless, the Cherokees or others might have been able to present a justiciable case, according the Court. Chief Justice John Marshall suggested, for example, that title to property might properly be litigated between appropriate parties.\textsuperscript{90} Alternatively, the United States might pursue criminal actions under statutes proscribing violations of Indian territory.\textsuperscript{91} Justice Smith Thompson, although acknowledging that granting relief to the full extent requested by the Cherokees would be beyond the Court's power, suggested in dissent that the Court could grant relief for Georgia's trespass on Cherokee gold and silver mines.\textsuperscript{92} The problem of justiciability therefore did not hinge so much on what issues the Court would decide once a common-law case was presented; the Cherokees' treaty rights might be at issue in any of the suggested types of action. But according to Justice Thompson and perhaps the Court as a whole, the issues had to arise in a traditional common-law action that would determine rights between two disputants or in government-initiated enforcement actions against individuals.\textsuperscript{93}

Indeed, following \textit{Cherokee Nation}, the Court reversed the conviction of a missionary for violation of a Georgia law forbidding non-Indians from living on Cherokee land absent a state license and

\textsuperscript{88} Id. (Johnson, J., concurring) (stating that this was "not a case of meum and tuum in the judicial but [only] in the political sense"); id. at 51 (Thompson, J., dissenting) (arguing that judicial relief limited to rights of person and property should be granted).

\textsuperscript{89} See id. at 19-20; see also id. at 51 (Thompson, J., dissenting) (arguing that relief to full extent prayed for would be beyond reach of Court and that much of relief would depend on exercise of political power by the executive).

\textsuperscript{90} See id. at 20.

\textsuperscript{91} Id. at 31 (Johnson, J., concurring). Justice William Johnson characterized the case as, inter alia, seeking an injunction against commission of a crime, which did not state a proper case in equity. Id. (Johnson, J., concurring).

\textsuperscript{92} Id. at 76 (Thompson, J., dissenting).

\textsuperscript{93} See id. at 77 (Thompson, J., dissenting).
loyalty oath. The law, said the Court, violated the federal government’s exclusive control over commerce with the Indians.

b. Boundary Disputes

One could question the Court’s unwillingness to litigate issues of sovereignty in *Cherokee Nation* in light of its decision to resolve a boundary dispute in *Rhode Island v. Massachusetts*, as well as later border disputes between other states. Boundary issues involve disputes over the power to make and apply law within a particular territory. Thus, like *Cherokee Nation*, such cases presented issues of jurisdiction or sovereignty. Boundary disputes, moreover, might be thought of as the quintessential state-versus-state cases, and the Framers apparently intended such cases to come within the Supreme Court’s original jurisdiction. Indeed, the Court more recently has cited the boundary cases as supporting an inference that issues of sovereignty, far from being nonjusticiable, present the most appropriate questions for the Supreme Court’s original jurisdiction. But the fact that sovereignty was at issue in the boundary cases was never seen by the early Court as weighing in favor of the Court’s jurisdiction over such cases. Rather, it entertained these cases in part because they resembled traditional property claims that the Court could decide according to ordinary principles of law and equity, even though the cases

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94 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). The defendant’s missionary work was authorized by the United States. Id. at 562; see also Frickey, supra note 81, at 394-95 (stating that the Court would not undo settled expectations of colonization, but that *Worcester* indicated that “[t]hese prudential concerns . . . matter[ed] far less when indigenous peoples [were] challenging current efforts to destroy whatever rights they still possess[ed]” (emphasis omitted)).


97 See *Louisiana v. Texas*, 176 U.S. 1, 14-15 (1900) (discussing history of inclusion of state-as-party jurisdiction in Article III); see also *Kansas v. Colorado*, 206 U.S. 46, 84 (1907) (same).

98 See *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981) (stating that case should implicate unique federalism concerns forming basis for original jurisdiction); see also id. at 766 n.3 (Rehnquist, J., dissenting) (arguing that requiring sovereign interests to be implicated would serve requirement of “serious magnitude”).

99 See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) at 732. Chief Justice Roger Taney in dissent reasoned that because Rhode Island claimed a right not to property in the soil but only to sovereignty and jurisdiction, the Court did not have power to hear the case. See id. at 752 (Taney, C.J., dissenting); see also *New York v. Connecticut*, 4 U.S. (4 Dall.) 1,
also implicated sovereignty issues. The Court's discomfort with cases that did not seek to vindicate a common-law interest was apparent. The boundary cases nevertheless provide the primary and largely exclusive example of the early Court's willingness to allow states to vindicate sovereignty interests.

c. The Reconstruction Cases

Cherokee Nation and the boundary cases raised issues concerning which government could make and apply its law within a specific territory. A similar issue of sovereignty arose when the state and federal governments competed to regulate the same subject matter. Two cases in which the Court refused to allow states to challenge Reconstruction legislation present applications of the principle that suits to vindicate sovereignty were nonjusticiable.101

4 n.3 (1799) (comments of Ellsworth, C.J.) ("[B]ut, in no case, can a specific performance be decreed, unless there is a substantial right of soil, not a mere political jurisdiction . . ."). In Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1868), the Court interpreted Rhode Island v. Massachusetts as a case in which a decision about sovereignty was only incidental to a decision about property. See id. at 73; see also Currie, supra note 25, at 303 (discussing Stanton Court's characterization of Rhode Island v. Massachusetts). The Stanton Court bolstered this interpretation by reference to the escheat interest of the state. See Stanton, 73 U.S. (6 Wall.) at 73.

100 See Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) at 723; see also id. at 733-36 (describing state's prayer to restore rights of sovereignty and jurisdiction and to quiet their title). The Court also reasoned that boundary disputes came within its original jurisdiction because many were pending at the time of the adoption of the Constitution. Id. at 724. Indeed, the Court had decided cases between parties claiming title under grants of different states, which came within federal jurisdiction as provided in Article III and the 1789 Judiciary Act. See, e.g., Fowler v. Lindsey, 3 U.S. (3 Dall.) 411 (1799); cf. Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820) (deciding ejectment action to recover land that plaintiffs claimed under grant from Kentucky and that defendant held under grant from the United States as part of Indiana). In such cases the claimants made traditional claims to the soil, and the Court collaterally decided which states had jurisdiction over particular territory although the decisions were not formally binding on the states. Cf. Mississippi v. Louisiana, 113 S. Ct. 549, 553 (1992) (stating that states are not bound by determination of boundary in suit between private parties); Durfee v. Duke, 375 U.S. 106, 115 (1963) (same); New York v. Connecticut, 4 U.S. (4 Dall.) 6 (denying injunction to New York against parties to Fowler v. Lindsay because New York was not a party and was not interested in the decision).

101 See Currie, supra note 25, at 303 (noting that passages in Stanton strongly suggest that the Court did not see the issue of Reconstruction as political but rather denied Georgia standing because it sued in its sovereign capacity). For criticism of these decisions, see Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1367-68 (1973) (arguing that reasoning of cases was "wholly unsatisfactory" because "the real contestants were Congress and the states"). Some criticism of Mississippi v.
In *Mississippi v. Johnson*, Mississippi alleged that federal statutes unconstitutionally invaded its right to govern its inhabitants. Mississippi's allegations particularly focused on the displacement of the state's normal justice system by military tribunals. The Court held that it lacked jurisdiction to issue an injunction against the discretionary acts of the President in enforcing federal law. But it noted that the acts of the federal executive and legislative branches, "when performed, are, in proper cases" subject to judicial cognizance. In *Georgia v. Stanton*, the plaintiff state sought to fit into a common-law mold virtually the same dispute addressed in *Johnson* by adding allegations that federal law deprived it of the use of real estate and buildings it owned. The Court nevertheless treated the case as one attempting to litigate, as in *Cherokee Nation*, nonlitigable interests in governing—that is, "the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State."
As in *Cherokee Nation*, practical decisions regarding the limits of judicial power\(^{108}\) were backed by respectable legal arguments. The fairly direct attempt to vindicate sovereignty in the two Reconstruction cases by litigation against another sovereign\(^{109}\) provided a defensible doctrinal rationale for dismissal. It was the lack of a common-law injury, rather than the nature of the issues underlying the legality of the defendants' conduct, that led to the finding of nonjusticiability. Indeed, the Court was quite willing to consider the constitutionality of Reconstruction legislation when claimants presented proper claims of invasion of common-law interests in person or property.

This explanation probably accounts for the Court's reaching the merits of *Ex parte Milligan*\(^ {110}\) and initially taking jurisdiction in *Ex parte McCardle*\(^ {111}\)—both of which also raised challenges to the constitutionality of aspects of Reconstruction. *Milligan* and *McCardle* were habeas cases in which individuals challenged their incarceration under federal military authority, and thus presented issues similar to those in *Johnson*. In *Milligan* and *McCardle* the traditional common-law writ of habeas corpus provided an appropriate form of action to vindicate interests in individual liberty. Accordingly, the underlying issues of authority to govern and the constitutionality of executive and legislative acts during Reconstruction could be decided as incident to a justiciable case. In *Milligan*, the Court granted habeas relief to the prisoner in part because the federal military tribunal lacked jurisdiction in a state where the regular federal courts still operated.\(^ {112}\) And in *McCar-\(^ {108}\) See Low & Jeffries, supra note 54, at 181-82 (noting the Court's desire to avoid decisions as to the constitutionality of Reconstruction, which would have invited a major institutional confrontation between the Court and Congress).

\(^{109}\) Of course, individuals had been named as defendants in both suits. See Currie, supra note 25, at 302 (noting that *Stanton* was analogous to *Cherokee Nation* in that both concerned the protection of an established government against an arguably usurping rival); cf. Monaghan, supra note 101, at 1368 n.29 (observing that the "political" character of suit in cases such as *Stanton* seems ultimately to have been simply a function of the character of the plaintiffs, not the issues at stake).

\(^{110}\) 71 U.S. (4 Wall.) 2, 119-23 (1866) (deciding that military tribunal lacked jurisdiction and discussing deprivation of Bill of Rights guaranties, including jury trial).

\(^{111}\) 73 U.S. (6 Wall.) 318 (1868).

\(^{112}\) *Milligan*, 71 U.S. at 121-22. Because the prisoner had been arrested and tried in Indiana, the legality of military tribunals in the Southern states was not necessarily implicated by the decision. See id. at 127. The Court reasoned:
dle, the Court denied a motion to dismiss, thereby suggesting that it would address the legality of the prisoner's custody under military authority pending trial before a military tribunal in a formerly Confederate state. The Court failed to reach a decision in McCardle only because Congress pulled the jurisdictional plug after the Court had already denied the motion to dismiss for lack of jurisdiction.

**d. Common-Law Vehicles for Vindication of Sovereignty**

As Cherokee Nation and the challenges to Reconstruction illustrate, the Court's concerns over litigating sovereignty interests could be ameliorated by presenting a sovereignty issue in the context of a traditional common-law case. States, for example, could assert a nonsovereign interest comparable to that which an individual could assert. As noted above, Chief Justice Marshall suggested in Cherokee Nation that a claim for title to specific property would present a justiciable case.

Another way to test issues of sovereignty was for each of the governments with competing claims of governing authority to attempt to enforce its laws against individuals by use of its respective executive and judicial officers. In so

Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered.

Id. McCardle, 73 U.S. (6 Wall.) at 327.

Congress stopped McCardle in its tracks by taking away the Supreme Court's appellate jurisdiction over such cases brought under the Habeas Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385-86. See Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44, 44; Ex parte McCardle, 74 U.S. (7 Wall.) 506, 512 (1869). The Court, however, continued to entertain habeas petitions under the 1789 Habeas Act, ch. 20, § 14, 1 Stat. 73, 81-82, which had been the basis for relief in Milligan. See Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869) (upholding Supreme Court jurisdiction on appeal from a lower federal court denial of habeas to prisoner held by military officers for trial before a military commission); Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 465 n.49 (1963).

See Cherokee Nation, 30 U.S. (5 Pet.) at 20. Similarly, Justice Smith Thompson in dissent suggested that the Cherokees should be able to sue for the trespass to their gold and silver mines. See id. at 76 (Thompson, J., dissenting). In Stanton, Georgia relied on its proprietary interests in government buildings, but the Court treated such allegations as incidental. See Stanton, 73 U.S. (6 Wall.) at 77.
doing, each government acted in its most typical litigant role by seeking to exercise its power by enforcement in its own courts. Defendant individuals in such actions could challenge each government's exercise of power, which thereby would allow courts to resolve the underlying question of where power properly rested.

If a federal law was at issue, individual challenges might arise either defensively, in a federal prosecution, or collaterally, in an attack through habeas corpus. Alternatively, the regulated party might bring a damages or equity action against individual enforcement officers. For example, Reconstruction legislation that the states unsuccessfully had tried to challenge in Johnson and Stanton was challenged in habeas corpus actions brought against federal officials who acted under the legislation.

Alternatively, a state might adopt and enforce laws that conflicted with federal laws to test indirectly whether the federal government exceeded its powers. For example, in Worcester v.

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116 Cf. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 21 (1983) ("There are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law."); Massachusetts v. Mellon, 262 U.S. 447, 485 (1923) (stating that ordinarily states protect citizens through enforcement of their own laws). Governmental entities, however, require sufficient de facto power to test their laws by enforcement, which neither the Cherokees nor the occupied states in Stanton or Johnson necessarily had.

117 See Henry P. Monaghan, Harmless Error and the Valid Rule Requirement, 1989 Sup. Ct. Rev. 195, 195-96 (explaining that defendant in coercive action always has standing to challenge rule actually applied to him regardless of whether his own conduct is constitutionally privileged). But cf. Yakus v. United States, 321 U.S. 414, 430-31 (1944) (holding that criminal defendants could not challenge regulation when Congress had provided that such challenges could be made only in Emergency Court).

118 Although not all legal error could be attacked on habeas, jurisdiction and the constitutionality of statutes under which the prisoner was charged generally could be challenged. See Bator, supra note 114, at 467 & n.56, 471-72, 479-84.

119 See, e.g., Ex parte Siebold, 100 U.S. 371 (1879) (considering on merits and upholding constitutionality of certain federal laws governing conduct of congressional elections); cf. Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869) (taking jurisdiction in case challenging custody by military authorities for trial before a military commission).

120 See Amar, supra note 35, at 1503-12 (noting that state legislatures can check federal government abuse not only by sounding alarm but also by passing laws providing judicial remedies to persons wronged by officials of federal government). The Supreme Court, however, limited state court power to issue injunctive-type remedies against federal officials. See, e.g., Tarble's Case, 80 U.S. (13 Wall.) 397, 409 (1872) (holding that state courts cannot grant habeas relief to order release of federal soldier from military); McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821) (holding that state courts lacked authority to issue mandamus against federal officer).
Georgia, 121 Georgia prosecuted a missionary (who had acted with federal permission) for violating the Georgia licensing requirements for non-Indians living within Cherokee territory. 122 The defendant successfully challenged the Georgia statute as trenching on exclusive federal power over commerce with Indian tribes. Similarly, McCulloch v. Maryland 123 arose from the enforcement of state legislation requiring banks not chartered by the state to use state-stamped paper for their bank notes. 124 The state therefore could originate enforcement suits in its own courts where its sovereignty gave it an unquestionable litigable interest even if such an assertion of sovereign interests would have availed it nothing had the state attempted to originate a case against federal officials outside of its own courts. 125

Furthermore, states could litigate their sovereignty interests when individuals subject to state enforcement brought either common-law suits against individual enforcement officers for damages or comparable actions for injunctions. In such cases, plaintiffs asserted trespassory or other common-law harms, which resulted in a case litigable in state court or in federal court (if there were grounds for federal subject matter jurisdiction). For example, in Osborn v. Bank of the United States, 126 the State of Ohio passed and executed laws taxing the Bank of the United States that were certainly unconstitutional after the Court’s decision in McCulloch, which had struck down a similar tax. 127 In response, the Bank brought an action for injunctive relief against Ohio’s enforcement

121 31 U.S. (6 Pet.) 515 (1832).
122 See id. at 561-62; see also supra notes 94-95 and accompanying text (discussing Worcester).
123 17 U.S. (4 Wheat.) 316 (1819).
124 The statute authorized fines, which could be pursued by indictment or informer's actions. The action was originated as an informer's action by John James, who sued for himself and the State, id. at 317, but Maryland participated in the case. See id. at 372 (argument of Maryland attorney general).
125 Such cases could come into federal court by way of removal or appeal when a federal issue arose. See infra notes 161-65 and accompanying text.
126 22 U.S. (9 Wheat.) 738 (1824).
127 See Amar, supra note 35, at 1514 (noting that Chief Justice Marshall’s opinion in McCulloch implied that if establishment of United States Bank had been unconstitutional, then State could have taxed it). The statute at issue in Osborn was passed on February 8, 1819, about a month before the Court’s March 7, 1819, decision in McCulloch. See Osborn, 22 U.S. (9 Wheat.) at 740; McCulloch, 17 U.S. (4 Wheat.) at 400.
officers, based on their trespass. One could criticize as excessively formal the Court's refusal to allow direct litigation of sovereignty issues in federal court while allowing litigation of similar issues when they arose in traditional actions. There were, however, functional purposes served by the Court's insistence on form, as discussed more fully below.

2. Enforcement Interests

As we have shown, an allegation of injury to sovereignty did not ordinarily suffice to create a common-law case outside of a state's own courts. States could, of course, litigate their sovereignty interests by enforcement actions in their own courts. General jurisdictional principles operative during the nineteenth century, however, did not allow a state to begin a prosecution under its laws in the courts of another sovereign. Nor through most of the nineteenth century could a state ordinarily prosecute an appeal to the Supreme Court from judgments rendered against it by its own courts in favor of an individual's claim of a federal right.

_128 Osborn_, 22 U.S. (9 Wheat.) at 840. When the government exercises power against individuals through the executive without use of the courts as an intermediate enforcement mechanism, plaintiffs might test the government's assertion of power in a common-law damages action or comparable equity action. Where sovereignty issues arise in a common-law suit against an individual state officer, the case could go to a federal trial court via diversity, assorted removal provisions, or, later, federal question jurisdiction. See, e.g., _Scott v. Donald_, 165 U.S. 58, 71-73 (1897) (allowing federal question damages action for seizures of liquor under state statute interfering with interstate commerce). Because plaintiffs sued the defendant-officers as individuals, these cases were not enforcement suits, which typically could be brought only in the court of the enforcing sovereign. See _Amar_, supra note 35, at 1506-07 (arguing that common-law actions against officers of one sovereign in courts of the other were a mechanism by which federalism enhanced individual rights against government). The 1871 Civil Rights Act, ch. 22, § 1, 17 Stat. 13, 13 (current version at 42 U.S.C. § 1983 (1988)), provided a cause of action for private parties against officers who deprived them of federal rights under color of state law, but the statute was not much used until this century. See _Collins_, supra note 34, at 1498-1506.

Of course, the Supreme Court could review state enforcement suits brought in state courts. Until 1914, however, such review could generally be instigated only by a party claiming denial of a federal right. See infra notes 268-72 and accompanying text.

_129_ See _Meltzer_, supra note 35, at 1588-92 (discussing but disagreeing with arguments that _Judiciary Act of 1789_, ch. 20, § 25, 1 Stat. 73, 85, allowed for review when a claim of federal right was upheld). Professor Amar has endeavored to show that the limitation under § 25 was not a meaningful one and that defenses to a claim of right could be characterized as an "immunity" under the Act. _Amar_, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499, 1530 (1990). Even if this is true, the Court apparently did not perceive § 25 as reaching claims of overvindication of federal
theless, state prosecutions might still find their way into federal court due to the presence of federal officers as parties or the presence of federal questions—by way of the defendant’s removal to a lower federal court or appeal to the Supreme Court.¹³⁰

a. Prohibition of State Enforcement Actions in the Courts of Other States

Federal court prohibitions on litigating state enforcement actions mirrored similar prohibitions that existed among states. Such prohibitions were attributable in part to the then-prevailing association of territory and power. Criminal prosecutions were considered “local” actions requiring local jurisdiction similar to actions that determined title to real property. ¹³¹ Because the offense was against the state, the criminal statute was thought to lack force outside of the territorial jurisdiction of the state.¹³²

This lack of enforcement power outside of a state’s own courts might seem to be in tension with the Constitution’s Full Faith and Credit Clause,¹³³ which provides for interstate recognition not only of judicial decisions but also of the acts of state legislatures.¹³⁴ Before this century, however, the Court consistently interpreted “full faith and credit” against a background of general choice-of-law principles that restricted the acts of one sovereign outside of its own territory.¹³⁵ Indeed, the full faith and credit statute¹³⁶ did not

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¹³⁰ See Meltzer, supra note 35, at 1589-90. Cases supporting the Amar view, according to Meltzer, did not surface until 1908. See id. at 1589 & n.68 (citing Southern Ry. v. Crockett, 234 U.S. 725, 730 (1914); St. Louis, I.M. & S. Ry. v. McWhirter, 229 U.S. 265, 275, 277 (1913); and Seaboard Air Line Ry. v. Duvall, 225 U.S. 477, 485-86 (1912)).

¹³¹ See infra text accompanying notes 161-63.

¹³² See Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888), overruled in part by Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935); Joseph Story, Commentaries on the Conflict of Laws 516 (Boston, Hilliard, Gray & Co. 1834) (“The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country, where they are committed.”). See Huntington v. Attrill, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extraterritorial effect only by the comity of other States.”); cf. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (“The Courts of no country execute the penal laws of another . . . .”).

¹³³ U.S. Const. art. IV, § 1.

¹³⁴ Id.


¹³⁶ Act of May 26, 1790, ch. 11, 1 Stat. 122.
explicitly require recognition of state legislation until the 1948 revision of the judicial code.\textsuperscript{137} Thus, requirements of interstate recognition were strongest when private parties attempted to enforce out-of-state \textit{judgments} between private parties and weaker when a party sought to apply the \textit{laws} of one state in the courts of another.\textsuperscript{138} Full faith and credit requirements were similarly weak when an official whose authority derived from the laws of one state sued in his official capacity in another state.\textsuperscript{139} This distinction

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\item \textsuperscript{137} See Currie, supra note 135, at 200. The full faith and credit statute originally provided:
\begin{quote}
That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk . . . . And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.
\end{quote}
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\item \textsuperscript{139} See, e.g., Booth v. Clark, 58 U.S. (17 How.) 322, 331 (1855) (stating that receiver appointed by New York had no extraterritorial powers); Vaughan v. Northup, 40 U.S. (15 Pet.) 1, 5 (1841) (stating that administrator appointed and deriving authority from another state is not liable to be sued in District of Columbia in official capacity); Dixon's \textit{Ex'rs} v. Ramsay's \textit{Ex'rs}, 7 U.S. (3 Cranch) 319, 323-24 (1806) (stating that executor of person who dies in foreign country could not by virtue of letters testamentary granted in foreign country bring action in District of Columbia); cf. Moore v. Mitchell, 281 U.S. 18, 24 (1930) (stating that collector of taxes was "mere arm of state" and "ha[d] no better standing to bring suits in courts outside Indiana than have executors . . . appointed under the laws and
\end{itemize}
between the full faith and credit accorded judgments and that accorded legislative acts operates even today, although not to the same extent that it once did.\textsuperscript{140}

For these reasons, administrators and receivers who derived from state law their ability to litigate on behalf of others could not rely on their appointments in one state to give them authority to sue in the courts of another.\textsuperscript{141} Corporations suffered similar disabilities in attempting to sue outside of the state of their incorporation.\textsuperscript{142} It followed that one state’s officials were unable to

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\item[141] See, e.g., \textit{Booth}, 58 U.S. (17 How.) at 331 (stating that receiver appointed by New York had no extraterritorial powers). If the appointment vested title in the receiver, however, the receiver generally could sue in another state. See, e.g., \textit{Converse v. Hamilton}, 224 U.S. 243, 253, 255-56, 261 (1912) (holding that Wisconsin courts were required by full faith and credit to allow Minnesota receiver of corporation to sue when the liabilities sued on were not penal and when under Minnesota statute receiver was not a mere equity receiver but a quasi-assignee invested with rights of creditors); cf. \textit{Relfe v. Rundle}, 103 U.S. 222, 226 (1881) (holding that Missouri receiver in whom assets of company statutorily vested had standing as party in federal court in Louisiana). Absent state statutes providing for comity, suits by administrators and executors outside of the state of appointment remain problematic. See Scoles \& Hay, supra note 140, § 22.14, at 873.
\item[142] See \textit{Bank of Augusta v. Earle}, 38 U.S. (13 Pet.) 519, 588-89, 592 (1839) (stating that corporations lacked “legal existence out of the boundaries of the sovereignty by which [they] were created,” but could make valid contracts in other states under principles of comity, absent state policy to the contrary); see also \textit{Paul v. Virginia}, 75 U.S. (8 Wall.) 168, 177, 181 (1869) (stating that corporations are not “citizens” protected by Privileges and Immunities Clause but that, as creatures of local law, they depend upon comity for enforcement of their contracts in other states—comity being “granted upon such terms and conditions as those states may think proper to impose”); Herbert Hovenkamp, The Classical Corporation in American Legal Thought, 76 Geo. L.J. 1593, 1595 (1988) (“Within the preclassical, mercantilist model, the corporation was a unique entity created by the state for a special purpose and enjoying a privileged relationship with the sovereign.”).
\end{itemize}
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prosecute enforcement actions in the courts of another because in such suits, both the officers' official capacity and the statutes they sought to enforce were deemed inoperative outside of their home state.

b. Prohibition of State Enforcement Actions in Federal Courts

Given the limitations on interstate recognition of official acts, the presumptive inability of states to pursue their sovereignty interests through the prosecution of actions in federal courts was unremarkable. To be sure, the problem of extraterritorial enforcement was often inapplicable between state and federal courts because their jurisdiction might cover the same territory. Nevertheless, the concept that one sovereign's penal or local laws lacked force in the courts of another persisted. The federal courts thus enforced a prohibition against state law prosecutions similar to that which applied between states. Chief Justice Marshall implicitly recognized this prohibition in *Cohens v. Virginia* by indicating that state criminal prosecutions could not ordinarily originate in the federal courts even though such suits might eventually find their way into federal courts by appeal or removal. The Court later stated in *Huntington v. Attrill*.

Beyond doubt, (except in cases removed from a state court in obedience to an express act of Congress in order to protect rights under the Constitution and laws of the United States,) a Circuit Court of the United States cannot entertain jurisdiction of a suit in

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143 In Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), overruled by Puerto Rico v. Branstad, 483 U.S. 219 (1987), the Court held that states were not compelled to comply with even extradition requests of other states despite apparent constitutional and statutory requirements to do so. Article IV provides:

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

U.S. Const. art. IV, § 2, cl. 2; see also Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302, 302 (implementing Article IV, § 2, cl. 2).

144 See Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 300 (1888), overruled in part by Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935); *Chisholm*, 2 U.S. (2 Dall.) at 432 (Iredell, J., dissenting) (arguing that grant of jurisdiction where state is a party would not have included criminal cases, which are considered to be of a local nature).

145 19 U.S. (6 Wheat.) 264 (1821).

146 See id. at 398-99, 409.

147 146 U.S. 657 (1892).
behalf of the State, or of the people thereof, to recover a penalty imposed by way of punishment for a violation of a statute of the State, "the courts of the United States . . . having no power to execute the penal laws of the individual States."\textsuperscript{148}

Similar principles barred the initiation of state civil enforcement suits outside of a state’s own courts during the nineteenth century as well.\textsuperscript{149} As noted above, the Court often considered such actions penal in nature and therefore cases that the courts of other governments were not required to entertain.\textsuperscript{150} In Wisconsin v. Pelican Insurance Co.,\textsuperscript{151} for example, the Court refused to take original jurisdiction of an action to enforce a state court judgment against an out-of-state insurance company for failure to file annual statements required by state law.\textsuperscript{152} Although the case otherwise satisfied the requirements for original jurisdiction,\textsuperscript{153} the Court determined that the underlying suit was sufficiently close to a criminal enforcement action to come within its maxim against

\textsuperscript{148} Id. at 672-73 (quoting Gwin, 43 U.S. (2 How.) 29, 37 (1844)); see also Gwin, 43 U.S. (2 How.) at 36-37 (stating that although Congress had adopted state procedures for use in federal courts, state act providing for 25% damages against sheriff who failed to pay over money received in execution was a penalty and would not apply to federal marshal).

\textsuperscript{149} Wisconsin v. Pelican Ins. Co, 127 U.S. 265, 289 (1888), overruled in part by Milwaukee Country v. M.E. White Co., 296 U.S. 268 (1935). Sometimes decisions based on other grounds seem influenced by a reluctance to allow state enforcement proceedings outside of the state’s own courts. See, e.g., Minnesota v. Northern Sec. Co., 184 U.S. 199, 234-35 (1902) (holding that essential parties were missing in suit where state attempted to block merger of competing railroads under its statute and therefore declining to decide whether this was a suit by a state to enforce its penal laws); Alabama v. Burr, 115 U.S. 413, 428-29 (1885) (sustaining demurrer to original suit to collect statutory liability of shareholders because allegations were insufficient under the statute and declining to consider other grounds for dismissal).

\textsuperscript{150} See, e.g., Huntington, 146 U.S. at 670-73; Gwin, 43 U.S. (2 How.) at 37. The federal courts within a state exercised to a certain extent the same powers as state courts, provided there was subject matter jurisdiction over the controversy. See Grant v. A.B. Leach & Co., 280 U.S. 351, 361-62 (1930) (holding in suit by Ohio receiver in Ohio federal court that rule prohibiting chancery receiver from suing in foreign jurisdiction was inapplicable); cf. Moore v. Mitchell, 281 U.S. 18, 23 (1930) ("[S]o far as concerns [Indiana tax collector's] capacity to sue [in New York federal district court], that court is not to be distinguished from the courts of the State of New York.").


\textsuperscript{152} See Pelican Ins., 127 U.S. at 299-300.

\textsuperscript{153} Id. at 287.
interjurisdictional enforcement of penal laws. The Court distinguished the immediate case from one in which the King of Spain had sued to recover duties imposed by Spanish revenue laws. The Pelican Insurance Court said that the suit involving the King of Spain was not based directly on the revenue laws of a foreign country but rather was akin to an action in assumpsit, which the federal courts could hear. Thus, a common-law interest might allow a state to litigate outside of its home court, whereas a sovereignty interest in enforcing its statutes would not. The Court's refusal to entertain Pelican Insurance, a suit merely to enforce a judgment entered in a prior state-court enforcement action, suggests that any attempt to enforce state laws directly in the Supreme Court would have been even less hospitably received.

c. Exceptions to the Nonlitigability of Enforcement Suits

In the nineteenth century, there were several exceptions to the rule against litigating criminal and civil enforcement suits in the courts of another sovereign. These exceptions, however, proved the rule of nonlitigability. For example, early federal legislation provided that certain federal actions for fines and perhaps other criminal matters could be enforced in state courts. The practice, however, was short-lived. Many states concluded that they lacked the power to hear such cases, and the Court subsequently interpreted state courts' entertaining such actions as a matter of comity

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154 Id. at 290-91, 299-300; see also Huntington, 146 U.S. at 672-73 (stating that penal laws that need not be enforced by other states encompass all suits for recovery of monetary penalties).

155 See Pelican Ins., 127 U.S. at 290 (distinguishing King of Spain v. Oliver, 14 F. Cas. 571 (C.C.D. Pa. 1816) (No. 7,812); King of Spain v. Oliver, 14 F. Cas. 572 (C.C.D. Pa. 1816) (No. 7,813); and King of Spain v. Oliver, 14 F. Cas. 577 (C.C.D. Pa. 1810) (No. 7,814)).

156 Id. at 290. In Oklahoma v. Atchison, T. & S.F. Ry., 220 U.S. 277 (1911), the Court rejected a challenge to railroad rates applied in Oklahoma as not complying with Kansas law, reasoning that the State of Oklahoma could not seek to enforce its own railroad rates by a suit in the original jurisdiction of the Supreme Court, because it lacked a sufficient individualized interest. Id. at 286, 289. The Court reached a similar result in an original jurisdiction suit in which Oklahoma brought a state statutory action against a shareholder of a failed bank. See Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 396 (1938). In Cook, Oklahoma alleged that it was a proper plaintiff because state law authorized the suit and established the state's economic policy protecting depositors and creditors of the bank. Id. at 391.

157 See Warren, supra note 51.
rather than compulsion. Some current commentators cite these cases as supporting an inference that the federal government has broad powers to require states to use their governmental machinery to enforce federal penal laws or to implement federal programs, but such reliance may be misplaced as a historical matter.

Another exception arose from federal legislation dating back to 1815 that, in order to protect the defendants from state hostility, allowed the removal to federal court of state prosecutions against federal officers or others acting under various federal statutes. These removal statutes allowed some state criminal actions to proceed in federal court in violation of the principle against interjurisdictional enforcement of penal laws. Reconstruction legislation provided additional possibilities for the removal of civil and criminal actions, for example, where parties claimed they were "denied or [could not] enforce" certain federal equal rights guaranties in the state courts. Furthermore, between 1875 and 1894, the Court regularly allowed removal of state civil enforcement actions where the defendant raised federal law defenses under the provision for removal of federal question cases; during that period, a federal defense could provide grounds for "federal question" removal.

158 For the Court's own retrospective on these cases, see, e.g., Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108-09 (1861), overruled by Puerto Rico v. Branstad, 483 U.S. 219 (1987); see also James D. Barnett, The Delegation of Federal Jurisdiction to State Courts by Congress, 43 Am. L. Rev. 852, 867-68 (1909) (noting tradition of state court refusals to entertain federal penal actions); Collins, supra note 45 (manuscript at 40-52) (same).

159 See Powell, supra note 53, at 661-64 (arguing that the Framers thought Congress could use state instrumentalities to govern); Prakash, supra note 53 (same).

160 See Collins, supra note 45 (manuscript at 43-50).


158 For the Court's own retrospective on these cases, see, e.g., Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108-09 (1861), overruled by Puerto Rico v. Branstad, 483 U.S. 219 (1987); see also James D. Barnett, The Delegation of Federal Jurisdiction to State Courts by Congress, 43 Am. L. Rev. 852, 867-68 (1909) (noting tradition of state court refusals to entertain federal penal actions); Collins, supra note 45 (manuscript at 40-52) (same).

159 See Powell, supra note 53, at 661-64 (arguing that the Framers thought Congress could use state instrumentalities to govern); Prakash, supra note 53 (same).

160 See Collins, supra note 45 (manuscript at 43-50).


The Court apparently believed that, because these actions originated in state courts, the states were empowered to continue to litigate sovereignty interests in federal court even if they could not have filed the actions there in the first instance.\textsuperscript{164} Removal of cases with federal question defenses thus was consistent with the suggestion in \textit{Cohens} that state enforcement actions might be outside of the federal judicial power when filed, but might subsequently come within it. More significantly, when the Court allowed removal of enforcement actions prior to a final judgment on the merits in state court, it frequently characterized federal jurisdiction as an unusual incursion on the independence of state administration necessary to vindicate supreme federal law.\textsuperscript{165}

Moreover, the Court severely limited removal of enforcement suits other than those involving state prosecutions of federal officers. As Reconstruction drew to a close, the Court eviscerated civil rights removal by requiring the denial of federal equal rights guaranties that would allow for removal to arise from the operation of a state statute. Customary practices and ad hoc discrimination that lacked explicit statutory authorization would not suffice for removal.\textsuperscript{166} Not long before that, the Court denied federal removal against railroad that raised a federal defense); see also Michael G. Collins, The Unhappy History of Federal Question Removal, 71 Iowa L. Rev. 717, 727 (1986) (noting nonoperation of “well-pleaded complaint” rule on removal and suggesting that Congress intended removal provisions as protections against state regulation).

\textsuperscript{164} See \textit{Cohens}, 19 U.S. (6 Wheat.) at 402-03; \textit{Martin v. Hunter's Lessee}, 14 U.S. (1 Wheat.) 304, 349 (1816) (stating that removal “presupposes an exercise of original jurisdiction to have attached elsewhere” and is “familiar in courts acting according to the course of the common law in criminal as well as civil cases,” but is “always deemed in both cases an exercise of appellate, and not original jurisdiction”); see also \textit{The Mayor v. Cooper}, 73 U.S. (6 Wall.) 247, 251, 253-54 (1868) (upholding constitutionality of act providing for removal of civil and criminal actions where the defendant alleged that his acts were under orders of the President, Secretary of War, or other military commander, and stating that removal rests on same foundation as appeal under the 1789 Judiciary Act). But cf. \textit{Railway Co. v. Whitton's Adm'r}, 80 U.S. (13 Wall.) 270, 287 (1872) (questioning Justice Joseph Story's reasoning in \textit{Martin} and suggesting that removal may “more properly be regarded as an indirect mode by which the Federal court acquires original jurisdiction of the causes”).

\textsuperscript{165} See \textit{Huntington}, 146 U.S. at 672.

\textsuperscript{166} See \textit{Virginia v. Rives}, 100 U.S. 313, 319-22 (1880); see also id. at 337 (Field, J., concurring) (doubting that the Framers contemplated “the possibility of a State being required to assert its authority over offenders against its laws in other tribunals than those of its own creation, and least of all in an inferior tribunal of the new government”). The Court also found posttrial removal unconstitutional in a civil enforcement action because it
courts the ability in many cases to entertain original prosecutions of state law criminal violations on behalf of victims who were denied or could not enforce their "rights" in state court.\textsuperscript{167} Similarly, decisions requiring that the federal question appear on the face of the plaintiff's well-pleaded complaint\textsuperscript{168} and eventually scrapping federal defense removal\textsuperscript{169} largely served to exclude state civil enforcement actions from federal trial courts. Indeed, one reason for the end of federal defense removal may have been the Court's desire to keep state civil enforcement actions out of the federal trial courts.\textsuperscript{170} Taken together, these developments suggest that removal of state enforcement proceedings—civil and criminal—was indeed exceptional.

3. Public Interests

In addition to prohibiting states from litigating their Governing and Enforcement Interests, the Court for many years also prohibited states from protecting the aggregated interests of their citizenry (i.e., Public Interests) in federal court. Again, such suits did violated the Seventh Amendment. See Justices v. Murray, 76 U.S. (9 Wall.) 274 (1870). Such removal might have resulted in a kind of trial de novo by state officials in federal courts. Congress followed suit by eliminating the posttrial removal provisions of the various Reconstruction era civil rights acts in its 1874 revision of the federal statutes. See Georgia v. Rachel, 384 U.S. 780, 795 (1966) (referring to Revised Statutes of 1874, ch. 7, § 641, 18 Stat. 114-15).

\textsuperscript{167} See Blyew v. United States, 80 U.S. (13 Wall.) 581 (1872); see also Robert D. Goldstein, Blyew: Variations on a Jurisdictional Theme, 41 Stan. L. Rev. 469, 478-83 (1989) (discussing Blyew and its historical context).

\textsuperscript{168} See Metcalf v. Watertown, 128 U.S. 586 (1888). The requirement that the federal question appear on the face of the plaintiff's well-pleaded complaint at first merely precluded an initial filing in federal court but did not preclude removal by either party if the defendant pleaded a federal defense. See id. at 588-89; see also Collins, supra note 163, at 731-33 (discussing Metcalf and the origin of the well-pleaded complaint rule).

\textsuperscript{169} See Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894). The Court interpreted the 1887 and 1888 amendments to the Judiciary Act as foreclosing removal unless the plaintiff could have initially filed the suit in a federal trial court. Id. at 461-62.

\textsuperscript{170} See Collins, supra note 163, at 760-61 & 761 n.199; cf. Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894) (stating that state suit for taxes normally should be in state court except where Congress provided removal as necessary measure to secure the supremacy of federal law, and remanding removed case because there was no federal question on face of the complaint and because a state was not a citizen of a state for purposes of diversity); Railroad Co. v. Mississippi, 102 U.S. 135, 142-44 (1880) (Miller, J., dissenting) (arguing that Congress intended removal only where the cause of action was federal).
not seek to vindicate individual common-law interests, and furthermore they resembled state attempts to enforce specific statutes outside of a state's own courts.

a. State Nuisance Cases

The prohibition against states' litigating the general interests of their citizens was chiefly evident in nuisance cases. At common law, governments could pursue public nuisance actions in their own courts, framing the actions as a common-law prosecution\(^1\) or a civil suit for an injunction.\(^2\) A private party also could sue for an injunction or damages on a public nuisance theory, but only if he showed a "particularized" or special injury to his person or property.\(^3\)

Governmental standing to bring nuisance suits at common law arguably would have justified states in bringing actions in the Supreme Court to enjoin interstate public nuisances, where the ability to allege a common-law action was critical to jurisdiction. Militating against jurisdiction, however, was the perception that government actions to enjoin public nuisances for the public benefit were similar to enforcement suits, which were of course forbidden to states in federal court.\(^4\) In all such cases, the government attempted to represent the general interests of its citizens outside its own courts.\(^5\) Therefore, a state suing in the Supreme Court for

\(^{1}\) The federal government, however, could not prosecute under a common-law crime theory. See supra note 25.


\(^{3}\) See Alexandria Canal, 37 U.S. (12 Pet.) at 97-98; Prosser, supra note 172, § 86, at 572; id. § 88, at 586; id. § 90, at 604.

\(^{4}\) See Paul M. Kurtz, Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor, 17 Win. & Mary L. Rev. 621, 640 (1976) (noting that "[e]arly English common law decisions characterized public nuisance as a low grade criminal offense that generally encompassed the blocking of a public highway or a navigable stream"); see also Prosser, supra note 172, § 86, at 573 (noting that public nuisance is a "catch-all criminal offense").

\(^{5}\) See Alexandria Canal, 37 U.S. (12 Pet.) at 99 (holding that city suing to enjoin building of piers in Potomac must show special damage to own property and that city had no powers as corporation to represent its citizens). Perhaps these suits, although brought by the states, were considered forbidden due to the prohibition on prosecution of common-law crimes in the federal courts.
public nuisance during most of the nineteenth century had to pursue a theory that it was suing not in an enforcement capacity but rather on the same grounds as those on which a private party could sue for public nuisance. Accordingly, a state could establish standing only when it could show that it had suffered special or particularized damage to its own property or instrumentalities.

Thus, when Pennsylvania sought an injunction against a bridge company for obstructing navigation on the Ohio River, the Court sustained the nuisance action because the state, as would a private party, had shown a particular injury. Justice John McLean noted for the majority that the state claimed "nothing connected with the exercise of its sovereignty," but rather "ask[ed] from the court a protection of its property, on the same ground and to the same extent as a corporation or individual may ask it." When the Court denied South Carolina an injunction against Georgia to stop a congressionally authorized project that deepened Georgia's side of the Savannah River at the expense of South Carolina's side, the Court noted that its decision to entertain the case should not be taken as authorizing a nuisance suit by a state in the Supreme Court without a showing of "some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court."

176 Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 577 (1851). The bridge was located in Virginia. Id. at 564.
177 Id. at 561-62; see also Alexandria Canal, 37 U.S. (12 Pet.) at 99 ("The [City of Georgetown] must, as in the case of private persons, to maintain their position in a court of equity for relief against a public nuisance, have averred and proved . . . that they thereby had suffered a special damage.").
178 Wheeling & Belmont Bridge, 54 U.S. (13 How.) at 561. Justice Peter Daniel protested in dissent that the state had not shown a special injury. See id. at 594-95 (Daniel, J., dissenting); see also id. at 589-93 (Taney, C.J., dissenting) (reasoning that Pennsylvania could only sue for private injuries, and that its damage was too trivial to support the requested jurisdiction). The state alleged that it suffered injury from a loss of tolls on its public works because fewer steamships could travel on the Ohio River past the Wheeling Bridge. See id. at 560. In contrast to the decision in Wheeling & Belmont Bridge, the Court in Alexandria Canal held that the city's allegations of damage to the wharves and harbors on which the city itself apparently had spent substantial sums did not state a claim of special damages. Alexandria Canal, 37 U.S. (12 Pet.) at 94, 99. The special injury in Wheeling & Belmont Bridge arguably bears a certain resemblance to the loss of tax revenues in the modern case Wyoming v. Oklahoma, 502 U.S. 437 (1992).
179 South Carolina v. Georgia, 93 U.S. 4 (1876).
180 Id. at 14.
b. Federal Government Nonstatutory Actions

Related to the prohibition against a state's litigating in federal courts the general interests of its citizens was a prohibition of federal executive extrastatutory litigation that purported to vindicate the Public Interest. As discussed above, the Court early on prohibited federal prosecution of common-law crimes, thereby restricting the ability of the federal executive and judiciary to define the public interest without legislative concurrence.\(^{181}\) The Court allowed federal attorneys to pursue some extrastatutory civil suits, but only those seeking to vindicate common-law interests.\(^{182}\)

The Court's discomfort with general governmental power to pursue extrastatutory actions was particularly evident in government-initiated suits to revoke land patents and invention patents obtained by fraud. In England, a line of precedent allowed suits by the Crown to revoke such patents for fraud on the part of the recipient.\(^{183}\) But in the early Republic, the idea of recognizing executive power to pursue such general interests by analogy to the Crown made the Court uneasy. Consequently, the Court allowed government patent revocation suits by reasoning that a private grantor of land who had been defrauded could have sought a revocation of his grant in equity.\(^{184}\) Thus, when the Court allowed the state and federal governments to pursue actions that might have been characterized as vindicating the general public interest, it consistently did so in reliance on a private law rationale.

\(^{181}\) See supra note 25.

\(^{182}\) See supra note 61 and accompanying text.


\(^{184}\) See, e.g., United States v. Minor, 114 U.S. 233, 240 (1885); Hughes, 52 U.S. (11 How.) at 568; cf. United States v. Stone, 69 U.S. (2 Wall.) 525 (1865) (stating that the United States could bring equity bill to declare patents for land void when land was reserved for military camp). Similarly, in an invention-patent-revocation case in which the Court disallowed a suit brought by a private claimant, the Court noted that the government, "as the party injured, . . . is the appropriate party to assert the remedy or seek relief." Mowry v. Whitney, 81 U.S. (14 Wall.) 434, 441 (1872); cf. Moore v. Robbins, 96 U.S. 530, 533 (1878) (noting in suit between private parties that the United States can sue for fraud and mistake in issuing patent if the government is the party injured).
E. Normative Attractions in the Nonlitigability of Sovereignty Interests

The principle that a state could not sue to vindicate sovereignty interests outside of its own courts drives the scheme for state standing that operated during most of the nineteenth century. Parts of this common-law approach to state standing may seem rather foreign, whereas others appear familiar. For example, limiting state enforcement suits to the state’s own courts is still ingrained in our federal structure.\(^\text{185}\) The doctrine prohibiting states from litigating outside their own courts to vindicate an injury to Governing Interests and Public Interests survives to a certain extent in the modern doctrine prohibiting the states from asserting *parens patriae* standing against the federal government.\(^\text{186}\) The modern Court has also suggested that states should not be able to bring declaratory judgment actions to test the conformity of their laws to federal law and the Constitution, largely because of the availability of enforcement suits in their own courts.\(^\text{187}\)

Unlike in the nineteenth century, however, today states can sometimes sue to vindicate some interests in governing\(^\text{188}\) and the generalized interests of their citizens.\(^\text{189}\) Early Court decisions that disallowed litigation of such sovereignty interests have suffered a drubbing at the hands of current scholars. Their criticism focuses on the very fact that private parties could have litigated the same questions, provided they followed the constraints of common-law pleading.\(^\text{190}\) For example, the Court’s decisions disallowing state challenges of Reconstruction legislation have been criticized in

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185 States regularly bring enforcement actions in their own courts, and the prohibitions against removal of such actions, together with abstention doctrines, generally prevent the party against whom enforcement is sought from subsequently acquiring a federal trial forum. See, e.g., Younger v. Harris, 401 U.S. 37 (1971). See generally Hart & Wechsler, supra note 5, at 1383-1438 (discussing *Younger* and related cases). Current practice allows government officials to appear in the courts of other sovereigns to some extent. See infra notes 451-52 and accompanying text. In addition, enforcement actions are occasionally removable, particularly those against federal officers. See 28 U.S.C. § 1442 (1988).

186 See infra text accompanying notes 415-19.


190 See, e.g., Monaghan, supra note 101, at 1367-68.
part because the Court contemporaneously allowed individuals to contest the same legislation in habeas actions.191 Because the real dispute was between the states and the federal government, critics charge that the litigation might as well have proceeded between them rather than await a citizen's habeas action.192 Thus, the prohibition on state litigation of sovereignty interests has been criticized as needless formality.

The question remains, then, whether anything can justify the early Court's approach to the problem. We believe that several justifications support the Court's approach, although the Court itself did not always explicitly articulate them.

I. The Requirement that Governments Pursue Enforcement Interests in Their Own Courts

Taken as a whole, the system of state standing premised on the nonlitigability of sovereignty interests outside the state's own courts reinforced both the structural guaranties of the Constitution and individual rights. Requiring the state and federal governments to originate enforcement actions in their own respective courts helped to maintain the vitality of the states as distinct political communities,193 thereby reinforcing the values that underlie federalism, including the diffusion of power and experimentation.194

191 See supra Part I.D.1.c.
192 See, e.g., Monaghan, supra note 101, at 1367-68 (arguing that the Court's reasoning in these cases was "wholly unsatisfactory" because "the real contestants were Congress and the states").
194 The separation of state and federal administration is, of course, not a matter of absolutes. See, e.g., U.S. Const. art. I, § 8, cl. 16 (providing that states are to appoint officers and train militia according to discipline prescribed by Congress); see also Amar, supra note 35, at 1496 (discussing the provision). For areas in which the federal government more recently has encroached on the independent administration of state governments, see Deborah J. Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 36-70 (1988). Scholars have discussed various textual bases for maintaining some state autonomy. See, e.g., Massey, supra note 54, at 66, 74-75, 87 (discussing 10th Amendment as source of state sovereign
Thus, by sanctioning state court refusals to allow federal prosecutions in state courts, the Court prevented the states from becoming bureaucratic arms of a central administration.\textsuperscript{195} And prohibiting state enforcement suits in federal courts prevented states from becoming dependent on federal instrumentalities for the enforcement of their own laws.\textsuperscript{196}

While strengthening state vitality, the Court's insistence on discrete administration of each government's public law by its own agents also limited the power of both the state and federal govern-

\textsuperscript{195} See Collins, supra note 45 (manuscript at 48-50).

\textsuperscript{196} For example, routine removal of state prosecutions to federal court could make federal judicial approval a requirement for state prosecution. Appellate review in the Supreme Court and postconviction habeas now serve as a subsequent check on state prosecutorial power, but may be considered more respectful of federalism. See Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1036 (1977) (arguing that the "Court chose redundancy and indirection as its remedial strategy in order to mediate the pragmatic perspective of criminal administration and the idealistic vision" of constitutional rights).
ments.\textsuperscript{197} Neither a state government nor the federal government could routinely employ the enforcement machinery of the other’s courts to assist in enforcing general governmental interests.\textsuperscript{198} Moreover, separate lines of enforcement clarified the lines of responsibility, thus enhancing government accountability to its citizens.\textsuperscript{199} For example, the federal government’s responsibility for enacting unpopular criminal laws could be obscured if state courts enforced such laws, just as state responsibility for state laws could be obscured if states could easily use federal courts for enforcement. Thus, confining enforcement actions to a sovereign’s own courts at once enhances the vitality of states as self-sufficient institutions while limiting state and federal power.\textsuperscript{200}

2. Nonlitigability of Governing Interests

Although the virtues of having visible lines of enforcement of state and federal law may be apparent, the benefits of the related prohibition against state suits seeking to vindicate a claim to govern to the exclusion of other sovereigns, as in the Reconstruction cases and Cherokee Nation,\textsuperscript{201} are less obvious. But this prohibition also reinforced federalism interests as well as strengthened

\textsuperscript{197} The use of tort suits against individual officers who are clearly identified with another sovereign also increases accountability. See Amar, supra note 35, at 1494, 1504. Tort suits against federal officers in state courts, however, now are generally subject to removal and federal preemption. See Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 6, 102 Stat. 4563, 4564-65 (amending 28 U.S.C. § 2679 (1988)).

\textsuperscript{198} When a state enlists the assistance of a federal court in pursuing its sovereignty interests, the state effectively may be conceding the inefficacy of its own powers to bring an enforcement suit in its own courts that would raise similar issues.

\textsuperscript{199} See Merritt, supra note 194, at 17 & n.99 (claiming that Congress may have incentives to escape fiscal responsibility by forcing state and local governments to administer national programs at state expense, and to avoid political censure by forcing state government to enact and enforce controversial measures). But see Levy, supra note 193, at 530-31 (suggesting that state administration of federal programs may not undermine accountability).

\textsuperscript{200} An analogy may be made to the separation of powers context. Although separation of powers implies that the concurrence of all branches may be required for the final, legitimate exercise of state power, the vitality of the legislative and judicial branches is nevertheless thought to require implicit contempt power. In other words, some separate enforcement power is traditionally implied for the self-preservation of the legislative and judicial branches. See McGrain v. Daughtery, 273 U.S. 135 (1927); Kilbourn v. Thompson, 103 U.S. 168 (1881).

\textsuperscript{201} See supra notes 81-95, 101-14 and accompanying text.
individual rights and the separation of powers. It did so by directing contests over which of two governments could properly exercise power to suits between individuals and government rather than to suits between governments.

a. Reinforcement of Federalism Values and Individual Rights

Because governments traditionally could not litigate between themselves conflicting claims to govern, such claims arose when one or both governments exercised their power against individuals. The Court considered these individuals the proper parties to challenge legislation, and it refused to consider suits between the two governments based solely on their regulation of the same individuals. Stated differently, the Court found no legal relationship between the two competing governments.

The resulting government-versus-individual suit reinforced the systemic federalism principle that the federal and state governments acted primarily on the people directly rather than upon each other. But perhaps more importantly, the preference for state-versus-individual actions over government-versus-government actions enhanced the status of the individual as a rights-holder against government. In enforcement actions, a private party could defensively question the constitutionality of the government’s exercise of power. In common-law actions brought by a private party, the government officer sued as an individual could raise governmental power as a defense of legal justification, and the regulated party (the plaintiff) could raise the issue of unconstitutionality or some other defect in justification to overcome the defense. Among the constitutional issues that such plaintiffs could raise to invalidate government action were violations of federalism principles and other structural matters.

202 See Alexander M. Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79, 88-89 (arguing that allowing state to litigate the constitutional validity of national law applicable in its territories would be a fundamental denial of the principle that “the federal government is a sovereign coexisting in the same territory with the states,” acting directly on citizens).

203 For example, a criminal defendant could allege that a state law encroached on powers that were exclusively federal. See, e.g., Ward v. Maryland, 79 U.S. (12 Wall.) 418, 426-27, 432 (1871) (invalidating state sales tax on Commerce Clause grounds); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 48-49 (1868) (invalidating tax on passengers leaving states).
The Court's acceptance of an individual's ability to raise structural constitutional issues in contests with governments\textsuperscript{204} may be due at least in part to the nonrecognition of a sovereign's right to litigate such questions. This preference for having individuals rather than government police even structural guaranties expresses that individuals are the intended beneficiaries of those guaranties. One may argue that allowing the state to assert that the federal government overstepped its powers was not necessarily mutually exclusive of individual claims. Nevertheless, the Court could more easily have denied individuals standing to raise structural challenges had it historically viewed the states as principal rights-holders as to limitations of federal power.

\textit{b. Reinforcement of the Separation of Powers}

The Court's refusal to allow states to litigate their Governing Interests also reinforced the constitutional requirement, grounded in the separation of powers, that federal courts hear only cases and controversies. The prohibition against governments' litigation of their competing claims to govern generally kept them from judicially challenging the constitutionality of one another's laws. The prohibition on litigating issues of sovereignty, therefore, closely tracked the prohibition on litigating questions of the constitutionality of statutes \textit{simpliciter}.\textsuperscript{205} An 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

\textsuperscript{204} See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (hearing father's suit to enjoin enforcement of federal child labor law as violation of 10th Amendment), overruled by United States v. Darby, 312 U.S. 100 (1941); Pennoyer v. Neff, 95 U.S. 714 (1877) (challenging personal jurisdiction on grounds of structural and due process defects).

\textsuperscript{205} See \textit{Stanton}, 73 U.S. (6 Wall.) at 75 (stating that a court can have "no right to pronounce an abstract opinion upon the constitutionality of state law" and that such law must be "brought into actual or threatened operation, upon rights properly falling under judicial cognizance" (quoting \textit{Cherokee Nation}, 30 U.S. (5 Pet.) at 75 (Thompson, J., dissenting))). Some commentators have suggested that the standard of deference applied to the underlying legal issues is more important to maintaining separation of powers than are restrictions on justiciable injuries. See, e.g., Nichol, Justice Scalia, supra note 1, at 1163-64, 1168 (suggesting that "[i]f the workings of American government are indeed 'overjudicialized,' it would seem more sensible, and more direct, to craft increasingly deferential standards of review on the merits rather than to completely bar Congress from recognizing certain interests"). But cf. Nichol, Disintegration, supra note 1, at 1915 (stating that standing involves parameters of a constitutional case).
threatened injury to what the Court would have considered a litigable interest.\textsuperscript{206} Government action typically could be tested only in cases involving a completed or imminent physical trespass against person or property. This scheme gave meaning to the Framers’ rejection of a Council of Revision\textsuperscript{207} because it insisted on a traditional injury before declaring statutes unconstitutional.

Although the underlying issues of the legality of the exercise of power by a particular government might well later be litigated in a proper case, the occasions for such judicial interference would nevertheless be limited by the requirement of an injury.\textsuperscript{208} In addition, because the judicial mandates that a common-law injury could occasion were more likely to address a tractable part of reality, judicial power was further limited.\textsuperscript{209} But at the same time, the requirement of a traditional case reinforced judicial power by minimizing direct clashes between the judiciary and the other branches of government. Indeed, as one scholar has observed, justiciability

\textsuperscript{206} Of course, the concept of injury is manipulable. See, e.g., Sunstein, After \textit{Lujan}, supra note 1, at 204. In addition, some types of cases known at common law apparently did not require damage to an individual interest. See Winter, supra note 12, at 1396-1406; see also Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 319-22 (1936) (discussing cases); Raoul Berger, Standing To Sue in Public Actions: Is It a Constitutional Requirement?, \textit{78 Yale L.J.} 816, 819-20 (1969) (noting that strangers could bring suits in courts of Westminster to attack acts in excess of jurisdiction); Caminker, supra note 23 (discussing \textit{qui tam} actions); Louis L. Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, \textit{116 U. Pa. L. Rev.} 1033, 1035-36 (1968) (recounting that prerogative court jurisdiction of King's Bench could be set in motion by stranger to official action and that citizen's mandamus and taxpayer actions have been common in states, and giving examples of Supreme Court's taking jurisdiction of cases with non-Hohfeldian plaintiffs). Although some types of cases did not require a focused individual injury, this does not necessarily imply that a generalized injury would suffice without regard to the specific type of lawsuit.

\textsuperscript{207} See 1 Farrand's Records, supra note 33, at 21, 94, 131 tbl., 138-40; 2 id. at 71, 80; Redish, supra note 20, at 104 (claiming that abandoning the case or controversy requirement would "ignore the framers' obvious attempt to distinguish the judiciary's operation from that of the two representative branches of government"); Fallon, supra note 20, at 951 n.8. But cf. Nichol, Rethinking, supra note 1, at 93-94 (noting that Council of Revision differed from allowing challenges in courts to unconstitutional legislation because Council would have been part of the enacting process and would have addressed the wisdom of legislation).

\textsuperscript{208} See Scalia, supra note 1, at 881, 892 (claiming that the standing doctrine can indeed operate to exclude issues from judicial review, but that even if standing never excluded particular issues, the relationship among the branches is implicated nevertheless by when and at whose instance courts address these issues).

\textsuperscript{209} See Monaghan, supra note 101, at 1365-66.
doctrines "allowed the current dimensions of judicial review to become established at an acceptable political pace." Thus, just as state power is at once limited and reinforced by the requirements of separate enforcement and administration, so too is judicial power at once limited and reinforced by maintaining the boundaries of a "case."

Currently, there is a rival to the traditional private law model of cases and controversies in so-called public law litigation, in which—as discussed below—the Court sometimes sees its primary role as one of hearing head-on disputes about sovereignty and constitutionality, unleavened by context. That we now have different views of a case, however, suggests the illegitimacy neither of the earlier, narrower view nor of the current, more expansive one. Rather, because a case was originally a creature of the common law, its meaning might change over time. Nevertheless, as discussed more fully below, the Court's early approach may provide some lessons for present efforts to find coherency in the concept of a case.

3. Nonlitigation of Public Interests

a. Reinforcement of Federalism Values and Separation of Powers

Prohibiting governments from litigating on behalf of general citizen interests (i.e., Public Interests) promoted similar goals as did

210 Id. at 1366 (emphasis omitted). We do not mean to imply, however, that Professor Monaghan recommends adhering exclusively to a private rights model for constitutional adjudication. See id. at 1375-79.

211 See Susan Bandes, The Idea of a Case, 42 Stan. L. Rev. 227, 285 (1990) (arguing that the primary role of federal courts is to interpret and enforce the Constitution and federal law); Monaghan, supra note 101, at 1370 (arguing that the Court has a special function as "final authoritative interpreter of constitutional text"); Fallon, supra note 20, at 950-51 (stating that many maintain dual-mindedness as to the functions of the Court as both common-law court and Council of Revision); cf. Richard A. Matasar, Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction, 71 Cal. L. Rev. 1399, 1478 (1983) (stating that "case" or "controversy" refers to limits of joinder of claims and parties set by lawfully adopted procedural rules).

212 See Bandes, supra note 211, at 283 (claiming that the adoption of common-law approach to the case chooses to treat the language of Article III as immutable rather than capable of evolution); cf. Gordon S. Wood, The Fundamentalists and the Constitution, N.Y. Rev. Books, Feb. 18, 1988, at 33, 40 (asserting that the historical process is a source of legitimacy in constitutional interpretation).
both requiring that states pursue enforcement actions in their own courts and prohibiting them from litigating competing claims to govern. Prohibiting state attempts to vindicate Public Interests in the federal courts effectively redirected states to litigate in their own courts, thereby advancing federalism values.  

The prohibition against government litigation in federal courts of General Interests also reinforced separation of powers. This was particularly true of the prohibition against federal executive actions to litigate nonstatutory claims, that is, claims not based on statutes that specifically authorize government litigation. Allowing such claims would have expanded executive and judicial power at the expense of Congress'. The Court's early prohibition of federal common-law crimes pointedly restricted the ability of the executive and the judiciary to define the public interest without legislative concurrence.  

Although the Court allowed federal attorneys to pursue certain common-law civil actions, it restricted the nature of the interests litigable to those at common law, which kept the executive branch from pursuing in the courts its own version of the general welfare.

Cases brought by states could have presented a similar problem had states' attorneys attempted to litigate extrastatutory state interests in federal court. State legislatures, however, apparently expressly authorized states' attorneys to bring and defend particular actions in the Supreme Court. Indeed, a state plaintiff's failure to demonstrate such authority would evoke an objection to which the state would respond by showing legislative authorization. Such nineteenth-century legislative micromanagement

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213 The prohibition against states' litigating their citizens' general interests in federal courts limited states' power by denying them access to federal judicial power as an instrument for implementing the general interests of their citizens. Additionally, this prohibition enhanced accountability by requiring states to use the state judicial machinery. See supra notes 198-200 and accompanying text. States gained strength, however, to the extent that they did not develop dependence on federal instrumentalities.

214 See supra note 25 and accompanying text.

215 See, e.g., Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 716 (1838) (noting that defendant state legislature adopted resolution authorizing the appearance of the state in the suit and the employment of counsel by the government).

216 See Texas v. White, 74 U.S. (7 Wall.) 700, 719 (1869) (addressing defendant's claim that insufficient authority was shown for suit), overruled by Morgan v. United States, 113 U.S. 476 (1885); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 560 (1851) (noting declaration of both houses of Pennsylvania legislature that the state's
reflected tight state legislative control over policies and purses.\textsuperscript{217} In modern cases, government attorneys may use litigation to pursue a wide variety of state interests, often unrestricted by the common law or statute. This current practice reflects the expansion of executive power to define the public interest independently of the legislature. Older practices, by contrast, reflected shared assumptions that executive power to act outside of specific legislative authorization was limited.\textsuperscript{218}

\subsection*{b. Reinforcement of Individual Rights}

Perhaps more importantly, the prohibition on states' representation of the general interests of their citizens—and of sovereignty interests more generally—helped to keep governmental power and private rights in conceptually distinct categories, thereby enhancing individual rights in the context of suits between individuals and government.\textsuperscript{219} For example, in nuisance cases such as Pennsylvania \textit{v. Wheeling & Belmont Bridge Co.},\textsuperscript{220} the Court refused to allow Pennsylvania to vindicate interests different from those of a private plaintiff.\textsuperscript{221} This contrasted with later approaches, described more fully below, in which the Court allowed the states to bring nuisance and other actions against both governmental and private parties where the injury alleged was the injury to their citizens' welfare.\textsuperscript{222} Allowing the states to vindicate the Public Interest in such nuisance suits meant that the Public Interest itself had been reformulated into a litigable claim of right similar to individ-

\begin{footnotesize}
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\item \textsuperscript{218} The foregoing analysis suggests that the injury requirement ordinarily falls out where the legislature has explicitly created a cause of action. But cf. Lujan \textit{v. Defenders of Wildlife}, 112 S. Ct. 2130, 2143-45 (1992) (holding that Congress cannot grant standing to citizens absent injury-in-fact); Muskrat \textit{v. United States}, 219 U.S. 346, 361-63 (1911) (refusing to review constitutionality of statute increasing number of persons entitled to share in final distribution of tribe's land and funds despite congressional authorization).
\item \textsuperscript{219} Cf. Nichol, Disintegration, supra note 1, at 1944-45 (criticizing standing for congressmen based on claims of alleged diminution of government power, which could allow for analogous claims by executive and judicial branches).
\item \textsuperscript{220} 54 U.S. (13 How.) 518 (1851).
\item \textsuperscript{221} Id. at 564.
\item \textsuperscript{222} See infra notes 227-32 and accompanying text.
\end{itemize}
\end{footnotesize}
ual claims of right. The defendants in such civil cases now found themselves at the disadvantage of opposing a plaintiff seeking to vindicate the rights of political majorities.223

A conceptualization that government has rights on behalf of the many not only could disadvantage defendants in civil nonenforcement suits, but also could give a new character to traditional enforcement actions. Previously in enforcement actions the courts kept governmental power and individual rights in separate categories; the individual had been seen as the exclusive rights-holder opposing an exercise of governmental power. Once courts reconceived Public Interests as rights, the individual would claim a right to engage in the activity that the government sought to punish, but the government itself might also claim that it had "rights," or that a majority of the people acting through it had "rights," to regulate the particular activity. Government thus could claim a right to exercise power or to make and enforce laws.

Although scholars may debate whether individual rights and government powers can be treated as commensurable interests,224 the early Court's refusal to do so had its advantages. Distinguishing the rights of individuals from the powers of the majority reinforced the idea that a claim based on a fundamental individual right should not be overcome by a simple claim of general utility,225

223 See, e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230, 238 (1907); see also infra notes 243-44 and accompanying text (discussing Tennessee Copper).

224 See, e.g., Richard H. Fallon, Jr., Individual Rights and the Powers of Government, 27 Ga. L. Rev. 343, 348, 360-61, 390 (1993) (describing that rights and powers are conceptually interdependent and that both represent interests the balancing of which is inevitable); Barry Friedman, Trumping Rights, 27 Ga. L. Rev. 435, 451, 456 (1993) (arguing both that rights and powers are reducible to interests and that although interests are always incommensurable, they must be balanced); see also Akhil R. Amar, Parity as a Constitutional Question, 71 B.U. L. Rev. 645, 648-49 & 649 n.22 (1991) (challenging the notion that "rights" are only on the side of individuals challenging government action).

225 See Ronald Dworkin, Taking Rights Seriously 193-95, 199, 269 (1977). Dworkin states:

It is true that we speak of the "right" of society to do what it wants, but this cannot be a "competing right" of the sort that may justify the invasion of a right against the Government. The existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done. If we now say that society has a right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these
or at least should require an affirmative showing of a heightened governmental interest before it could be overcome. Recognizing a right in government to exercise power tends to equalize power and right. The early Court, by keeping these interests separate, enhanced the citizen’s ability to challenge governmental action.

II. THE LITIGABILITY OF SOVEREIGNTY INTERESTS

The concept of a “case” gradually evolved from a traditional private law model to a public law model—an evolution illustrated below in the context of government-initiated nuisance actions. Nuisance law provided a ready mechanism for such change, given its alternative incarnations as a government-initiated enforcement suit and as a private action. As noted above, the early Court allowed states, like individuals, to bring public nuisance actions upon showing a special or particularized injury. During the first century of the Republic, the general interest of the state in protecting its citizens apparently did not give the state a sufficient litigable interest to originate such an action in federal court. Around the turn of the century, however, the Court quietly began allowing states to vindicate in federal court their general interest in protecting their citizens.

are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the latter rights.

Id. at 194. Dworkin argues that balancing is inappropriate when it takes the form of balancing society’s rights against fundamental individual rights, but may be appropriate where there are competing individual claims of right. See id. at 199; see also Aleinikoff, supra note 19, at 952-58, 986-92 (stating that balancing individual rights against government power implies that “constitutional law as a distinct form of discourse is slipping away” and that constitutional judgments are no longer trumps but merely “card[s] of higher value in the same suit”); Mark V. Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 Mich. L. Rev. 1502, 1509-18 (1985) (discussing critiques of balancing).

226 See Frederick Schauer, A Comment on the Structure of Rights, 27 Ga. L. Rev. 415, 424 (1993) (arguing that Robert Dworkin, Robert Nozick, and Charles Fried do not adequately deal with possibility that deontologically conceived rights may have to be overridden when interests would otherwise have to be sacrificed to a large but not catastrophic extent); id. at 428 (arguing that the right to do X may be right not to have the right to do X infringed without justification of special strength); id. at 430-31 (arguing that the interaction of deontological rights and consequentialist interests does not mean they are reducible to same coin); cf. Kathleen M. Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 Colo. L. Rev. 293, 313-16 (1992) (arguing conceptualist version of rights reflected in strict scrutiny).
The Court thus began permitting states to file original interstate pollution cases under a public nuisance theory without alleging special injury, simply on grounds of injury to the Public Interest. Accordingly, when Missouri sought an injunction against Illinois’ polluting the Mississippi River, the Court noted that no actual property rights of the plaintiff state were involved, but allowed the suit, stating 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.” Cases such as *Missouri v. Illinois* effectively allowed the state as litigant to cross over from its own courts to the Supreme Court and other federal courts.

Around the same time, the Court began allowing federal executive standing to vindicate the Public Interest in nonstatutory actions. In *In re Debs*, the Court upheld federal executive power to pursue, and federal judicial power to issue, an injunction against union officials based on a common-law public nuisance theory. Because the United States Attorney General brought suit in federal court, the enforcement role for the government was less problematic than in state-as-plaintiff cases where the executive sued

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228 See id. at 241.
229 Id.
230 Id.
231 180 U.S. 208 (1901).
232 Cases that limited the reach of *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888), overruled in part by *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), similarly expanded the ability of a state to pursue sovereign interests. These cases indicated that courts should recognize judgments of courts of other states on some penalties, even if the recognizing court was not required to entertain the state enforcement action initially. See, e.g., *Huntington v. Attrill*, 146 U.S. 657, 683-86 (1892) (requiring full faith and credit for judgment of statutory liability of shareholder).
233 158 U.S. 564 (1895).
234 Id. at 586-87, 599; see also *Sanitary District of Chicago v. United States*, 266 U.S. 405, 426 (1925) (allowing Attorney General to bring nuisance suit without statutory authorization based on obstruction of interstate commerce); *New York v. New Jersey*, 256 U.S. 296, 301-02 (1921) (allowing New York to bring suit against New Jersey regarding sewage regardless of the precise boundary line of states in New York Bay because state is proper party to assert rights of health, comfort, prosperity, and value of property in state); id. at 307-08 (allowing United States to intervene based, inter alia, on the interest in interstate commerce that might be affected if the channels of bay were obstructed and on the possibility of damage to United States property). See generally Owen M. Fiss, *The Civil Rights Injunction* 20-21 (1978) (discussing *Debs*).
outside its own courts. But concern that the federal executive not act beyond statutory authority and the related prohibition against federal common-law crimes\textsuperscript{235} counseled against allowing the Attorney General to represent the public.

Although the Court's allowance of the government suit in \textit{Debs} was controversial, it represented a more wide-ranging development in governmental standing. In addition to allowing expanded state standing in original suits, the Court increasingly recognized the standing of the federal government to sue on behalf of the public in nonstatutory actions to revoke previous government land grants and invention patents. In the nineteenth century, the Court had allowed such suits based on the theory that the government had suffered an injury that would allow a private grantor of property to sue. Despite the Court's expressed concern over whether the government would obtain proprietary or pecuniary benefits from the revocation suits, it nevertheless often found sufficient proprietary interest to allow them to go forward.\textsuperscript{236} These reservations eventually diminished when the Court began allowing government suits to revoke land patents even though the suit would primarily (if not exclusively) benefit a private party who had convinced the Attorney General to sue and who footed the bill for the litigation costs.\textsuperscript{237} In a similar vein, the Court allowed the United States to

\textsuperscript{235} See United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33-34 (1812); cf. Debs, 158 U.S. at 576 (arguing on behalf of petitioner Debs that using equity to enjoin crimes denied jury trial rights).

\textsuperscript{236} For example, in United States v. Minor, 114 U.S. 233 (1885), the Court sidestepped the issue because some land would revert to the United States rather than to the rival claimant, see id. at 240, 244, but noted:

\textit{[I]}t may become a grave question, in some future case of this character, how far the officers of the government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant.

\textit{Id. at 244.}

\textsuperscript{237} See, e.g., United States v. San Jacinto Tin Co., 125 U.S. 273, 286-87 (1888). Perhaps the Court's allowance of such cases rests on conclusions that the government showed sufficient pecuniary interests or that the government owed a duty either to the general public or to particular individuals. See id. at 285-86. The Court, although not clear on this point, may have reasoned that the United States had a duty to the nonfraudulent grantee to seek a revocation of the fraudulent patent. For example, despite evidence that the suit primarily would benefit a specific individual rival claimant to the land, the Court stated:

\textit{[W]}e are not so entirely satisfied of the want of interest of the United States in the whole or a part of the land which is covered by this patent as to justify us in saying that the bill in the present case ought to be dismissed on that ground.
sue to revoke telephone patents where the United States would not itself acquire any tangible benefit if it won. The Court reasoned that because the monopoly of a patent was a valuable property right in the patentholder's hands, the United States had a duty to retrieve it for the public.

Although government suits to vindicate a general public interest (as in the telephone patent litigation) may appear to present different problems from those posed by government suits to retrieve a benefit for a specific claimant (as in the land patent cases), both types of cases present similar questions of governmental standing. In both contexts, the executive arguably favored or disfavored some citizens or groups by bringing judicial proceedings without express legislative authorization or any allegation of its own common-law injury. By allowing such nonstatutory suits, the Court no longer enforced the requirement that the federal government resemble a private law litigant or that it receive a tangible, common-law benefit from the suit. As was true in the case of state-initiated suits, the judiciary condoned the executive branch's expanding role in defining the public interest, traditionally the domain of the legislature.

This expansion of governmental standing thus manifested the weakened hold of strict separation of powers principles coincident

Id. at 287; see also id. at 303, 308 (Field, J., concurring) (expressing reservations over the fact that suit was brought for private party but satisfaction with Court's requirement that the government show an interest as must a private party). In United States v. American Bell Tel. Co., 128 U.S. 315 (1888), the Court noted that the United States' pecuniary interest was not critical in the land patent cases. The Court noted that "the right of the government to sustain the suit was based upon its legal or moral obligation to give a good title to another party who had a prior and a better claim to the land, but whose right was obstructed by the patent issued by the United States." Id. at 368 (citing Hughes v. United States, 71 U.S. (4 Wall.) 232, 236 (1866)).

238 See American Bell, 128 U.S. at 358, 364-67, 373.

239 See id. at 369.

240 The connection between litigating an interest that is too general or too specific (in the sense that it benefits identifiable individuals) can be seen in Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938). In that case Oklahoma filed an original petition to enforce state statutory liability on a shareholder of a liquidating state bank. Id. at 388-89. Although Oklahoma claimed its statutory interest made it a proper party, the Supreme Court treated the case as one in which the state sued on behalf of individuals. Id. at 394-95.

241 Cf. Debs, 158 U.S. at 575 (outlining Debs' arguments that the government does not own the railroads and that the relief prayed for by the government was to prevent interference with private property of another).
with the advent of the regulatory era. It also represented the emerging idea that government could sue (outside of enforcement actions) to vindicate its general interests in exercising power or protecting its citizens.

A. "Police Power" Standing

The nuisance and patent revocation cases clearly were transitional. They were close enough to common-law precedents that had allowed for government suits that they arguably did not represent a significant advance in the conceptualization of governmental standing. This was particularly true of the nuisance suits, and related water rights cases, that were generally brought to protect state resources. These cases could therefore be characterized as modest extensions of ones in which the Court allowed the state to sue to vindicate its more individualized "proprietary" interests.

Even so, the Court in these cases had begun to deemphasize the common law as the basis for such litigation. Indeed, a state's arguing for jurisdiction based on a common-law analogy would soon occasion derision, which shows how fundamentally the Court had begun to refocus its inquiry. By entering into the Union, said Justice Oliver Wendell Holmes, the states "did not sink to the position of private owners subject to one system of private law."

Reviving an argument from the boundary cases, the Court instead conceived of state-as-party suits as substitutes for the use of force or

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242 See, e.g., Kansas v. Colorado, 206 U.S. 46, 85 (1907) ("The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed."); see also Prosser, supra note 172, § 89, at 601 (noting that riparian rights are treated as part of nuisance doctrine). Water rights could also be treated as rights incident to property. See Kansas v. Colorado, 206 U.S. at 103.

243 The Court referred to the nuisance cases as protecting "quasi-sovereign" interests. See, e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (reasoning that the state has an interest behind the titles of its citizens "in all the earth and air within its domain"). This term may be somewhat apt where the state protects a combination of the general interests of its citizenry and a residual proprietary interest in land or other resources. Thus, in Tennessee Copper, Justice Oliver Wendell Holmes saw the state's interest as distinct from that of its citizens. Id.

244 Id. at 237-38; see also Georgia v. Pennsylvania R.R., 324 U.S. 439, 450 (1945) (referring to state's allegation of damage to proprietary interests as a "makeweight"); id. at 451 (arguing that state should not be limited to litigating minor or conventional controversies). But cf. Tennessee Copper, 206 U.S. at 239-40 (Harlan, J., concurring) (arguing that the Constitution requires the same law to apply to state-as-parties suits as would apply between private parties).
diplomacy—as an alternative avenue for the exercise of state power. In the nuisance suits, the Court therefore saw the government's litigable interest as deriving not merely from common-law proprietary interests but also from the state's "police power" to regulate property 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 regulation followed by enforcement actions, now provided a basis for standing in the Supreme Court.

The weakening of the role of private law manifested itself not only in new standards for state standing or injury but also in new standards for determining liability and remedies. The Court, even as it developed judge-made rules of decision in these controversies, began to look to the regulatory or sovereignty interests of the governmental parties, rather than to the more traditional set of

245 Tennessee Copper, 206 U.S. at 237-38; see also Georgia v. Pennsylvania R.R., 324 U.S. at 450 (stating that a suit in the Supreme Court substituted for diplomacy and war); North Dakota v. Minnesota, 263 U.S. 365, 372-73 (1923) (stating that original jurisdiction was "limited generally to disputes which, between States entirely independent, might be properly the subject of diplomatic adjustment"); Missouri v. Illinois, 180 U.S. at 241 (reasoning that Missouri's relinquishment of diplomatic and military powers to the general government devolved on federal government a duty to provide a remedy).

246 See Hudson County Water Co. v. McCarter, 209 U.S. 349, 355-56 (1908) (upholding state police power to pass legislation to limit diversion of water from state and citing state's ability to assert in Supreme Court quasi-sovereign interests in protecting resources apart from specific legislation); see also Marshall Dental Mfg. Co. v. Iowa, 226 U.S. 460, 461-62 (1913) (holding that Iowa had sufficient interest by virtue of its sovereignty to seek to enjoin draining of lake claimed by the defendant to be on private property even though United States might own lake).

247 See North Dakota v. Minnesota, 263 U.S. at 374, 381 (stating that in public nuisance suit by one state against another, burden on complaining state is greater than that imposed upon complainant in an ordinary suit between private parties); Tennessee Copper, 206 U.S. at 238; Missouri v. Illinois, 200 U.S. 496, 520-21 (1906) (reasoning in nuisance case that the same system of municipal law that applied between individuals should not govern matters between states, and noting possible problem with using prescription against a sovereign and that the Court might be reluctant to issue an injunction against a sovereign in same circumstances as it might if defendant were a private party); see also Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931) (reasoning that although both states used riparian rights doctrine in suits between private parties, the Court need not use it to resolve dispute between the states); Florida v. Mellon, 273 U.S. 12, 16-17 (1927) (noting that relief may sometimes be granted to a quasi-sovereign state under circumstances that would not justify relief in a suit between private parties); Sanitary District of Chicago v. United States, 266 U.S. 405, 426 (1925) (stating that United States could sue based on federal government's power "to remove obstructions to interstate and foreign commerce," which was superior to states' power to provide for welfare of inhabitants).
common-law principles that might have controlled controversies between private parties, in fashioning its rules. One rationale for the gradual retreat from private law was that it did not provide a universal basis for decision. For example, one of the states in a dispute over water rights might apply within its borders the common law of riparian rights; the other, the law of prior appropriation. But even when two states would have employed the same law domestically, as when Connecticut and Massachusetts both applied the riparian rights doctrine, the common law seemed inadequate to the task of determining the distribution of water between them. The Court in *Connecticut v. Massachusetts* noted that the "laws in respect of riparian rights that happen to be effective for the time being in both states do not necessarily constitute a dependable guide" in state-versus-state disputes, particularly because "[t]he rules of the common law on that subject do not obtain in all the States of the Union, and there are variations in their application."

In place of traditional nuisance or property doctrines, the Court developed a new jurisprudence of governmental interests that took

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248 See *Connecticut v. Massachusetts*, 282 U.S. at 670 (reasoning that common law was not a dependable basis for decision of interstate controversy even where both states used riparian rights doctrine because rules of common law do not obtain in all states and vary in application); see also Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498, 501, 505 (1971) (declining to exercise original jurisdiction in interstate pollution cases based partly on difficulty the Court had in finding suitable law to govern interstate water and pollution cases); cf. Texas v. Florida, 306 U.S. 398, 401, 403, 408 (1939) (taking jurisdiction in action in nature of interpleader where total of taxes claimed by four states, all of which claimed death taxes based on domicile, was greater than value of estate such that complaining state might find estate exhausted).

249 Cf. *Kansas v. Colorado*, 206 U.S. 46, 95 (1907) ("Now the question arises between two states, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water."). discussed in *Wyoming v. Colorado*, 259 U.S. 419, 464 (1922).

250 See *Connecticut v. Massachusetts*, 282 U.S. at 670; cf. *Kansas v. Colorado*, 206 U.S. at 97, 100 (stating that although the law that would apply between private parties was relevant, basis for decision in suits between states over water rights was equality of right); id. at 104-05 (stating that because Kansas recognized the right of appropriation of waters of a stream for irrigation, subject to principles of equitable division between riparian properties, "she cannot complain if the same rule is administered between herself and a sister state"). But cf. *Wyoming v. Colorado*, 259 U.S. at 465, 470 (holding that the doctrine of appropriation provided the equitable basis for determining the dispute, despite the fact that Colorado objected to its use, because both states recognized the doctrine).

251 282 U.S. 660 (1931).

252 See id. at 670.
as its founding principle respect for the equivalent sovereign powers of the states in protecting their citizens—"the equal level or plane on which all the States stand, in point of power and right, under our constitutional system." In addition, respect for the fact that the defendant as well as the plaintiff was a sovereign led the Court to begin to restrict the availability of injunctions in state-versus-state nuisance and water rights cases. In order to obtain an injunction, the complaining state had to show, by clear and convincing evidence, that the defendant state had inflicted an injury of great magnitude even though such a showing would not necessarily have been required in a suit between private parties.

While the principle of respect for the equivalent sovereign powers of the states in protecting their citizens was becoming the guiding principle in interstate disputes, this principle also was having an impact outside the interstate context. That is, a nongovernmental

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253 Wyoming v. Colorado, 259 U.S. at 465; see also Connecticut v. Massachusetts, 282 U.S. at 670 (quoting the same). Although the Court's disillusionment with a general common law often led it to reject traditional common-law rules in suits between states, the result of its fashioning an appropriate rule for interstate disputes was federal common law. See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."); see also Nebraska v. Wyoming, 325 U.S. 589, 591, 610 (1945) (apportioning waters between states); id. at 657 (Roberts, J., dissenting) (arguing that the Court was departing from a recent decision declining jurisdiction of interstate water disputes absent proof of actual damage or threat thereof). When there was a federal statute for the Court to hang its hat on, then the Court would often use it as a basis for decision. See Arizona v. California, 373 U.S. 546, 562, 589-90 (1963) (resolving Arizona's long-time water allocation dispute with other states by deciding that Congress had delegated decision to the Secretary of the Interior in his power to make contracts to allocate water in dams).


255 See, e.g., Connecticut v. Massachusetts, 282 U.S. at 669 (noting that burden is greater in suit between states than in suit between private parties); North Dakota v. Minnesota, 263 U.S. at 374 (stating that in interstate nuisance suit, burden on complaining state is greater than that on complainant in suit between private parties, and that threatened invasion must be of serious magnitude and must be established by clear and convincing evidence). These doctrines could lead to a finding of nonliability on the merits. See id. at 386-88 (applying high standard of proof and finding Minnesota not responsible for flooding in North Dakota). They could also be grounds to deny leave to file an original suit at the outset. See Alabama v. Arizona, 291 U.S. at 292 (placing burden on plaintiff state fully and clearly to establish that it would suffer great loss or serious injury).
party sued by a state would find his relative position diminished from what it might have been had the Court continued to use private law standards in state-as-party litigation. For example, when Georgia complained in the Supreme Court of a nuisance created by an out-of-state corporation, the Court indicated that once the nuisance was shown, there was no room to balance interests as there might have been if the suit were between two private parties; respect for state power meant that the corporation's nuisance had to be enjoined pure and simple.

Although a private party might be disadvantaged in litigation with a state under the evolving new regime, the federal government could be advantaged vis-à-vis the states when the dispute was over the power to regulate. Missouri v. Holland, in which a state sought to enjoin a federal game warden from enforcing federal legislation implementing a treaty that protected migratory birds, illustrates the transition from a jurisprudence grounded in common law to one based on relative regulatory power. The state claimed a litigable interest in challenging the federal legislation partly "as owner of the wild birds within its borders"; prior case law rejecting private challenges to state regulation of wild game supported the claim of a state proprietary interest. By restricting the killing of such birds—as the treaty and its implementing federal legislation did—federal law arguably restricted the state's exercise

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257 See id. at 239. The decision in Tennessee Copper reflected the results of the evolution of Justice Holmes' legal thought. See generally Morton J. Horwitz, The Transformation of American Law 1870-1960, at 109-43 (1992) (describing Justice Holmes' contribution to American legal scholarship). In the 1870s and early 1880s, Justice Holmes had defended the common law as providing determinate solutions to legal problems based on customary norms. Holmes' later writings reflected a more positivist and contingent view of law. See id. at 124, 127. For a decision by another Justice, Justice David Brewer, reflecting greater confidence in the common law while nevertheless allowing parens patriae standing, see Kansas v. Colorado, 206 U.S. 46, 96-97 (1907).
258 252 U.S. 416 (1920).
259 Id. at 431.
260 See Geer v. Connecticut, 161 U.S. 519, 529, 534-35 (1896) (stating that authority of state over wild game is derived from common ownership by people and that state could restrict possession with intent to transport in interstate commerce), overruled by Hughes v. Oklahoma, 441 U.S. 322 (1979); McCready v. Virginia, 94 U.S. 391, 394 (1877) (stating that Virginia could prohibit noncitizens from planting oysters in Ware River because state owns beds of all its tidewaters, the waters themselves, and fish in them, so far as water is capable of being owned while running).
of the privileges of ownership. The Court, however, deemphasized property rights as the basis for federal court standing, stating that it was enough that the case was "a reasonable and proper means to assert the alleged quasi sovereign rights of a State." Nor, in turn, did property law provide an appropriate basis on which to decide the merits. Rather, the state's claim of ownership was treated by the Court as a metaphor for the state's police power to regulate the killing and sale of the birds by individuals within its borders. And this state interest in regulating, concluded the Court, had to give way before the superior regulatory power of the federal government when acting within its constitutional authority. Thus, rather than deciding the case by reference to superior property interests, the Court decided the case by reference to superior regulatory interests.

B. The Metamorphosis of Claims of Governmental Power into Claims of Right

The turn-of-the-century intergovernmental suits highlight several aspects of the movement away from older notions of an Article III case or controversy. The Court no longer limited state standing to suits that implicated common-law interests. Sovereignty interests, once nonlitigable outside of cases originating in the state's own courts, had become litigable in federal courts. In addition, the Court no longer necessarily relied on the common law to decide the merits of intergovernmental disputes. Rather, the Court

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261 Holland, 252 U.S. at 434 (stating that title was a "slender reed" on which to base state's claim).
262 Id. at 431; see also Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (relying not on state's residuum of title but on its quasi-sovereign standing to protect resources irrespective of private ownership).
263 See Holland, 252 U.S. at 434.
264 See id. at 434-45.
265 See id. at 435. Similarly, the Court viewed a United States suit to remove an obstruction to navigation as an exercise of superior power under the Commerce Clause, and did not emphasize nuisance doctrines. See Sanitary District of Chicago v. United States, 266 U.S. 405, 425 (1925) (stating that nonstatutory nuisance suit originating in lower federal court to enjoin diversion of water that the federal government alleged would obstruct navigability was not a controversy between equals, because United States was asserting its sovereign control over navigable waters); cf. Horwitz, supra note 257, at 156 (discussing Wesley Hohfeld's demonstration that property consisted of abstract legal relations, not physical things); id. at 165 (discussing reconceptualization of property as part of public rather than strictly private law).
decided such cases according to standards that derived at least in part from relative regulatory power. Police or regulatory power both defined the injury that provided governmental standing and influenced the standards for liability and remedy.

Implicit in this transformation was the recognition that a government's interests in exercising its regulatory or protective powers had a status comparable to that of common-law claims of right. The trend also implied that the Court was obscuring the distinction between public power and private right. Previously, a state litigating in the Supreme Court might have been thought to have, as an individual did, common-law proprietary and contractual rights but not "liberty" rights comparable to those of an individual against a government. Such liberty-like interests had previously been litigable primarily in enforcement suits brought in a state's own courts. At the turn of the century, however, governmental power began to supply a sufficient interest for which a state could sue outside its own courts, and such power became roughly equivalent to an individual's claim of freedom to act.

These emergent governmental liberty interests were reflected not only in the suits brought by states in the Supreme Court's original jurisdiction but also in changes in the reviewability of cases that originated in the state courts as traditional enforcement suits. Under section 25 of the 1789 Judiciary Act decisions from state courts had been reviewable of right by writ of error, but only when

266 See Nichol, Disintegration, supra note 1, at 1944-45 (objecting to governmental standing based on power).
267 See Holland, 252 U.S. at 431 (addressing state claim of interference with its will as manifested in statutes). Progressive legal thinkers early in the century urged that there were no rights, only interests. See Roscoe Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 Harv. L. Rev. 195 (1914). Pound argued:

[T]he change began with the recognition of interests as the ultimate idea behind rights. It began when jurists saw that the so-called natural rights are something quite distinct in character from legal rights; that they are claims which human beings may reasonably make, whereas legal rights are means which the state employs in order to give effect to such claims within certain defined limits. But when natural rights are put in this form it becomes evident that these individual interests are at most on no higher plane than social interests . . . .

Id. at 225-26; see also Robert G. Bone, Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 Colum. L. Rev. 1, 92-93 (1989) (discussing Pound).
268 Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87.
the lower court had denied the claim of federal right. The Court reviewed state enforcement actions in which the defendant raised a constitutional defense under the Court's mandatory jurisdiction if the defendant lost her constitutional claim. The Court would not review the claim, however, if the defendant prevailed as to her federal defense, because the defendant's claim of federal right had been upheld. The Supreme Court thus would not ordinarily review state enforcement actions unless the state won, and for a long time Congress was prepared to tolerate a certain amount of potential overvindication of constitutional rights.

In 1911, however, the unreviewability of a New York Court of Appeals decision that struck down the state's workers' compensation act provided the impetus for Congress to give the Court discretionary review, by writ of certiorari, of state court decisions sustaining a claim of federal right. The hue and cry that led to the legislative expansion of certiorari characterized courts as preferring the "rights of property" to the "rights of humanity."

269 The Act provided for mandatory review of questions regarding (i) "the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity"; (ii) "the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity"; or (iii) "the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed." Id. § 25, 1 Stat. at 85-86; see also Hart & Wechsler, supra note 5, at 34, 501-03 (describing § 25 and subsequent amendments).

270 There is some dispute over whether the Act should be interpreted to have excluded appeals when the claim of federal right was upheld by the state court. See supra note 129. Prior to 1908, however, there was little judicial support for allowing review under § 25 for those who lost to a federal rights claimant. See Meltzer, supra note 35, at 1589-91. The emergence of such arguments in the early 1900s is consistent with our view that governmental power was being reconceptualized as a claim of right.

271 Ives v. South Buffalo Ry., 94 N.E. 431 (N.Y. 1911), overruled in part by Montgomery v. Daniels, 340 N.E.2d 444 (N.Y. 1975). The Ives decision is discussed in Felix Frankfurter & James M. Landis, The Business of the Supreme Court 193-94 (1928). Because the decision held the statute invalid on both state and federal constitutional grounds, see Ives, 94 N.E. at 439, the advent of certiorari would not necessarily have changed the result.


273 Frankfurter & Landis, supra note 271, at 193-94 & 194 n.37 (quoting Theodore Roosevelt, Workmen's Compensation, Outlook, May 13, 1911, at 49, 53); see also Horwitz, supra note 257, at 34 (stating that Pound urged that an individualistic conception of justice exaggerates private right over public right); Joseph W. Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. Rev. 975, 1056-57
rights of the general public to effect a vision of the public good through legislation and the rights of the legislative beneficiaries (i.e., the "rights of humanity") were pitted against those of traditional constitutional or common-law beneficiaries. Congress' legislation allowed the Supreme Court to review state enforcement actions at the instance of the state or its officials when the individual's claim of right had been vindicated by the state courts. Congress' action thus conferred a kind of state standing to appeal that had previously been missing. Congress also enacted statutes that similarly increased the ability of federal agencies to appeal adverse lower federal court rulings and enabled federal prosecutors to seek certiorari in the Supreme Court when the government lost at the appellate level.

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(stating that Hohfeld recognized that legal liberties could not be justified by the fiction that they concerned acts that did not harm others but rather that liberties had to be justified by policy conclusion that the freedom to do the act was more important than good obtained from forbidding it, and that whether to grant a particular liberty was a choice between competing interests and policies).

274 See Coleman v. Miller, 307 U.S. 433, 443 (1939) (discussing changes in statutes providing for Supreme Court review). The Court in Coleman attributed state officials' standing in part to the officers' being obstructed in their duty to enforce state law when a state court declared the law unconstitutional. Coleman allowed state legislators to question whether the legislature had validly approved an amendment to the federal Constitution. The Court stated:

This class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn into question. In none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any "private damage."

Id. at 445; see also id. at 466 (Frankfurter, J., concurring) (discussing state-official standing to seek Supreme Court review of state court judgments based on obstruction of duty to enforce statute). Because the duty of the state officer was to enforce positive state law, the allowance of state-official standing based on this duty effectively translated state enforcement interests into a litigable interest for appeal. In addition, the Court apparently viewed the grant of certiorari as meant to uphold the rights of the states. Id. at 443 (referring to the Court's granting certiorari in Blodgett v. Silberman, 277 U.S. 1 (1928), as reviewing state court decision insofar as it had "denied the right created by [the state's] statute to tax the transfer of certain securities").

C. The Evolution of Article III "Cases" in the Lochner Era

The reconceptualization of a government's interest in exercising power for the benefit of its citizens into the equivalent of a claim of right in these governmental standing cases was a manifestation of more widespread changes in legal thinking that tended to equate claims of individual right and governmental power. As part of their attack on laissez-faire economic theory in favor of increased economic regulation, Progressives endeavored to reconceive rights as interests. And the interests of the citizenry in regulating sometimes could outweigh private rights or interests in this nascent age of constitutional balancing. Moreover, the recognition of government liberty interests signaled a switch from a concept of government as inherently limited in its ends to a concept of government entitled to act in any way that political majorities determined, albeit with some fairly specific exceptions. The established norm of the liberty of individuals to act according to their own wills, free from government regulation, therefore had to compete with the norm of liberty of government to act according to the will of majorities, free from individual claims of right.

To argue that the governmental standing cases manifested these changes may seem at odds, however, with accepted understandings of this period of constitutional history. The Lochner era is generally characterized as excessively glorifying the common law at the expense of governmental power. Indeed, some scholars, such as Cass Sunstein, have characterized the early part of this century as a period in which the Court adhered to a "common-law baseline" in both its approach to standing and its substantive constitutional decisions. Similarly, Steven Winter has maintained that the early twentieth century was not merely conservative on justiciability issues, but regressive. According to Winter, the Court, beginning in the Lochner era, deliberately submerged a preexisting public law model of litigation in favor of a newly constitutionalized

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277 Lochner v. New York, 198 U.S. 45 (1905) (invalidating law limiting number of hours bakers could work as outside of proper scope of state police power); see also Coppage v. Kansas, 236 U.S. 1, 26 (1915) (invalidating under the Due Process Clause a Kansas statute forbidding employment contracts containing a condition that employee not join union).
278 See Sunstein, Privatization, supra note 1, at 1435-36.
private law model.\textsuperscript{279} We discuss our points of dispute with this scholarship in more detail below. But the portrait of the early twentieth century as reactionary for standing may obscure the fact that the era was one in which the requirement of a common-law injury as an ingredient of a case was fading,\textsuperscript{280} particularly in the state-as-party suits described above.

Although these government-as-plaintiff cases may seem somewhat marginal to the larger world of litigation, they cast light on the changing relationship of government and citizen. Moreover, the concept of an Article III "case" underwent a transformation even in suits in which regulated parties challenged the legality of government action. For example, some scholars cite the watershed opinion in \textit{Ex parte Young}\textsuperscript{281} as exemplifying a common-law baseline for standing.\textsuperscript{282} In \textit{Young}, the Court allowed a suit to challenge enforcement of an allegedly unconstitutional law by a regulated party who could have eventually been subjected to an enforcement action and who thereby would have been in a position to claim a deprivation of a traditional liberty or property interest. But \textit{Young} also was a case in which the Court allowed an anticipatory action without the plaintiff having to allege a concrete common-law injury.\textsuperscript{283} No less than in actions at law, actions in equity

\textsuperscript{279} Winter, supra note 12, at 1417, 1454-57. Sunstein sometimes appears to agree with Winter's assessment. See Sunstein, Privatization, supra note 1, at 1438 & n.26.

\textsuperscript{280} The ideas that would bring about the demise of \textit{Lochner} took root contemporaneously with \textit{Lochner} and began to manifest themselves in Supreme Court opinions. See Pound, supra note 267, at 197 & n.13 (writing in 1911 that Supreme Court had abandoned artificial reasoning of late 19th century and citing McLean v. Arkansas, 211 U.S. 539 (1909), and Chicago, B. & Q.R.R. v. McGuire, 219 U.S. 549, 566-75 (1911)). \textit{McLean} upheld a state statute providing that when miners were paid by a bushel or ton rate, the coal was not to be screened prior to weighing. The Court reasoned that if the law had a reasonable relation to the public health, safety, and welfare, it should not be set aside simply because the judiciary believed the act would fail in its purpose. \textit{McLean}, 211 U.S. at 547. \textit{McGuire} used similar reasoning in upholding a state statute that did not allow railroads to limit their liability for negligence to employees by contracts with the employees providing for insurance. \textit{McGuire}, 219 U.S. at 569.

\textsuperscript{281} 209 U.S. 123 (1908).

\textsuperscript{282} See Monaghan, supra note 101, at 1390 (referring to private tortfeasor model of \textit{Young}); Collins, supra note 103, at 240 (suggesting \textit{Young} was closer to common-law model than public law model).

\textsuperscript{283} See Kenneth E. Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 651 (1973). \textit{Young} overruled the holding of \textit{In re Ayers}, 123 U.S. 443 (1887), that a threat of governmental prosecution under an unconstitutional statute was not actionable by the potential defendant. Although some prior cases had already reached
also had once required a "common-law" injury, typically an imminent physical trespass. After Young, however, the threat of an enforcement action could itself support an equity action to contest the constitutionality of a statute. Young suggested that the violation of the Constitution or positive law, rather than the violation of the common law, was starting to be seen as the source of the cause of action in injunctive actions against government.

To be sure, injunction suits such as Young merely allowed a regulated party—a traditional enforcement defendant—to anticipate a later enforcement action in which he unquestionably could raise constitutional defenses. The parties to the injunction suit could well have appeared in court later, raising essentially the same issues either in a traditional enforcement action brought by the state or in a damages action against state officers after they took action to enforce the law. During most of the nineteenth cen-

similar results, Young is considered the benchmark. See, e.g., American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902); see also Louis L. Jaffe, Judicial Control of Administrative Action 193 (1965) (discussing McAnnulty as indicating that if the only way of testing regulation is to risk penal enforcement by defiance, court may permit injunction); Woolhandler, supra note 27, at 440-41 & 441 n.236 (citing cases in which Court allowed injunctions absent invasions of tangible property).

See Woolhandler, supra note 27, at 419-21.

Scott, supra note 283, at 651 (arguing that in Young "the Court embarked on a course of sometimes making judicial remedies available where no common law tort could have been found if all parties had been viewed as private citizens"). But see Jaffe, supra note 283, at 221 (arguing that Young is an easy case and that if the Court is going to adjudicate the legality of state programs, particularly when enforcement could proceed by the exercise of force (trespass), its intervention should be effective).

See Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 523-25 & 524 n.124 (1954) (stating that by time of Young, courts had "by almost imperceptible steps" come to view the Constitution rather than state law as the source of the right to sue to enjoin the enforcement of unconstitutional statutes); see also Hart & Wechsler, supra note 5, at 1181 (drawing similar conclusion); Woolhandler, supra note 217, at 623 & n.289 (suggesting that Young marked divorce of federal question pleading from its common-law moorings by eliminating the need to allege a common-law trespass in federal question cases, and that in early federal question cases, federal questions had been incorporated into general common-law causes of action).

Cf. Monaghan, supra note 117, at 195-96 (stating "valid rule requirement" that a defendant in coercive action always has standing to challenge rule actually applied to him and asserting that the Constitution forbids imposition of sanctions pursuant to a constitutionally infirm rule); Scott, supra note 283, at 648-49 (stating that a person subject to direct government enforcement might have right to attack validity of rule he was alleged to have violated and claiming that there may be similar right to anticipatory review if the penalties would be harsh and conduct upon which it may be visited is in many respects socially desirable). The ability to change the timing and party structure of the case is
tury, however, this possibility alone, absent the threat of an imminent common-law injury, was insufficient to make out a case.\(^{288}\) By the time of Young, however, courts allowed greater flexibility in the form and timing of cases. And just as government suits to assert sovereignty interests expanded beyond enforcement suits, parties challenging governmental acts could assert a claim against government without awaiting an enforcement suit or imminent trespass.\(^ {289}\)

This focus on the violation of positive law as the source of the plaintiff’s cause of action in suits against government shifted the emphasis from the plaintiff’s injury to the defendant’s violation.\(^ {290}\) This change in emphasis paved the way for increased recognition of standing for persons who were affected by statutes or regulations but who could not necessarily have maintained a common-law action against government officials or who might not have been subject to enforcement.\(^ {291}\) For example, in The Chicago Junction Case,\(^ {292}\) the Court accorded standing to various railroads that con-

significant because it allows many suits that might not otherwise crystallize to do so. See Abbott Labs. v. Gardner, 387 U.S. 136, 149-54 (1967) (approving preenforcement challenge to FDA regulation).

\(^{288}\) Thus, the Bank of the United States could sue to order a state official to return a trunk full of Ohio-assessed taxes, not because he was acting under an unconstitutional law but because he had committed a trespassory harm. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 842-43 (1824). The mere initiation of state enforcement proceedings, however, would not traditionally have been considered an imminent trespass that would warrant an injunction. Cf. In re Ayers, 123 U.S. 443, 466 (1887) (stating that “merely suing is no trespass”).


\(^{290}\) A characteristic of the modern public law case is its focus on the defendant. Stated differently, there is more emphasis on the violation of a positive law norm by the defendant than on the injury to plaintiff. See Scott, supra note 11, at 939; see also Bandes, supra note 211, at 285 (arguing that harms to interests in governmental legality should be recognized as actionable); Monaghan, supra note 101, at 1368-69 (questioning need for injury for a case); Winter, supra note 12, at 1469 (“In the public rights context, . . . there is only legal right . . . . The plaintiff sues because the government did something the law prohibits. The ‘injury’ is to whatever concern lies behind the law.”).

\(^{291}\) As many scholars have noted, private law trespass actions no longer proved adequate to control government because harms by government often did not take a form that could have been caused by a private person. See, e.g., Jaffe, supra note 283, at 221; Vining, supra note 1, at 35; Albert, Inadequate Surrogate, supra note 1, at 434; Stewart, supra note 17, at 1725-26.

\(^{292}\) 264 U.S. 258 (1924).
tested the Interstate Commerce Commission's approval of a competing railroad's acquisition of previously independent "terminal" railways even though the alleged competitive injury had no precise common-law analogue.\textsuperscript{293} The Court allowed the railroads standing because the legislation under which the agency acted purported to protect competitors' interests in being treated equally by such terminal lines.\textsuperscript{294}

Thus, the early-twentieth-century Court expanded some aspects of a case and controversy, thereby paving the way for the later ascendency of public law litigation. Modern public law litigation is a much-discussed phenomenon,\textsuperscript{295} differing in a number of respects from traditional private law litigation. It focuses on statutory and constitutional (rather than common-law) violations,\textsuperscript{296} on the wrongs of the defendant more than the injury to the plaintiff, and on group rather than individual rights. In addition, public law litigation deals with polycentric rather than bipolar issues and tolerates a looser fit between right and remedy than was characteristic of private law litigation.\textsuperscript{297} Classic illustrations of the public law model are the school desegregation and voting rights cases of the 1960s and 1970s as well as the increased standing of regulatory beneficiaries to seek review of agency action to vindicate interests in enforcement of statutory norms.\textsuperscript{298} The public law model contrasts

\textsuperscript{293} See id. at 266-69. The terminal or "belt" railways gave access to various locations in Chicago.

\textsuperscript{294} See id. at 267. An allegation of competitive injury without a showing that the statute protected that interest would not have been sufficient. See Jaffe, supra note 283, at 507-08; Stewart, supra note 17, at 1724-25 & 1725 n.280; see also Edward Hines Yellow Pines Trustees v. United States, 263 U.S. 143, 148 (1923) (holding that increased competition by Interstate Commerce Commission's removal of charges on competitors gave no standing to challenge order).

\textsuperscript{295} Generally, the emergence of the public law model is associated with the Warren Court. See, e.g., Stewart, supra note 17, at 1726 (noting that statutorily-protected-interest rationale was used with increasing frequency and boldness in 1960s, even where statutes were silent on right of judicial review); Sunstein, Privatization, supra note 1, at 1432 (noting that not until 1960s did courts develop an independent public law).

\textsuperscript{296} Cf. Chayes, supra note 11, at 1284, 1304 (claiming that dominant characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights but that the object of litigation is instead the vindication of constitutional or statutory policies).

\textsuperscript{297} See id. at 1282-84, 1300; Scott, supra note 11, at 939 (describing the defendant-focus of behavior-modification model of litigation).

\textsuperscript{298} Increased standing may have resulted from the fact that the government party that had traditionally been assigned the role of protecting the public interest in enforcement
sharply with the older private law model, which focused more on compensating plaintiffs' injuries than on ensuring defendants' future compliance with law. Suits under a private law model are bipolar in structure and typically seek damages rather than injunctions. The linchpin of both models is the nature of the injury that the plaintiff must allege in order to litigate. The private law model requires a substantial injury to an individualized common-law interest, whereas the public law model allows suits based on shared and probabilistic injuries—interests that often go unprotected by the common law.

The public law model of litigation truly came into its own following the advent of structural reform injunctions and broad standing doctrines associated with the Warren Court. But it is possible to trace the decreasing emphasis on a plaintiff's common-law injury and the increasing emphasis on a defendant's positive-law wrong to the early part of this century—both in state-as-plaintiff suits and in suits by regulated parties challenging government action. Furthermore, the collective or group plaintiff made an early appearance in the form of state governments representing the generalized claims of their citizens outside of traditional, home-court enforcement actions. In some sense, then, it is possible to view the state as an early prototype of the modern public law plaintiff. Thus, although state-as-plaintiff suits may at first glance seem tangential to the modern development of litigation, identifying the government as an early public law litigant may nevertheless shed light on current problems in public law litigation.

D. Modern Scholarship and the Development of Public Law Standing

As noted above, viewing the turn of the century as an expansive era for governmental standing is somewhat at odds with current scholarship, which regards the early twentieth century as a regressive era for standing. Cass Sunstein views the Lochner era as

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299 See text accompanying supra note 297.

300 The position expressed in this Article, however, is consistent with the view that standing law emerged when the writ system no longer adequately defined the scope of a
one in which the Court adhered to a common-law baseline that protected traditional property and liberty interests in suits between individuals and government and reinforced the economic regime of laissez faire. According to Sunstein, the common-law baseline was evident in both substantive constitutional law decisions and in the law of standing. For example, the Court invalidated legislation regulating the conditions of labor on the substantive grounds that readjustment of bargaining power was not a legitimate governmental end and that such legislation encroached on the common-law norm of freedom of contract. The Court reasoned similarly with respect to standing by allowing subjects of regulation who could allege injury to traditional liberty or property interests to challenge adverse governmental action. But regulatory beneficiaries liad, according to Sunstein, a difficult time obtaining judicial review. Sunstein views restrictive standing doctrine as compatible with preexisting common-law doctrines and the New Deal as a decisive rejection of the common-law baseline for substantive constitutional law. But Sunstein suggests that the common-law baseline for standing survived beyond the New Deal due to a combination of conservative attachment to the common law and liberal reluctance to interfere with governmental decisionmaking.
Sunstein's view that the *Lochner* era was regressive for standing is consistent with Steven Winter's version of standing history. Winter focuses on certain exemplars of a public law model for litigation that existed during the early Republic, such as mandamus suits, informers' actions, and shareholder suits.\(^3\) In such suits, nonindividuated interests could provide the requisite injury even in a common-law universe.\(^3\) Winter acknowledges that a private law model of litigation was ascendant throughout the nineteenth century, but claims that the courts saw the precursors of modern standing law as decisions on the merits and not as Article III problems.\(^3\) Accordingly, Winter argues that standing doctrine emerged as an Article III inquiry only at the turn of the century as a result of the Court's deliberate effort to submerge what he sees as a persistent and pedigreed public law model of litigation.\(^3\)

Sunstein's and Winter's histories of standing recognize the transition that standing underwent in the modern era. But their histories require a measure of correction to provide a complete account of the transformation of standing doctrine. We address their arguments in turn.

1. *State Standing and the Common-Law Baseline*

Insofar as Sunstein focuses on individual standing, our difference with his views may be more one of emphasis than one of substance,
and in some ways our analysis may even complement his thesis. Sunstein's characterization of the *Lochner* era may usefully describe a number of cases in which the Court denied standing to individuals based on a lack of a common-law injury. This characterization also rightly contrasts the *Lochner* era with a later period in which the Court increasingly allowed standing for regulatory and constitutional beneficiaries. But if the focus is changed to governmental standing, it is clear that the Court had in fact accorded standing based on injury to generalized interests that did not easily fit the common-law mold. Moreover, nongovernmental standing cases such as *Ex parte Young* reflected an increasing reliance on positive law rather than the common law as a source of rights of action. This Article suggests that governmental standing may be fairly characterized as a step ahead of individual standing. That is, the realm of interests that the legislature might have protected through statutes became a basis for governmental suits early on, whereas it took some time before individual standing expanded similarly.

Of course, the Court did not uniformly interpret even governmental standing during this period. For example, in *Massachu-

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313 Sunstein's view that a substantive rejection of a common-law baseline in constitutional law outstripped the rejection of the common-law baseline for standing law may better describe individual standing than governmental standing. The recognition of diffuse governmental interests in vindicating the public interest and in appealing adverse rulings on issues of constitutional law seems to have kept pace with the substantive recognition of majoritarian interests in pursuing a broad range of ends that could outweigh common-law interests in liberty and property. The relatively early recognition of governmental standing may have reflected a temporary faith in government to protect the general interest. See Stewart, supra note 17, at 1725-26 & 1725 n.281, 1726 n.284. The declining faith in the government to protect the public interest, and indeed the declining belief that "public interest" can be defined, contributed to an increased recognition of regulatory beneficiary standing. See supra note 298 and accompanying text.


317 See, e.g., *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *United States v. West Virginia*, 295 U.S. 463, 472-74 (1935) (holding that United States could not sue state to enjoin building of dam by private company that state had licensed to build dam pursuant to state's claim of exclusive authority over river as nonnavigable). Nor did the Court uniformly interpret narrowly individual standing. See, e.g., *Chicago Junction Case*, 264
sett v. Mellon and its more famous companion case Frothingham v. Mellon, the Court denied, respectively, state and taxpayer standing to question the constitutionality of a statute authorizing the federal government to spend money on maternal welfare programs. Sunstein and others cite Mellon as characteristic of a restrictive early-twentieth-century view of standing. Indeed, the Mellon Court reasoned that issues of the constitutionality of statutes simpliciter and injuries to sovereignty were not litigable, thus insisting on the traditional requirements of a common-law injury.

One week after Mellon, however, the Court in Pennsylvania v. West Virginia allowed a state to sue on its own behalf and as the representative of its consuming public to raise a constitutional challenge to another state’s legislation restricting pipeline companies from removing natural gas from the state. The West Virginia legislation did not directly regulate either Pennsylvania or its citizens; the state’s standing as a consumer and as a representative of its people as consumers was not the stuff of traditional common-law actions. Yet the decision was characteristic of a line of police

U.S. 258 (1924); cf. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940) (holding that party had standing to appeal FCC grant of license to another where party claimed it could be injured economically by resulting competition).

318 262 U.S. 447 (1923).

319 Id.

320 See Sunstein, After Lujan, supra note 1, at 180 & n.84 (citing Mellon as example of using standing as a way to prevent citizens from invoking Constitution to block democratic outcomes); Winter, supra note 12, at 1455 & n.489.

321 See Mellon, 262 U.S. at 484-85.

322 262 U.S. 553 (1923).

323 Winter asserts that the Court vacillated for decades on whether states could invoke the public rights model on behalf of their citizens. See Winter, supra note 12, at 1437. He cites Pennsylvania v. West Virginia as an example of the survival of a public rights model, which was ascendant for a time in state litigation. See id. at 1439-40. Winter’s determination to establish a long pedigree for a public rights model, we believe, obscures the expansion of the concept of a “case” occurring at this time.

324 Thus, while standing for constitutional and regulatory beneficiaries progressed haltingly, see Stewart, supra note 17, at 1725-26 & n.281, the Court took the intermediate step of recognizing governmental standing for interests that government possibly could pursue by regulation. Indeed, even those who see the Lochner era as a regressive one for standing nevertheless trace the beginning of regulatory beneficiary standing to the Chicago Junction Case, 264 U.S. 258 (1924), wherein railroads loid standing to attack an Interstate Commerce Commission (“ICC”) order allowing a competing railroad to acquire a previously independent terminal line. This change is perhaps symbolic of a more general decline in the notion of “privity.” Analogous to suits questioning administrative action by
power standing cases dating from the turn of the century, a time that Sunstein suggests was a heyday of restrictive standing. That such representative or *parens patriae* standing was unavailable to a state to challenge federal government action but was available to challenge another state’s action illustrates that the Court adhered to something other than a consistent common-law baseline in resolving questions of state standing.

This era for standing therefore was more transitional than is usually supposed; it is an era better characterized as Janus-faced than as regressive. On the one hand, the Court increasingly recognized as litigable the injuries to any legitimate interest that a legislature might seek to protect (which, as developed in Part III, formed an expanding universe). On the other hand, as discussed more fully below, if the Court intended to retain a meaningful injury requirement, then it had to define and limit that concept because the definition of a legitimate government interest provided no limitations at all. Not surprisingly, the Court looked to the common law and positive law for such limitations. It is hard to criticize such contradictory tendencies to expand litigable interests while seeking limits short of all perceived injuries, particularly because we have yet to resolve them. Finding the boundaries of justiciable injuries in the wake of the decline of the common-law case remains the Holy Grail of modern standing scholarship.

2. State Standing, Individual Standing, and Article III

As with Sunstein’s account, we take issue with Winter’s characterization of the early years of the century as regressive ones for standing. Winter successfully documents nineteenth-century instances of special causes of action at common law, such as informers’ actions, in which a “stranger,” or person who argued parties who were not the direct objects of regulation, cases such as MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), no longer required legal interaction between the plaintiff and defendant for tort liability. See Horwitz, supra note 257, at 62 (discussing Cardozo’s dispensing with necessity of privity in *MacPherson* and his later attempt to find a limit on duties in *Palsgraf* v. Long Island R.R., 162 N.E. 99 (N.Y. 1928)); see also Vining, supra note 1, at 69 (arguing that allowing standing for those who were not direct objects of regulation dispensed with privity requirement).

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325 See Sunstein, Privatization, supra note 1, at 1435-36.
326 See infra Part II.E.
327 See Winter, supra note 12, at 1406-09.
bly lacked an individualized injury, was nevertheless authorized by statute to sue for the statute’s enforcement and to obtain part of the recovery that went to the government. Winter does not claim that such early instances of a public law model were ever the predominant form of litigation. Rather, he sees the public law model as having coexisted peacefully with a predominant private law model throughout the nineteenth century. According to Winter, although precursors to modern standing doctrine appear in the nineteenth century—as in cases in which the Court found that the plaintiff had not stated an injury for which equity provided a remedy—the early Court did not treat such proto-standing doctrines as posing Article III problems. Rather, in such cases the Court had merely ruled on the merits. Winter argues that the private law model’s individual injury requirement did not assume constitutional status—thereby making cases of diffuse injuries nonjusticiable—until the early twentieth century. Winter thus views the emergence of standing and other justiciability doctrines in this century (in cases such as Mellon) as innovative, not so much in their use of private law concepts of injury as in their constitutionalizing the requirement of such an injury. He characterizes the early twentieth century as an era in which the Court deliberately submerged an already well-established public law model.

Surely Winter is correct in maintaining that precedents existed that could have supported the idea that diffuse injuries to interests in governmental legality could appropriately be litigable, even in cases such as Mellon. His characterization of the early twentieth century as one in which the Court suppressed a public law model, however, fails to take into account the extent to which the Court had moved away from the predominant common-law idea of a case, especially in the area of state standing, even if the Court sometimes failed to embrace possible precedents for a public law model. Moreover, the expanding universe of litigable interests owed more to the evolution from a common-law to a positive-law

328 Id. at 1418-24.
329 Id.
330 See id. at 1374, 1379-82.
331 See supra note 310.
332 See Winter, supra note 12, at 1417.
view of the source of cases than to precedents in mandamus and informers' actions.

Furthermore, Winter's characterization of the nineteenth-century cases that required common-law injuries as involving "doctrines unrelated to Article III,"\(^{333}\) we believe, is incorrect, even if some early precursors for litigation based on shared injuries existed. Winter relies on the fact that prior to the *Lochner*-era cases, when the Court refused to entertain litigation for lack of a sufficient injury, it did not state explicitly that the cases presented an Article III problem.\(^{334}\) That may be true, but the earlier decisions that found a lack of a common-law injury referred to the problem as one of a limitation on judicial power in relation to the other branches—certainly an Article III or constitutionally grounded issue. For example, when the Court refused to litigate whether Reconstruction infringed the states' rights of sovereignty, it reasoned that "[n]o case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court."\(^{335}\) The Court quoted from Justice Smith Thompson's opinion in *Cherokee Nation v. Georgia*,\(^{336}\) in which the Court similarly saw adjudication in the absence of a common-law injury as implicating separation-of-powers concerns:\(^{338}\)

This court can grant relief so far, only, as the rights of persons or property are drawn in question . . . and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a State

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333 See id. at 1382.
334 See id. at 1419 (noting instances in which standing referred to lack of claim on the merits); id. at 1420 (noting instances in which standing referred to lack of status to support party-based jurisdiction); id. at 1421-22 (noting instances in which standing referred to lack of interest for which equity would provide a remedy).
335 See, e.g., *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 71-77 (1868); see also William A. Fletcher, The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions, 78 Cal. L. Rev. 263, 273 (1990) (discussing references to need for person with legal right to bring action).
336 *Stanton*, 73 U.S. (6 Wall.) at 77; see also id. at 71 (noting motion to dismiss for want of subject matter jurisdiction due to presence of political questions).
338 See id. at 19-20; see also *Stanton*, 73 U.S. (6 Wall.) at 73-75 (discussing *Cherokee Nation*).
law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here.\textsuperscript{339}

Perhaps the Court did rely here on common-law notions of what courts could do. It is difficult to argue, however, that such statements respecting the requirements of a common-law "case" had no bearing on the existence of a constitutional "case" or federal "judicial power," in view of their focus on maintaining the proper role of the courts in relation to the states and to the popular branches.\textsuperscript{340}

In the nineteenth century, moreover, the concepts of a constitutional case and a common-law case likely would not have presented distinct questions.\textsuperscript{341} Thus, when the Court in \textit{Georgia v. Stanton}\textsuperscript{342} refused to decide the case on the merits because the state failed to assert a common-law injury, it mattered little whether the Court held that there was no Article III case or no common-law case. In this respect, common-law and constitutional reasoning in the nineteenth century were not appreciably distinct.\textsuperscript{343}

\textsuperscript{339} \textit{Stanton}, 73 U.S. (6 Wall.) at 75 (quoting with approval \textit{Cherokee Nation}, 30 U.S. (5 Pet.) at 51 (Thompson, J., dissenting)). Justice Thompson dissented to the refusal to take cognizance of the case because he believed that the Cherokees should be considered a foreign nation. See \textit{Cherokee Nation}, 30 U.S. (5 Pet.) at 68 (Thompson, J., dissenting). He would have considered only that part of the Cherokees' equity bill that stated an injury at common law. See id. at 51, 75 (Thompson, J., dissenting).

\textsuperscript{340} See Fletcher, supra note 335, at 267 (stating that "'case' and 'controversy' undoubtedly carried the connotation of judicially resolvable disputes," as did "'judicial power' ").

\textsuperscript{341} See, e.g., \textit{Kansas v. Colorado}, 206 U.S. 46, 94 (1907) (stating that "common law throws light on the meaning and scope of the Constitution"). That the concept of a "case" was derived from the common law would not have meant that statutes could not create causes of action.

\textsuperscript{342} 73 U.S. (6 Wall.) 50 (1868).

\textsuperscript{343} See Akhil R. Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193, 1205-10 (1992) (asserting that the Bill of Rights was declaratory of common-law rights); Eben Moglen, Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination, 92 Mich. L. Rev. 1086, 1121-22 (1994) (arguing that Bill of Rights' criminal procedural guaranties were intended to preserve common-law procedures); Woolhandler, supra note 217, at 610 (noting the prevalent perception that the Bill of Rights articulated preexisting common-law rights of criminal defendants). Nor does Winter's suggestion that the precursors to the constitutional standing cases involved merely a failure of the claim on the merits indicate that such cases did not have constitutional underpinnings. See Winter, supra note 12, at 1418-19, 1425, 1451. The failure to state a
Although we conclude that the Court's concerns over the lack of a common-law injury were constitutional in dimension, we do not contend that Article III requires a traditional common-law injury. Like other constitutional concepts that take their meaning from the common law, concepts such as cases and controversies are not static. The evolution of cases and controversies has included an increased recognition of shared injuries that formerly might not have given a complainant a right to relief in similar circumstances. Moreover, the historical record (at least for governmental standing) suggests that legislatively conferred standing for individuals, which has been the source of much recent debate, should rarely pose Article III problems. The problems with governmental standing in the nineteenth century arose primarily because the legislature of the sovereign in whose courts a government litigant sued had not authorized suit. Once such statutory authority was provided, the legitimacy problem disappeared. Although modern debate on legislatively conferred standing focuses on whether the legislature can interfere with executive enforcement authority by allowing those without individualized injuries to bring citizen-suits, it is useful to remember that a central concern in the nineteenth-century governmental standing cases was that the executive claim on which relief can be granted may present a nonjusticiable case. See supra note 2; see also Sunstein, Revisionism, supra note 1, at 132 (arguing that "Article III forbids courts from hearing cases in which the plaintiff has no cause of action"). Nor does Winter's characterization of Stanton as a "political question" case rather than an instance of the Court's preference for a private rights model, see Winter, supra note 12, at 1437, make a meaningful distinction. See Albert, Justiciability, supra note 1, at 1143, 1144-60 (arguing that "standing, ripeness, and political question . . . entail adjudication of a component of the claim for relief"). The Court, after all, treated the case as one involving a political question because the state sought to vindicate political rather than common-law rights. See Stanton, 73 U.S. (6 Wall.) at 77. Moreover, the Court was willing to review the merits of Reconstruction legislation when presented in habeas cases. See supra text accompanying notes 110-14.

See supra note 343; see also H. Jefferson Powell, The Principles of '98: An Essay in Historical Retrieval, 80 Va. L. Rev. 689, 733 (1994) ("In America, with its common-law legal heritage, the operative meaning of constitutional texts . . . evolves over time.").

Cf. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2146-47 (1992) (Kennedy, J., concurring) (suggesting that Congress must state clearly "the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit").

See, e.g., Sunstein, After Lujan, supra note 1.
and the judiciary not act outside of legislatively conferred authority.\footnote{See Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 527 (1989) (stating that the Court's decisions favoring deference to agencies that exclude external checks by Congress and the judiciary ignore the increased power delegated to the executive); cf. Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 2 (1994) (stating that the Framers did not constitutionalize presidential control over all that is now considered executive).}

E. Expansive Tendencies of the Public Law Model for State Standing

The early expansion of governmental standing highlighted the difficulty of defining litigable interests once the Court departed from the common-law menu for standing. Indeed, the state interests that became litigable—that is, the interests that might have been pursued by way of legislation—roughly resembled interests that individuals could eventually pursue in suits against government. When the Court inaugurated what we have identified as police power standing in nuisance and water rights cases, it deviated only slightly from common-law actions and operated squarely within the area of health, safety, and welfare encompassed by even limited views of state regulatory power.\footnote{See Kansas v. Colorado, 206 U.S. 46, 86-98 (1907) (recognizing state parens patriae standing in water rights cases, but denying intervention to United States on the ground that federal power did not generally extend to reclamation of arid lands); Horwitz, supra note 257, at 28 (asserting that nuisance law was seen as providing categories for appropriate regulation). Justice Holmes, who did not conceive of governmental power as narrow, authored many of the state police power standing cases. His reasoning in the state standing cases, however, provoked little dissent or comment. See, e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (unanimous decision); Missouri v. Illinois, 200 U.S. 496 (1906) (unanimous decision), superseded by 33 U.S.C. § 1251 (1988). But see Tennessee Copper, 206 U.S. at 239-40 (Harlan, J., concurring) (arguing, in contrast to the majority, that the same rules should apply between the states and private parties).} A limited idea of which governmental ends were permissible—a characteristic of Lochner-era opinions—thus might itself have limited the scope of standing founded upon nonstatutory sovereign interests. With the demise of Lochner, however, the Court largely abandoned the attempt to set limits on the appropriate ends of government. But even while the Court maintained a limited view of governmental ends, a wide
potential field for governmental regulatory interests existed.\textsuperscript{349} The breadth of legitimate governmental ends accordingly meant that state standing based on such ends would be hard to restrain within any logical bounds.

Police power standing quickly reached its expansive potential. For example, in \textit{Pennsylvania v. West Virginia},\textsuperscript{350} the pre-New Deal Court allowed Pennsylvania to challenge a sister state’s law restricting the distribution of natural gas, based partly on its status as the representative of its consuming public.\textsuperscript{351} The Court thus allowed the state to represent the interests of its people generally, relying on the then-emerging rubric of \textit{parens patriae} standing. The latter was a variant of police power standing, by which governmental power to promote the general welfare found an outlet in federal litigation rather than in state legislation and home-court enforcement. Similarly, state regulatory agencies that once would have protected their citizens by direct regulation and enforcement often sought to protect their citizens by appearing as aggrieved parties contesting federal agency orders in federal court.\textsuperscript{352}

\begin{itemize}
\item The Court was perhaps more successful in setting limits by defining ends that government could not pursue (such as adjusting bargaining power between management and labor) than in defining the ends government could pursue. Selective exclusion, however, may be a natural result of the common-law method.
\item \textsuperscript{350} 262 U.S. 553 (1923).
\item \textsuperscript{351} Id. at 591-92.
\item \textsuperscript{352} Because the state cannot substantially address problems of an interstate nature through regulation, it may be argued that its general interest properly should find expression in \textit{parens patriae} litigant status contesting federal agency action rather than enforcement suits. This increasingly subordinate status of the states vis-à-vis the federal government in the regulatory era was evident early on in the ICC cases. When the ICC set rates, the states could intervene before the ICC and appeal agency orders as aggrieved parties who represented the interests of their states in obtaining adequate transportation services. Federal court review was provided for under the Urgent Deficiencies Act, ch. 32, 38 Stat. 208, 219-20 (1913). The states still maintained some direct regulatory control over purely intrastate rates, but their power would increasingly be expressed only through a right to be heard in a federal regulatory scheme and to seek review of federal administrative orders rather than through the direct exercise of control over transportation. See North Carolina v. United States, 325 U.S. 507, 520 (1945) (enjoining ICC regulations of certain intrastate rates at instance of state because there was insufficient showing of unlawful discrimination against interstate rates), superseded by Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 11, 45, and 49 U.S.C.). The \textit{North Carolina v. United States} Court stated that “[t]his clash between state and federal agencies came about because the State Commission and the [ICC] each claimed the paramount power to fix railroad rates in North Carolina.” North Carolina v. United States, 325 U.S. at 509; see also United States v. Louisiana, 290 U.S. 70, 75 (1933)
\end{itemize}
Subsequently, the Court allowed Georgia as *parens patriae* to sue various railroad companies for an alleged antitrust conspiracy to discriminate against the state, with the remarkable damage claim being that the conspiracy would keep Georgia in a "state of arrested development." More recently, in *Alfred L. Snapp & Son v. Puerto Rico,* the Court gave its most expansive statement of the *parens patriae* doctrine when it approved a lower court's grant of standing to Puerto Rico to sue private companies for allegedly discriminating against some of its citizens seeking employment on the mainland. In attempting to set limits on such standing, the *Snapp* Court said:

One 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 attempt to address through its sovereign lawmaking powers.

Of course, how this expressed a *limitation* on standing was less than clear. Limitations on the definition of state interests derive primarily from the political process of enacting legislation rather than from inherent limits on state ends; that was the lesson from the demise of *Lochner.* Justice William Brennan apparently understood that standing based on the inchoate regulatory powers of a state was, in fact, not limited. Concurring in *Snapp,* he said that the state was no "ordinary litigant" and should be entitled to


*Id.* at 608.

*Id.* at 607.

The end of the *Lochner* era is generally associated with several decisions in the 1930s that ceased to restrict governmental ends to narrowly conceived categories of health, safety, and welfare. See, e.g., *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937) (upholding minimum wage for women); *Nebbia v. New York,* 291 U.S. 502, 536-37 (1934) (allowing state to adopt price regulation of milk and finding no closed category of business affected with public interest).
decide which harms to its citizens warranted the state's protection by *parens patriae* standing.\(^{358}\) By such reasoning, the state's attorney general could define the state's interests for purposes of litigation in federal courts.\(^{359}\) With the approval of state standing to vindicate any general interests of a state's citizens that could appropriately be the subject of legislation, state standing doctrine had come around 180 degrees.

*Parens patriae* provides an easy way for states to assert the interests of their citizens and is thus a variant of police power standing—by which states litigated interstate nuisances, water rights, and rights to regulate wild game without the *parens patriae* label. With the advent of the modern injury-in-fact approach to standing, a state could more easily characterize injuries to its citizens as its own without necessarily suing as *parens patriae*. In the recent decision of *Wyoming v. Oklahoma*,\(^{360}\) for example, the Court allowed the State of Wyoming to contest Oklahoma legislation that required Oklahoma coal-fired power plants to use at least ten percent Oklahoma-mined coal, because the Court found sufficient injury to Wyoming in its loss of severance tax revenues on coal.\(^{361}\) Historically, state tax collectors were not even recognized as having standing to enforce directly a state's tax laws outside of the

\(^{358}\) *Snapp*, 458 U.S. at 612 (Brennan, J., concurring).

\(^{359}\) The Court has sometimes attempted to limit *parens patriae* standing by requiring the state to seek to benefit more than a limited number of individuals. See, e.g., *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938) (holding that allowing state to litigate quasi-sovereign interests does not allow it to litigate in the Supreme Court for particular individuals); *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) (noting that Louisiana represented the interests "of all her citizens" on matters that "affect[ed] her citizens at large"). The state's definition of the public interest, however, may easily include protections that overlap with the interests of identifiable individuals. See *Snapp*, 458 U.S. at 607 (stating that state "must articulate an interest apart from the interests of particular private parties," but allowing Puerto Rico to bring *parens patriae* claim for discrimination against Puerto Rican workers who had sought work on mainland); see also supra notes 236-39 and accompanying text (discussing federal government's standing to sue on behalf of public). The inevitable overlap of sovereign and individual interests is clear in the Court's allowance of both public and private actions that address the same issues (for example, criminal and civil actions for battery). Cf. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (allowing state agency standing to challenge another state's law as a trade association would).


\(^{361}\) Id. at 447.
courts of the state, much less to litigate the constitutionality of another government's laws based on the collateral impact on the plaintiff state's tax revenues. The result in *Wyoming v. Oklahoma* also plainly was at odds with the old Court's approach to a similar Dormant Commerce Clause challenge in which the Court had previously held that Louisiana could not challenge a Texas quarantine on goods that had passed through the port of New Orleans. With the modern Court's recognition of "tax collector standing" in *Wyoming v. Oklahoma*, however, virtually any economic injury to persons or industries operating within a state can supply a basis for state standing because the state can easily claim a tax revenue loss when one of its citizens suffers economic loss.

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362 See infra note 434 and accompanying text. But cf. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 559-62 (1851) (finding that state's loss of tolls was special damage adequate to support nuisance action).

363 See Florida v. Mellon, 273 U.S. 12, 17-18 (1927) (indicating that there was no direct injury to state from loss of state tax revenue due to federal inheritance tax); cf. Massachusetts v. Missouri, 308 U.S. 1, 15 (1939) (holding that Massachusetts had no controversy against Missouri to prevent its tax assessment against property that Massachusetts also sought to tax). These results followed from the related doctrines that the mere constitutionality of statutes was nonjusticiable, that issues of sovereignty (i.e., conflicting claims to regulate or tax) were not litigable, that there was a lack of legal privity among sovereigns in most cases contesting the laws of one of them, and that most constitutional protections were for the benefit of the governed, not government.

364 U.S. Const. art. I, § 8, cl. 3.

365 Louisiana v. Texas, 176 U.S. 1, 19-23 (1900) (denying standing to Louisiana to contest a Texas law requiring quarantine of goods from New Orleans and reasoning in part that the Commerce Clause was for the protection of participants in commerce, not states). The Court stated:

> Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, 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. Nevertheless if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this court as against the State of Texas cannot be maintained.

Id. at 19. The Court proceeded with a discussion in which it also seemed to base its decision on a lack of state action. See id. at 22-23.
III. VIEWING THE STATE AS AN EARLY PUBLIC LAW PLAINTIFF

A. STATE STANDING AS A PATTERN FOR INDIVIDUAL STANDING

The expansion of governmental standing early in this century foreshadowed problems that would arise for individual standing once the Court moved away from common-law actions as the basis for suit. Before the New Deal and with increasing frequency thereafter, the Court in administrative review cases focused on the "legally protected interest" of the complaining party to determine standing. This inquiry looked beyond interests protected by the common law to include those that Congress had protected. Looking to statutes or legislative intent to determine rights to sue made perfect sense when causes of action were increasingly seen as deriving from positive law as well as common law.

This expansion of standing proceeded slowly until the Warren Court accelerated the pace by allowing standing for various regulatory and constitutional beneficiaries who would not have had standing under the common law. Then, in *Association of Data...*

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366 See Stewart, supra note 17, at 1725-26 & 1726 n.282 (stating that "courts frequently construed statutes as protecting competitors," but that "broader classes of putative beneficiaries, such as consumers, were frequently denied standing in the absence of an express statutory warrant").

367 See Chicago Junction Case, 264 U.S. 258, 266-70 (1924); supra notes 317-24 and accompanying text. Another landmark on the road away from the private law model for standing was the decision in FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (allowing a competing station to contest the FCC's grant of a radio license on the ground that Congress intended that competing licensees have standing because they would have incentives to uncover agency errors). See also Jaffe, supra note 283, at 502 (discussing Sanders); Scott, supra note 283, at 656 (same); Stewart, supra note 17, at 1731 (same).

368 See Stewart, supra note 17, at 1725 & n.281 (noting that development of statutory beneficiary concept was at first halting, perhaps because of common-law reasoning, but perhaps also because courts perceived that agencies would adequately protect affected interests and courts did not wish to tax agency resources or thwart programs). In a series of decisions beginning in the late 1960s, the Warren Court expanded standing in constitutional cases along lines similar to the expansion of standing in administrative review, recognizing litigable interests for intended beneficiaries of constitutional provisions who had not suffered a common-law injury. For example, the Court allowed taxpayers to raise Establishment Clause challenges to government expenditures in Flast v. Cohen, 392 U.S. 83 (1968). See also Scott, supra note 283, at 660-62 (discussing *Flast*). Taxpayers arguably fit within the legally-protected-interest test because the citizens who are offended by the government's use of money for any particular religious purpose could be considered to be the intended beneficiaries of the Establishment Clause. See Sunstein, *After Lujan*, supra note 1, at 210 n.218; see also Fletcher, supra note 1, at 267-69 (arguing that standing...
Processing Service Organizations v. Camp, the Court seemed to expand standing still further by focusing on "injury in fact" and purporting to displace the narrower focus on legally protected interests that had itself represented an expansion beyond the focus on common-law interests as the basis for standing. The injury-in-fact test required, first, that the plaintiff had suffered (or was threatened with) actual injury and, second, that the interest sought to be protected was arguably within the "zone of interests" protected by the statute or constitutional provision in question. The injury-in-fact approach differed from the legally-protected-interest approach by purporting to make a fact-based inquiry divorced from legislative intent or the merits of the case. Although the zone-of-interest inquiry could have revisited the question whether the legislature intended to create a right of action in the plaintiff, the Data Processing Court indicated that this test should be applied leniently and that only an injury-in-fact was constitutionally required.

The injury-in-fact test has come under intense scholarly criticism for lacking coherent limitations and for failing to provide an objective test of standing divorced from the "merits" of whether the plaintiff's interests are legally protected. Particularly, any

in constitutional cases should focus on particular constitutional claims at issue and not taxpayer status).

370 The injury-in-fact test, if applied to exclude the possibility of legislative definition of injuries for shared and probabilistic harms, can, however, result in narrower standing than the legally-protected-interest test. See, e.g., Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143 (1992).
371 See Data Processing, 397 U.S. at 152-53.
372 See id. The test as developed includes requirements that the injury be fairly traceable to the defendant's actions and that a favorable decree be likely to redress the injury. See, e.g., Lujan, 112 S. Ct. at 2136 (outlining standing requirements); see also Sunstein, Privatization, supra note 1, at 1452 (same).
373 See Data Processing, 397 U.S. at 153.
374 Id. at 154-55; see also Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 78-81 (1978) (rejecting, outside the taxpayer context, a requirement of a subject matter nexus between the rights asserted and injury alleged); Sunstein, Privatization, supra note 1, at 1445-46 (discussing Data Processing); Sunstein, After Lujan, supra note 1, at 185 (same).
375 See, e.g., Fletcher, supra note 1, at 231-32 (arguing that the injury-in-fact test requires normative judgments); Sunstein, After Lujan, supra note 1, at 188-89 (criticizing injury-in-fact test as value-laden standard). Sunstein maintains that the injury-in-fact test, despite its faults, worked fairly well in administrative cases for a time, but that later
attempt to define injury-in-fact beyond a determination that the plaintiff feels injured necessarily requires a normative determination as to what should be a judicially cognizable injury.\textsuperscript{376} Thus, those decisions in which the Court has found injury lacking have had an arbitrary and result-oriented quality.\textsuperscript{377}

When the Court began to depart from the common law as the basis for individual standing early in this century, some members of the Court may have believed that there would be limits on individual standing, just as they may have thought that there would be limits to police power standing for state litigants. In the case of regulatory beneficiary standing, the Court originally derived limits from legislation and legislative intent; those who alleged injury to interests that the legislature had sought to protect and who were thus the intended beneficiaries of given legislation could bring suit.\textsuperscript{378} But when Congress delegates broadly, as it has done consistently since the New Deal, the mandate of the agency may include consideration of any interests that Congress properly could consider if it legislated in the same subject matter area.\textsuperscript{379} Thus, regulatory beneficiary standing, even under the older and generally more restrictive legally-protected-interest test, logically could expand (as could police power standing for states) to include any interests that the legislature might legitimately seek to protect through regulation.\textsuperscript{380} The injury-in-fact test, with its more superficial inquiry into express or implied legislative purpose, made this

\textsuperscript{376} See Fletcher, supra note 1, at 231-32; Sunstein, After \textit{Lujan}, supra note 1, at 188-89.

\textsuperscript{377} See, e.g., Fletcher, supra note 1, at 231.

\textsuperscript{378} See Stewart, supra note 17, at 1723, 1725. Similarly, state standing, apart from standing provided by injury to a common-law interest, had previously depended on the legislative intent as expressed through legislation, which the state could then enforce in its own courts.

\textsuperscript{379} See id. at 1735 (observing that given the vague nature of many statutes and the pervasive role of government in the economy, "there appears to be no logical limit to [the] expansion of standing rights").

\textsuperscript{380} See id. at 1726-27, 1735.
expansion still easier. And absent limits on the interests that government can legitimately seek to protect, there remain no real limits on regulatory beneficiary standing any more than there are limits on police power standing. Hypothetical governmental interests similar to those that the Court would consider in determining whether economic legislation meets rational basis scrutiny are thus the basis for standing for both the government and individuals.

The absence of meaningful limits on the standing of regulatory beneficiaries runs the risk of creating doctrinal incoherence comparable to that which exists in the context of state standing. On the one hand, injury-in-fact has no inherent limits other than perceived injury. On the other, the concept of a "case" arguably demands some limit other than perceived injury. This stalemate results in a patchwork of inconsistent decisions allowing and disallowing standing. As discussed more fully below, many scholars have suggested returning to the historically intermediate legally-protected-interest approach to standing to remedy the current chaos, a suggestion with which we agree. Any such revival, however, also must include interpretive principles to keep the universe of legally protected interests in check. Without addressing the entirety of the larger debate, we believe that a narrowed focus on interests protected by statutory and constitutional provisions promises manageable limits in state standing cases, which we discuss in Part IV.

B. State Standing as Enhancing the Rights of Majorities

The Court's recognition of states as early public law plaintiffs also highlights the tendency of public law litigation actually to dilute claims of individual rights. Although the public law model is often thought of as unqualifiedly rights enhancing, we believe that it can also be rights diluting insofar as it encourages the legal recognition of injury resulting from the vindication of someone else's

381 See id. at 1737.
382 See, e.g., Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (indicating that the Court would consider hypothetical purposes of state economic regulations in considering whether a statute satisfies rational basis scrutiny). Individuals may have some interests, such as in expressing their particular religious beliefs, that government may not have. Government, however, may have related interests in protecting individual rights to practice their religious beliefs.
383 See Sunstein, After Lujan, supra note 1, at 204.
Progressive and Realist thinkers early in this century sought to undermine the notion of individual rights because they believed that the common law overly protected property rights and contractual freedom at the expense of the majority's interests in regulating for the public good. Rights were therefore often reformulated as interests and balanced against competing government interests, and the newly recognized majoritarian interests in freedom to regulate were balanced against private rights to be free from regulation. The freedom of government thus sparred with the freedom from government.

These rights of majorities began to receive both substantive recognition in the New Deal Court's minimal scrutiny of economic regulation and procedural recognition in the expansion of govern-

384 Professor Sunstein has questioned the usefulness of analyzing whether standing enhances majority versus minority interests. See id. at 217. In any event, reinforcement of majority interests is not necessarily a bad thing. Both public and private suits to enforce statutes, for example, reinforce majoritarian decisions as to what constitutes the public interest. For many the "countermajoritarian difficulty" has been considered the central problem of judicial review of legislation. See Jaffe, supra note 206, at 1045 ("The usual taxpayer and citizen suit is thoroughly consistent with the primacy of majority rule."). Justice Scalia, however, takes the position that the law of standing should roughly restrict "courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and exclude[ ] them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself." Scalia, supra note 1, at 894. Justice Scalia apparently believes not so much that majority interests are not entitled to invoke judicial process, but rather that absent an individualized injury, the executive branch should have a monopoly on the representation of majoritarian interests in the courts.

Although in the past the executive was the primary party representing the generalized interests of the public, the legislature kept the executive on a tighter leash. Indeed, as we have noted, the historical concern in governmental standing cases was that the executive have appropriate legislative authorization to bring suit. See supra notes 345-47 and accompanying text. In light of vast congressional delegations of lawmaking power to the executive in recent decades, Congress should have the power to authorize broader citizen standing as a counterbalance to enhanced executive power. See Farina, supra note 347, at 527 (arguing that the Court's decisions favoring deference to agencies that exclude external checks by Congress and judiciary ignore the increased power of the executive in world of delegated power).

mental standing to sue and appeal.\textsuperscript{386} For example, legislation allowing states to seek Supreme Court reversal of state court decisions that allegedly overenforced federal constitutional norms implicitly acknowledged that the rights of the majority to enforce laws should be recognized as procedurally comparable to individual claims of constitutional rights. As the regulatory era progressed, regulatory beneficiaries—that is, parties who were not the immediate objects of regulation but who would benefit from affirmative government action against regulated parties—also obtained standing based on interests that the government might have protected through regulation.\textsuperscript{387} The targets of regulation, historically perceived as the more exclusive rights-claimants in contests with government, now found that the high ground of rights was shared by political majorities and regulatory beneficiaries.

In the economic sphere, a modern consensus favors the Court's preference for government interests in enforcing its regulations over most claims of freedom from regulation.\textsuperscript{388} There is perhaps a similar consensus favoring the current, roughly equal status of regulatory beneficiaries and regulated parties in seeking review of agency action.\textsuperscript{389} But the transformation of the interests opposing a claim of right into the equivalent of rights—exemplified in both state police power and individual regulatory beneficiary standing

\textsuperscript{386} Indeed, to the extent that the New Deal Court endorsed more searching judicial review for some claims of right, it was arguably on the basis that in certain areas, such as legislation restricting the political process or disadvantaging minorities, the political (i.e., majoritarian) process would lack proper self-correction mechanisms. See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). See generally Jesse H. Choper, Judicial Review and the National Political Process (1980) (discussing the proper role of the Court in judicial review); John H. Ely, Democracy and Distrust (1980) (same).

\textsuperscript{387} Underenforcement of statutory norms and the resultant passive overenforcement of interests in being free from regulation are factors that led to the Court's recognition of litigable interests in regulatory beneficiaries. See Sunstein, Privatization, supra note 1, at 1443-44; Sunstein, After \textit{Lujan}, supra note 1, at 187-88.

\textsuperscript{388} See, e.g., Dworkin, supra note 225, at 269 (arguing that there is no general right to liberty as such); Stewart, supra note 17, at 1725 (claiming that "common law liberty and property rights are an inadequate measure of the private interests entitled to seek judicial intervention").

\textsuperscript{389} But cf. Scalia, supra note 1, at 881-82 (arguing that courts should accord greater weight to the requirement of particularized injury because prosecution of generalized grievances should be left to executive branch).
cases—has effects that extend well beyond the economic sphere. And those effects have been comparably rights diluting.\footnote{390}{See Dworkin, supra note 225, at 269; Aleinikoff, supra note 19, at 986-87.}

For example, the recognition of litigable interests in persons opposing governmentally sponsored affirmative action in employment is one outgrowth of a public law model of standing, according to which any person who may be affected by another's assertion of a claim of right has the potential to seek party and rights-holder status herself.\footnote{391}{See, e.g., George M. Strickler, Jr., \textit{Martin v. Wilks}, 64 Tul. L. Rev. 1557, 1557, 1571 (1990) (claiming that the Court's decision in \textit{Martin v. Wilks}, 490 U.S. 755 (1989), superseded by Civil Rights Act of 1991 § 108, 42 U.S.C. § 2000e-2(n) (Supp. V 1993), was correct in finding that consent decree between city and black firefighters affected interests of white firefighters by reducing their promotional opportunities and changing the legal status of their claims under Title VII, 42 U.S.C. § 2000e to 2000e-17 (1988 & Supp. V 1993)); see also Douglas Laycock, \textit{Due Process of Law in Trilateral Disputes}, 78 Iowa L. Rev. 1011, 1011 (1993) (claiming that respect for due process rights of incumbent employees is not inconsistent with effective structural decrees). Often such parties secure status first as intervenors of right and later as independent parties. See Chayes, supra note 11, at 1290 (noting that the right to intervene is inevitably linked to question of standing to initiate litigation in the first place).}

\footnote{392}{"Capture" refers to the phenomenon of the regulated industries' overinfluencing agencies to the detriment of the public interest.}

\footnote{393}{Of course, what constitutes overenforcement is the fighting issue. The perception of overenforcement of the rights of regulated parties earlier in the century led to both the enhanced recognition of governmental and regulatory beneficiary standing and a decrease in the substantive scope of the rights of the regulated. Cf. Horwitz, supra note 257, at 142 (claiming that Justice Holmes' conclusion that law is politics led to deference to legislature).}

\footnote{394}{Although defendants in lawsuits are traditionally seen as having rights, those rights are often a more general right not to have property transferred to the plaintiff without due process of law rather than a more specific right, such as a right to receive the benefits of governmental regulation or an equal protection right to be free from "overenforcement" of minority rights.}
tional claims of right (through agency capture or affirmative action plans), courts increasingly recognized litigable interests against government in the persons who would have benefited from a more active, rights-opposing stance.\(^{395}\) As did regulatory beneficiaries, these rights-opposing litigants obtained substantive rights nearly equivalent to those of the initial rights-holders.\(^{396}\)

This result, which could be loosely characterized as majority reinforcing, may seem to contradict the dominant perception of the public law model of litigation as a vehicle for vindicating minority or other politically disfavored rights.\(^{397}\) The public law model, as ordinarily presented, favors minority claims against the power-holding majorities in government and in private enterprise by allowing for aggregated parties, proof, and remedies for discrimination claims. This is particularly true in the context of federal statutory and constitutional actions outside the administrative review context. Thus, some have thought that retrenchment in the enforcement of minority rights would result from a private law model of rights with its more individualized conceptions of right and remedy.\(^{398}\) Nevertheless, retrenchment regarding minority

\(^{395}\) See supra note 387. Agency underregulation can be seen as a form of passive overenforcement of common-law liberty and property interests in nonregulation. Voluntary affirmative action by government may be perceived as a more active form of overprotection of minority rights.

\(^{396}\) See Shaw v. Reno, 113 S. Ct. 2816, 2828 (1993) (holding that equal protection claim would be stated where an election district can be understood only as an effort to separate voters by race without sufficient justification); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (holding that disadvantaging white contractors under city's affirmative action plan would violate Equal Protection Clause absent a compelling government interest and a plan narrowly tailored to advance that interest, and that a compelling interest would require showing of discrimination within the construction industry in Richmond).

\(^{397}\) See Chayes, supra note 11, at 1305 (arguing that Burger Court's hostility to public law model may manifest hostility to substantive results and to idea of federal courts as vehicles of social and economic reform); Strickler, supra note 391, at 1606 (noting Court's hostility to large-scale institutional reform litigation to enforce rights of minorities and disadvantaged). Enhanced administrative review for regulatory beneficiaries, however, has traditionally been seen as advancing the rights of majorities. See, e.g., Jaffe, supra note 206, at 1045 (discussing citizen participation as "not simply a vehicle for minority protection, but a creative element in government and lawmaking").

\(^{398}\) For example, the Reagan Justice Department favored a return to individualized determinations in employment discrimination that would have excluded statistical evidence. See, e.g., William B. Reynolds, The Reagan Administration's Civil Rights Policy: The Challenge for the Future, 42 Vand. L. Rev. 993, 995-96 (1989) (describing fundamental ideal of nondiscrimination as in opposition to a "racial spoils system" whereby individual
rights has arguably occurred less by way of the recognition of an absolute individual right not to be disadvantaged by race-based decisions and more by way of the recognition of rights in majorities to be free from overenforcement of the rights of minorities. We do not argue, however, that courts should return to narrowly conceived notions of litigable interests, although we do suggest some narrowing of the current tests for state (and individual) standing. Nevertheless, the recognition of litigable interests in individuals or groups who oppose claims of right need not have a drastic effect on the claims of the initial rights-claimants. The degrees of scrutiny of government action can be altered to prefer certain classes of claimants to others. But tracing the headwa-

rights are drowned out by group entitlements). Similar arguments resurfaced recently as Congress debated whether to overrule the result in McCleskey v. Kemp, 481 U.S. 279 (1987), which restricted judicial consideration of patterns of racial discrimination in the imposition of the death penalty.

Recognition of an absolute right of whites not to be discriminated against on the basis of race indeed would have restricted remedies for discrimination more severely than the current norm, which is based on the non-overenforcement of minority rights. On the other hand, use of a more categorical concept of rights does not dictate recognition of a right in whites to be free from race-based affirmative action plans.

In "reverse" discrimination cases, a person asserts an individual right not to be discriminated against based on race. But frequently the Court recognizes a group right as well; the compelling government interest that could justify discrimination takes its definition only with reference to the rights and interests of other groups in being free from discrimination. For example, in Croson the Court did not recognize an absolute right of white contractors to be free from the negative effects of race-based affirmative action, but rather recognized a right of white contractors not to be discriminated against absent a compelling government interest in remedying discrimination against blacks in the Richmond construction industry. See Croson, 488 U.S. at 493-94, 500, 505; see also id. at 507, 509 (stating that a remedy must be narrowly tailored to further the compelling government interest); Reno, 113 S. Ct. at 2828 (forbidding certain voting districts drawn based on racial distribution where the separation of races "lacks sufficient justification").

See Drew S. Days, III, The Court's Response to the Reagan Civil Rights Agenda, 42 Vand. L. Rev. 1003, 1015-16 (1989) (arguing that the Court did not agree with the Reagan administration's claim that race-conscious remedies must be limited to narrowly defined group of victims).

In the context of affirmative action in government employment, for example, nonminority incumbent employees may be allowed to intervene in lawsuits to avoid undue harms to themselves without going so far as to create in them a right not to be dealt with on the basis of race absent a compelling governmental interest. See generally Schauer, supra note 226, at 428, 430 (discussing the operation of rights under varying levels of scrutiny); Kate Stith, Government Interests in Criminal Law, 55 Alb. L. Rev. 679, 685-86 (1992) (proposing hierarchy of government interests).
ters of modern public law litigation to the expanded standing of states highlights the tendency of public law litigation to reinforce the interests of political majorities, or at least of those who stand to lose because of another's claim of right. Recognizing that current substantive and procedural law tend easily to turn rights and the interests opposing them into near equivalents suggests the importance of developing principles for determining which "interests" will carry more weight than others.

IV. STATE STANDING AND THE SUPREME COURT'S ORIGINAL JURISDICTION

A. Modern Day Limits on State Standing and Original Jurisdiction

Once sovereignty interests became litigable, state standing naturally expanded to include virtually any legitimate interest that the government could pursue. Individual standing grew similarly, albeit at a slower pace. Inevitably, the Court sought limiting principles. Where a state sued another state or an out-of-state citizen, the Court's need for limiting principles on state standing became particularly compelling because the state as plaintiff had a pre-

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402 See, e.g., Albert W. Alschuler, Failed Pragmatism: Reflections on the Burger Court, 100 Harv. L. Rev. 1436, 1454-55 (1987) (noting that the rise of "public interest litigation" suggests that courts are little different from legislatures, and that "[a]s courts have abandoned traditional limitations of the judicial role, they have become less able to provide the service that differentiates their work from that of other public agencies—assuring individuals that their claims of injustice will be heard, considered, and judged on their merits"); Judith Resnick, From "Cases" to "Litigation," Law & Contemp. Probs., Summer 1991, at 5, 5 (arguing that aggregation may lead to less attention to individual cases); Stewart, supra note 17, at 1764-70 (questioning legitimacy of interest representation model for review of administrative decisions); Subrin, supra note 385, at 989-90, 1001 (critiquing some results of equity-based system of Federal Rules of Civil Procedure, including reducing rationality and predictability in law; arguing that when one side is weaker, a system that efficiently delivers rights is critical; and noting the benefits of formalism).

403 See Schauer, supra note 226, at 425, 428, 430-31; Stith, supra note 401, at 685-87; cf. Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779, 861 (1994) (arguing that values are diverse and incommensurable and that "[a]n especially large task for legal theory is to offer an adequate description of how, in legal contexts, choices should be made among incommensurable goods and among different possible kinds of valuation").
sumptive claim to the Court's original jurisdiction. Moreover, when the defendant was another state, Supreme Court jurisdiction would be exclusive of that of the lower federal courts. In addition, controversies between a state and the federal government could frequently proceed in the Supreme Court on the ground that such suits often come within the State-Citizen Diversity Clause.

Over time, the Court developed certain principles to exclude cases from its original jurisdiction, even though that jurisdiction theoretically could be invoked as a matter of right. Some of these principles prohibit state-as-plaintiff litigation of certain claims altogether, whereas others allow states to sue in lower courts. The limiting doctrines, however, have contradictory qualities. A few reiterate the older notion that sovereignty is not a liti-gable interest; others treat the vindication of sovereignty interests as the most appropriate use of the Court's state-as-party jurisdiction. These factors reflect the ambiguity in the Court's role: on the one hand, as a "common-law court," which decides constitutional questions incidental to its duty to decide ordinary cases; on the other, as an institution with limited resources and the special role


405 See Mississippi v. Louisiana, 113 S. Ct. 549, 551 (1992) (holding that a boundary dispute between states could not be decided in lower federal court); California v. West Virginia, 454 U.S. 1027, 1027-28 (1981) (Stevens, J., dissenting) (arguing that Court should have granted leave to file original suit for breach of contract covering athletic contests at the Supreme Court level). Compare David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 545, 561 (1985) (justifying refusals to exercise nondiscretionary jurisdiction, but nevertheless criticizing such refusals as to cases within the Court's original jurisdiction) with Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 74 (1984) (criticizing discretionary denials of jurisdiction).

406 See U.S. Const. art. III, § 2 (providing that federal judicial power extends to controversies "between a State and Citizens of another State"). Absent consent, however, the United States could claim sovereign immunity against the states. See supra note 39. But the state might be allowed to sue a diverse federal enforcement official. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966). The Supreme Court also has allowed suits by the United States as plaintiff against a state defendant to be brought originally in the Supreme Court. See supra note 39. Suits between the states and the United States, however, proceed also in the lower federal courts. See, e.g., United States v. Nevada, 412 U.S. 534, 537 (1973) (per curiam) (holding that because there was no controversy between states, Supreme Court jurisdiction was not exclusive and case could be brought in lower federal court); United States v. Illinois, 803 F. Supp. 1338 (N.D. Ill. 1992).

407 See Arizona v. New Mexico, 425 U.S. 794, 797 (1976) (per curiam); see also supra note 404 (citing discussions of propriety of federal courts' discretionary denials of jurisdiction).
of expounding constitutional values.\textsuperscript{408} In determining whether it will hear original state-as-party cases, the Court at various times has declared that states cannot litigate as \textit{parens patriae} against the federal government.\textsuperscript{409} that original jurisdiction may be declined for matters based on local law,\textsuperscript{410} that important federalism concerns should be at issue,\textsuperscript{411} and that the injury of which a state complains should be of great magnitude.\textsuperscript{412} The Court also has suggested that it may decline jurisdiction if the same parties can litigate the same issues in another forum\textsuperscript{413} or, alternatively, if the same issues can be litigated by other interested parties in another forum.\textsuperscript{414}

1. \textbf{The Unavailability of \textit{Parens Patriae} Against the Federal Government}

The Court frequently has stated that a state cannot assert \textit{parens patriae} standing to protect its citizens from the operation of an allegedly unconstitutional federal statute.\textsuperscript{415} Although the Court first articulated this principle in an original jurisdiction suit, the principle bars state standing in the lower federal courts as well as in

\textsuperscript{408} See Fallon, supra note 20, at 952; see also Monaghan, supra note 101, at 1365-71 (describing private rights and special functions models for Supreme Court adjudication).


\textsuperscript{413} See Washington v. General Motors Corp., 406 U.S. 109, 114 (1972) (reasoning that availability of federal district court as alternative forum mitigated against original Supreme Court jurisdiction in antitrust case); see also Wyoming v. Oklahoma, 502 U.S. 437, 452 (1992) (reasoning that even if mining companies were to bring challenges to Oklahoma’s requirement that utilities use 10% Oklahoma coal, “Wyoming’s interests would not be directly represented”).

\textsuperscript{414} See, e.g., Arizona v. New Mexico, 425 U.S. 794, 796-97 (1976) (per curiam) (holding that pending state court action in which Arizona utilities challenged New Mexico’s tax on generation of electricity provided appropriate forum in which issues could be litigated); Alabama v. Arizona, 291 U.S. at 292 (determining that Alabama showed neither that there was a direct issue between itself and defendant states whose laws prohibited sale of prisoner-made goods nor that the validity of the statutes in question would not “speedily and conveniently be tested by the controlling company”).

the Supreme Court. The principle echoes the older doctrine that prohibited governments from litigating conflicting claims to regulatory power. When a state seeks to shield its citizens from the operation of federal law, it is often asserting a claim that Congress has overstepped its powers and has intruded into a domain reserved to the people and the states.\(^{416}\) For example, in *Massachusetts v. Mellon*\(^{417}\) the Court reasoned that because Massachusetts citizens were also United States citizens, the state should not be allowed to interpose itself to protect its citizens from the operation of federal statutes.\(^{418}\) A state ordinarily should protect its citizens by enforcing its own laws, said the Court, or where appropriate, by opening its own courts to injured persons for the maintenance of civil suits.\(^{419}\)

The requirement that the state pursue legal rights that belong to the state itself rather than to its citizens implies that most challenges to federal legislation will occur in traditional citizen-versus-government contests instead of government-versus-government suits.\(^{420}\) Nevertheless, the doctrine forbidding *parens patriae* suits against the federal government is narrower than the prohibition

\(^{416}\) In *Mellon*, for example, the Court denied Massachusetts standing to contest the constitutionality of federal spending on maternal welfare that the state alleged was beyond federal power and trespassed on the reserved powers of the states under the 10th Amendment. *Mellon*, 262 U.S. at 479-80. The Court relied on the long-established doctrine that general interests in sovereignty—that is, in making and applying law to the exclusion of another government—were not justiciable. Id. at 484-85; see also *Arizona v. New Mexico*, 425 U.S. at 797-98 (declining original jurisdiction to Arizona's challenge of New Mexico's tax on generation of electricity and stating that the Court was "not unmindful that the legal incidence of the electrical energy tax [was] upon the utilities" contesting its validity in other actions); cf. *Massachusetts v. Missouri*, 308 U.S. 1, 16-17 (1939) (reasoning that Missouri law that abstained from taxing intangibles of decedent domiciled outside of state when latter state gave reciprocal privileges did not give rise to a justiciable claim in Massachusetts to enforce Missouri law).

\(^{417}\) 262 U.S. 447 (1923).

\(^{418}\) Id. at 485-86.

\(^{419}\) Id. at 485; cf. Amar, supra note 35, at 1494 (noting that federalism serves to diffuse power with "each government checking the lawlessness of the other").

\(^{420}\) See Albert, Inadequate Surrogate, supra note 1, at 447-49 (noting that structural guaranties are reviewable in claims brought by individuals and that individuals, but not states, harmed by federal power could question whether the federal government acts within area of its competence); see also *Florida v. Mellon*, 273 U.S. 12, 17-18 (1927) (holding that state could not assert citizens' rights as *parens patriae* against the federal government to contest federal inheritance tax that gave partial credit for state inheritance taxes and stating that the state itself was not directly injured despite allegation that state's option not to tax inheritance was impinged on). The *Florida v. Mellon* Court could be criticized for attempting to maintain a line between direct and indirect injuries. See id. at
against litigation of sovereignty interests. It does not prevent states from suing each other on a parens patriae theory in the Supreme Court's original jurisdiction, as the Court indicated when it upheld Pennsylvania's Dormant Commerce Clause claim against West Virginia, shortly after denying jurisdiction in Mellon. 421

In addition, and despite Mellon, states can sometimes litigate conflicting claims to regulatory power against the federal government (usually by suing a diverse federal official) if the state claims that its "own" rights, rather than merely its citizens' rights or a claim of want of congressional power, are implicated. For example, when South Carolina challenged the validity of certain provisions of the 1965 Voting Rights Act 422 in South Carolina v. Katzenbach, 423 the Court allowed the state to contest whether Congress could set voter qualifications in state and federal elections under the Fifteenth Amendment. 424 Presumably the state sought to litigate its own liberty interest in setting voter qualifications, as provided by specific provisions of the Constitution that expressly contemplate state power to set such qualifications. 425 By contrast, the Court held that the state could not assert claims that the Voting Rights Act violated either separation of powers or the Due Process and Bill of Attainder Clauses. Such provisions, said the Court, protected people rather than states, 426 and the state could not assert as parens patriae such rights of its people against the United

18. But to the extent that the direct-indirect distinction reiterates the issue of whether legally protected interests are at stake, the distinction may be useful.

A citizen suit to contest the legislation at issue in Massachusetts v. Mellon, however, was not available in the companion case Frothingham v. Mellon, 262 U.S. 447 (1923), because the Court denied taxpayer standing. Id. at 486. But cf. Flast v. Cohen, 392 U.S. 83, 103-04 (1968) (allowing taxpayer standing to contest spending alleged to violate specific constitutional prohibition in the Establishment Clause).

421 See Pennsylvania v. West Virginia, 262 U.S. 553, 592, 599-600 (1923). The Court itself distinguished Mellon by stating in Pennsylvania v. West Virginia that the state had suffered more concrete harm as proprietor of various public institutions and schools whose supply of natural gas would be curtailed, and as representative of the consuming public whose supply would be similarly affected. Id. at 591-92. The different results in the two cases may reflect the enhanced respect for federal regulatory power vis-à-vis the states.


424 Id. at 324.


426 Katzenbach, 383 U.S. at 324. The state seemed to argue that its own rights of due process and against bills of attainder, rather than its people's, had been violated.
States.\textsuperscript{427} Not long thereafter, the Court in \textit{Oregon v. Mitchell}\textsuperscript{428} allowed states to contest federal legislation requiring them to institute the eighteen-year-old voting age and allowed the Attorney General to seek an injunction against conflicting state regulation.\textsuperscript{429} The Court again based the state’s standing on explicit constitutional language contemplating general state control of election qualifications.\textsuperscript{430} 

Allowing a state to litigate to vindicate its own rights is technically consistent with older doctrines; the state could litigate property and contractual rights because they belonged to the state as an entity. But with the expansion of state standing to include liberty interests rather than merely property and contractual interests, the state’s own rights could include certain conflicting claims to regulatory power that traditionally had been nonjusticiable, as was true of the state contests to voting rights legislation. Thus, the Court in \textit{South Carolina v. Katzenbach} and \textit{Oregon v. Mitchell} presumably viewed the states as asserting their own constitutional rights—that is, their power to make and apply law concerning participation in elections—rather than the rights of their citizens.\textsuperscript{431} The Court, however, had declined to characterize similarly the Tenth Amend-

\textsuperscript{427} Id.
\textsuperscript{428} 400 U.S. 112 (1970).
\textsuperscript{429} See id. at 117 n.1. Both sides of the dispute were seeking to invoke federal jurisdiction. See id. at 153 n.1 (Harlan, J., concurring in part and dissenting in part) (noting that no one had asked the Court to reexamine the justiciability decision in \textit{Katzenbach}).
\textsuperscript{430} See id. at 119-25 (citing U.S. Const. art. I, §§ 2, 4, and stating that the Constitution intended the States to keep for themselves the power to regulate most elections, with the exception of some congressional authority over federal elections and of modifications by 15th Amendment). The allowance of state standing in the voting cases could also be seen as nearly parallel to taxpayer standing. The Court may allow taxpayer standing when there is an explicit spending limitation in the Constitution, but it disallows such standing when a more general 10th Amendment limitation on federal power is claimed. See Flast v. Cohen, 392 U.S. 104-05 (1968). But cf. Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) (denying citizen-taxpayers standing to challenge federal agency’s gift of land to sectarian college in part because action occurred under Property Clause, U.S. Const. art. IV, § 3, cl. 2, not under Taxing and Spending Clause, id. § 8, cl. 1).
\textsuperscript{431} To the extent that voters themselves would have standing and incentives to challenge the new federal laws, however, it may be questionable whether it was desirable to recognize such rights as liberty interests belonging to the states. See Davis v. Bandemer, 478 U.S. 109, 118-27 (1986) (finding justiciable a question presented by allegation of dilution by party affiliation); Baker v. Carr, 369 U.S. 186, 204-08 (1962) (allowing voters standing to contest malapportionment).
ment rights at issue in *Mellon* as belonging to the state. The Court therefore appears more inclined to find a state's own constitutional rights at issue for standing purposes when the state's claim implicates a specific constitutional provision relating to state powers or when state officials are themselves the direct object of coercive federal regulations.\(^4\)

2. Nonlitigability of Disputes Grounded in Local Law

In addition, the Court has sometimes refused to hear under its original jurisdiction disputes based on local law.\(^3\) This doctrine echoes the principles that sovereignty interests were litigable primarily in enforcement suits in a state's own courts and that state officials ordinarily lacked enforcement power and power otherwise to pursue citizens' general interests in federal courts. The Court, however, turned to docket-control rationales to exclude cases based on local law, following the weakening of the prohibition against litigation of sovereignty interests.\(^4\)


In *Ohio v. Wyandotte Chemicals Corp.*, for example, Ohio brought a public nuisance action against an out-of-state corporation. The state had ample precedent for bringing an original suit because the Supreme Court had allowed the states to sue for public nuisance based on general rather than special damage. Such precedents accorded a Supreme Court forum to cases that the Court once would have barred as impermissible state litigation of sovereignty interests. Once the Court allowed such sovereignty interests to be litigated outside a state's own courts, the state arguably was entitled to bring its case in the Supreme Court. And if properly invoked, the Court's original jurisdiction was presumptively obligatory. But the Court in *Wyandotte* declined original jurisdiction. It reasoned that although it generally must exercise jurisdiction given to it, the states' increasing conflicts with out-of-staters and the increasing complexity of the social system necessitated the discretionary power to decline jurisdiction.

The Court need not have been so apologetic about turning this case away, however, because the Supreme Court, and the federal courts generally, were once viewed as inappropriate forums for state enforcement suits and state litigation to vindicate general interests of their citizens. Perhaps it was not the increase in state disputes with out-of-staters (as the Court supposed), but rather the

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436 Id. at 494.
437 Id. at 496; see also supra notes 171-80 and accompanying text (discussing requirement that states show special injury to bring public nuisance actions).
438 See *Wyandotte*, 401 U.S. at 496-97 (stating that generally a court with jurisdiction must exercise it).
439 See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should."); Redish, supra note 20, at 47-74.
440 *Wyandotte*, 401 U.S. at 497. In addition, the advent of long-arm jurisdiction meant states could more easily sue out-of-staters in their home courts. Id.
441 See supra Part I.D.1.a; see also Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989) (stating that federal defense of tribal sovereign immunity did not convert state tax claims into federal questions); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 21 (1983) (reasoning that original federal question jurisdiction would not exist for suits by states to declare validity of their regulations); Massey, supra note 54, at 78-82 (noting that abstention doctrines have roots in constitutional guaranties of residual state sovereignty and supremacy of federal law, and claiming that "[t]he discretionary nature of abstention does not reflect a lack of constitutional foundation so much as it illustrates the continually shifting . . . frontier of federal and state sovereignty").
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The Court's own relaxation of the doctrine prohibiting litigation of sovereignty interests, that added to the demands on the Supreme Court's time.

3. The Requirement of Importance

The doctrine that the states cannot assert *parens patriae* standing against the United States, as well as the doctrine that matters of local law will not be litigated in the Supreme Court, largely serves to reiterate the results of the older doctrine of nonlitigability of sovereignty interests. Other discretionary standards that the Court uses to select cases for its original jurisdiction point in the opposite direction, one more consistent with the public law model of litigation. The Court's insistence on injuries of great magnitude or injuries to important federalism interests as a precondition to original jurisdiction falls into this category. Although these are merely discretionary docket-control factors, the emphasis on such interests tends to encourage the Court to find that states have litigable interests where traditionally they had none.

When the Court rejected the common law as a basis for deciding interstate disputes in favor of doctrines that respected the equal sovereignty interests of the states, it articulated the requirement that only interstate disputes alleging injuries of great magnitude could make a claim to the Court's original jurisdiction. The related requirement that a claim implicate important federalism concerns was far removed from the idea that the Court's role in deciding issues of constitutional law derived from its duty to decide cases. Thus, in allowing Wyoming to contest Oklahoma's requirement that Oklahoma utilities use a minimum percentage of

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442 See North Dakota v. Minnesota, 263 U.S. 365, 374 (1923); Missouri v. Illinois, 200 U.S. 496, 521 (1906); see also Maryland v. Louisiana, 451 U.S. 725, 766 n.3 (1981) (Rehnquist, J., dissenting) (arguing that requiring a state's claim to implicate sovereign interests also satisfies the "serious magnitude" requirement). The doctrine may have derived partly from a general equity rubric under which equitable remedies are available only when damages would not have afforded an adequate remedy. See Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 566 (1851) (requiring state to show special injury for which law would not afford adequate remedy). Particularly in nuisance cases, some courts stated that an injunction should not issue absent a clear and undisputed right. See Kurtz, supra note 174, at 631-32. That the doctrine would become part of a special jurisprudence for interstate disputes including nonnuisance cases, however, seemed to derive from the Court's departure from the common law as a basis for decisions in interstate disputes. See supra notes 242-46 and accompanying text.
Oklahoma-mined coal, the Court was taking account of what it perceived as the important federalism interests at issue.\(^4^4^3\) Earlier the Court had denied jurisdiction over an analogous Dormant Commerce Clause claim in part because the Court lodged the "right" protected by the Commerce Clause in persons, not states.\(^4^4^4\) In addition, the Court had previously indicated that a collateral loss of tax revenues did not give a state standing to challenge the legislation of another government.\(^4^4^5\) The Court's new emphasis on litigating important federalism issues, however, guided it to the conclusion in *Wyoming v. Oklahoma*\(^4^4^6\) that a state had a litigable injury from lost tax revenues where the protectionist legislation of other states affected its citizens.\(^4^4^7\)

4. **Availability of Alternative Forums**

A final factor that the Court sometimes uses to determine whether to entertain cases within its original jurisdiction is whether an alternative forum is available to hear the claim. Suits between states are, by statute, committed to the Supreme Court's exclusive original jurisdiction, and for them there is (at least technically) no other federal forum.\(^4^4^8\) Other cases in the Supreme Court's origi-


\(^4^4^4\) See *Louisiana v. Texas*, 176 U.S. 1, 19 (1900); cf. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664-65 (1976) (per curiam) (holding that equal protection and interstate privileges and immunities violations against Pennsylvania citizens could not be litigated by Pennsylvania and stating that constitutional provisions in question "protect people, not States").


\(^4^4^7\) Id. at 451-52.

\(^4^4^8\) If a state brings an action against an enforcement official of another state, that action can be brought in a lower federal court. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (allowing Washington Commission to bring action in North Carolina federal court). Presumably, courts will allow such suits when a comparable suit brought by an individual litigant would not be barred by the 11th Amendment. If the suit defies reformulation as one against an officer, however, then it falls within the core of statutorily exclusive state-versus-state jurisdiction. Cf. *Mississippi v. Louisiana*, 113 S. Ct. 549, 551 (1992) (denying district court jurisdiction in a boundary dispute between states, which was brought after Louisiana intervened in a Mississippi federal court action between private parties and brought a third-party claim against Mississippi). For example, a suit over boundaries, property, or money would be difficult to reformulate as a suit against an enforcement officer. See *Hawaii v. Gordon*, 373 U.S. 57 (1963) (per curiam) (denying as an impermissible suit against the United States a state's original action in the Supreme Court to convey land); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-
nal jurisdiction are not statutorily exclusive. Using the availability of an alternative federal forum to shuttle to lower courts controversies other than those between states is a reasonable docket-control mechanism and cannot be characterized as having either a public law or private law slant.\(^9\) This is, moreover, an unexceptionable criterion once one assumes that Congress constitutionally may make the Supreme Court's original jurisdiction nonexclusive.

\(^{449}\) The application of the alternative-forum factor results in many state suits against private out-of-state parties under federal statutory law, such as antitrust actions, being brought in the lower federal courts. See Washington v. General Motors Corp., 406 U.S. 109, 112-14 (1972) (directing states to bring in lower federal courts antitrust and common-law suits alleging conspiracy in restraint of trade); Georgia v. Evans, 316 U.S. 159, 163 n.2 (1942) ("If the district courts are given [original] jurisdiction, a State may bring suit there even though under Article III suit might be brought [in the Supreme Court]."). But cf. Georgia v. Pennsylvania R.R., 324 U.S. 439, 464-66 (1945) (noting that a state might have trouble obtaining personal jurisdiction against all defendants in lower federal court and therefore could sue in Supreme Court's original jurisdiction).

In recent years, for example, state suits have proceeded in district courts against private parties for recovery of costs under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1988). See, e.g., Arizona v. Motorola, Inc., 805 F. Supp. 742 (D. Ariz. 1992). The statute explicitly provides for liability to states, see 42 U.S.C. § 9607(a), and for jurisdiction in district courts, see id. § 9613(b). In addition, state challenges to federal administrative rulings generally originate in lower federal courts. See supra note 368. Federal reimbursements to states under Medicaid and similar state-administered programs are a frequent source of state suits against federal officials. See, e.g., New York v. Sullivan, 802 F. Supp. 752 (N.D.N.Y. 1992), aff'd sub nom. New York v. Health & Human Servs., 992 F.2d 321 (2d Cir. 1993). Unlike state enforcement suits, state suits under federal statutes historically would not have been presumptively excluded from Supreme Court jurisdiction. Federal question jurisdiction, however, was seen as distinct from state-as-party suits and was a category of jurisdiction as to which the Supreme Court's jurisdiction could be appellate rather than original, even when the state was a party. See supra text accompanying notes 55-56. The allocation of statutory federal question cases to lower federal courts, therefore, is appropriate in light of traditional practice, modern docket exigencies, and congressional designation of such jurisdiction as nonexclusive. Because a state generally can sue in a federal court sitting in the same state, the alternative forum is thought to be more appropriate than if the state were forced to sue in courts sitting in other states.
and that the Court may decline to hear a case that a party entitled to invoke original jurisdiction has brought.\textsuperscript{450}

It is the application of this limiting factor in cases in which one state sues another that is problematic. In interstate disputes, this factor can alternatively reinforce a more expansive public law view or a more contracted private law view of Supreme Court jurisdiction, depending on whether one asks if the same parties can litigate the same issues elsewhere or only if other parties may litigate them. If the question is whether the same parties can sue each other in another federal court, the Supreme Court will be encouraged, perhaps overly encouraged, to entertain state-versus-state disputes that meet the current minimal standing requirements. That is because the sovereign plaintiff typically lacks an appropriate alternative federal forum insofar as state-versus-state suits, denominated as such, are exclusively within the Supreme Court's jurisdiction. To be sure, the complaining state can sometimes bring an action in the offending state's courts\textsuperscript{451} or sue an enforcement official in the federal courts within the offending state.\textsuperscript{452} But forcing the state into a court in the state whose laws are being challenged arguably reassigns the complaining state to an

\textsuperscript{450} Both assumptions are well established. See supra notes 31, 433-41 and accompanying text.

\textsuperscript{451} See Massachusetts v. Missouri, 308 U.S. at 20 (noting that Missouri attorney general represented that Missouri would allow Massachusetts to sue in its courts); cf. Hunt, 432 U.S. at 338-39 (noting that Washington Commission pursued North Carolina administrative remedies before bringing action in federal court in North Carolina). Actions to enjoin taxes and rates would have to be brought in state courts under the Tax Injunction Act, 28 U.S.C. § 1341 (1988) and the Johnson Act, 28 U.S.C. § 1342 (1988), except that the Court has held the Tax Injunction Act inapplicable in original Supreme Court actions between states. See Maryland v. Louisiana, 451 U.S. 725, 745 n.21 (1981) (holding that Tax Injunction Act "by its terms only applies to injunctions issued by federal district courts").

inadequate forum. And that private parties could appropriately litigate the same issues in such alternative forums is irrelevant if the Court limits its inquiry to whether there are alternative forums for the particular parties before it.

In Wyoming v. Oklahoma, for example, the Court reasoned that the plaintiff State had no appropriate alternative forum in which to litigate its dispute with another state on its Commerce Clause claim. The Court apparently was unimpressed by the fact that various utilities and non-Oklahoma coal companies could have challenged in a federal court the Oklahoma statute requiring use of at least ten percent Oklahoma coal. As thus applied by the Court, the alternative-forum inquiry gives states a good shot at obtaining Supreme Court jurisdiction when they sue other states, regardless of pending or likely suits by citizens in lower courts raising similar issues. This is particularly true for Commerce Clause challenges to the legislation of other states, which inevitably implicate federalism concerns.

A different formulation of the alternative-forum inquiry in state-versus-state disputes, however, asks not whether state parties can litigate the same issues elsewhere but simply whether the same issues can be litigated elsewhere. Framing the inquiry in this way largely works to exclude from the Supreme Court's original jurisdiction state-versus-state litigation over the constitutionality of the laws of the defendant state. Original Supreme Court jurisdiction becomes unnecessary because private parties can sue for an injunc-

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453 See Maryland v. Louisiana, 451 U.S. at 743. The Court entertained original jurisdiction to contest Louisiana's first-use tax even though there were pending suits that would litigate the same issues. It was unclear if the States could intervene in the declaratory refund suits, but the Louisiana attorney general had said he would not oppose intervention. Id. at 741 & n.17. The Court distinguished Arizona v. New Mexico, 425 U.S. 794 (1976), inter alia, on the ground that a political subdivision of Arizona was involved in a New Mexico state court action contesting the tax at issue in that case. See Maryland v. Louisiana, 451 U.S. at 743. This contrasts with cases where a state brings a suit against a private party under federal statutory law, which often can be brought in the complaining state's federal courts or some other relatively neutral forum. See Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).


455 Id. (noting that coal companies "[for reasons unknown" had not filed actions). Perhaps the coal companies preferred to save their money in light of the state's litigation. The federal forum would have been in Oklahoma.

456 Private parties can sue state enforcement officials in lower federal courts and may be able to sue the state itself in state courts.
tion against these laws in the lower courts. Asking the question in this manner led the Court to decline jurisdiction when Arizona challenged New Mexico's tax on in-state power generated for out-of-state use, partly on the ground that power companies were already litigating the issue elsewhere.

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As these examples suggest, the factors that the Supreme Court uses to select cases to hear in its original jurisdiction have contradictory implications. On the one hand, the Court denies standing to states to contest federal legislation on behalf of their citizens, based in part on the survival of a preference for challenges by individuals to such legislation. Similarly, when the Court denies original jurisdiction because the same issues can be litigated elsewhere (generally between a nonstate party and the defendant state or its officials), it prefers individual challenges over state-versus-state suits. On the other hand, the Court allows state parens patriae standing when states sue other states, it prefers cases implicating significant federalism issues, and it sometimes asks whether a plaintiff-state has another appropriate forum, all of which tend to encourage states to bring constitutional challenges in the Supreme Court. As a practical matter, state challenges to the legislation of other states will preempt parallel individual actions to contest the same governmental actions because a conclusive Supreme Court

457 A state theoretically could secure monetary remedies from another state in instances where individuals could not. States typically, however, sue for injunctions, perhaps because they often sue for losses more directly suffered by others. Cf. Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) (per curiam) (rejecting state attempt to sue another state for tax refunds on illegal commuter taxes for which the plaintiff state had given credit to its own citizens and noting that defendant state had inflicted no injury upon the plaintiff state through the imposition of taxes).


459 Id.; cf. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819-20 (1976) (reasoning that federal courts are under obligation to exercise the jurisdiction given, but the availability of a more complete resolution of water rights in state court and the existence of a statute making United States amenable to such suits in state courts weighed in favor of abstention).

460 In many attempts by states to assert parens patriae standing against the federal government, as in Massachusetts v. Mellon, 262 U.S. 447 (1923), no one state is affected differently from other states, and all are represented to an extent in the national political process.
determination generally makes lower court efforts futile. Furthermore, interstate *parens patriae* standing and a relaxed definition of a state’s “own” litigable harms to include lost tax revenues and other derivative injuries mean that states often can present a justiciable challenge to the legislation of other states and the federal government, thus giving them a presumptive claim to a Supreme Court forum.

**B. New Directions**

As the above discussion suggests, there are two related problems in state-as-plaintiff suits in the federal courts. One concerns development of standards for state standing in the federal courts generally. The other concerns allocation of cases in which states have standing between Supreme Court and lower federal court original jurisdiction. To address these problems, we offer two related suggestions. First, in most instances, states should be allowed to litigate only their own legally protected interests. Second, in allocating between the Supreme Court and lower federal courts cases where state standing is present, the Court should look to factors that reinforce nonlitigability-of-sovereignty principles rather than to factors that reinforce public law principles. Particularly for state-versus-state constitutional disputes, the Court generally should employ the version of the alternative-forum inquiry that asks whether the same issues could be litigated elsewhere rather than the narrower question whether the same parties could litigate those issues elsewhere.

As a threshold matter, however, some might argue that these proposals are unnecessary because the increased ability of states to claim both standing and a Supreme Court forum is unproblematic. This argument assumes that the injury requirement for a case is superfluous and that in any event a state is injured in fact whenever its citizens suffer an injury. Once we allow for somewhat boundless state standing, the Court’s use of contradictory factors to determine when it will take original jurisdiction over such cases is arguably no worse than the discretion the Court exercises as to its certiorari jurisdiction. To the extent that the states’ ability to invoke original jurisdiction does give them a leg up on securing a Supreme Court forum, this advantage enhances federalism and is justified by the constitutional grant of original jurisdiction. After
that a state attorney general believes a civil dispute is important arguably should influence the Court’s docket. The Court, moreover, can provide quick answers to important legal questions, and the state can enhance its citizens’ rights by litigating issues for them and by providing resources ordinarily unavailable to individuals.

These arguments fail, however, to consider the downside of state standing, including its potential to undermine individual standing. In addition, we believe that an injury to the plaintiff is inherent in the concept of an Article III case and that the current injury-in-fact standard fails to satisfy this requirement in the context of state standing. And although it may be necessary for the Court to limit its original docket, a more principled set of limitations—limitations that better comport with the purposes of original jurisdiction—would be more in keeping with the fact that the Court’s original jurisdiction is, technically, not discretionary.

Moreover, the states’ abilities to make presumptive claims on the Court’s docket without having to start in the lower courts is unjustified in cases where the state asserts interests that largely derive from (or are parallel to) citizens’ rights. The Court is deprived of the benefits of percolation when it provides a quick answer to constitutional questions. Delaying access to the Supreme Court gives lower courts the opportunity to bring diverse perspectives to problems of national interest before a binding, final word is declared. State litigation not only effectively preempts individuals from litigating suits in the lower courts but might even be considered formally binding on citizens, thus depriving them of the representative and judicial checks that are normally provided by class actions.

Nor do we believe that increasing the states’ ability to litigate the rights of their citizens invariably enhances individual rights. As

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461 Only in statutorily defined, extraordinary contexts may cases be brought directly to the Supreme Court on review of a trial court without the filter of an intermediate appellate court.

462 See Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 692 n.32 (1979) (rejecting claim that district court lacked power to enjoin nonparties in part because “these individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and ‘they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment’” (quoting City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340-41 (1958)).
discussed above, increased state standing could potentially undermine individual standing to litigate individual and structural constitutional guaranties. Admittedly, increased state standing need not entail such restrictions on individual standing. If that is the case, then allowing broad state standing arguably provides an additional category of plaintiffs that can challenge the actions of other governmental bodies and that have access to public resources that individuals lack. But if our legal system has become so inaccessible that individual constitutional rights depend for their vindication on the decisions of states’ attorneys general, perhaps this is a problem that should be addressed by means other than doctrines of state standing. The state’s role in protecting the rights of its citizens in the federal system ought not to consist in bringing lawsuits to vindicate rights that belong to citizens, or in jumping ahead of citizens who sue and trying to obtain a Supreme Court forum. Rather, states help to secure freedom by providing separate areas for political participation and accountability. To the extent that part of a state’s vitality is expressed through litigation, therefore, such litigation should remain primarily in the state’s own courts with the state enforcing its own laws.

1. Legally Protected Interests as a Limitation on State Standing

The analogy of governmental standing to individual standing once supplied a limiting principle for governmental suits. Turn-of-the-century police power standing, however, pushed the boundaries of state standing beyond that limitation. Returning to the analogy to individual standing as it exists under current law, however, would not provide coherence to, or limiting principles for, state standing. Individual standing for regulatory or constitutional beneficiaries has expanded dramatically and has itself taken on aspects of police power standing. Under the Supreme Court’s current injury-in-fact inquiry, any interest that government might

463 See Comment, Re-examination, supra note 5, at 1071 (noting that “state [parens patriae] suits remain a viable option notwithstanding the availability of class actions, in that they preserve flexibility in allowing states to protect significant interests, thereby increasing public confidence in both state and federal government”).
legitimately pursue or protect could, if interfered with, provide a basis for standing for either a state or an individual.\textsuperscript{464}

Many thoughtful proposals in the area of individual standing have suggested a revival of the legally-protected-interest inquiry,\textsuperscript{465}

\textsuperscript{464} In addition, the \textit{parens patriae} doctrine allows states vicariously to take on the interests of its citizens.

\textsuperscript{465} See, e.g., Albert, Inadequate Surrogate, supra note 1, at 426, 474-75 (arguing that standing concerns components of cause of action and should therefore be addressed under law governing claims for relief, and disfavoring approach that would look merely to whether case called for public interest vindication); Currie, supra note 1, at 43, 47 (suggesting that the proper inquiry in nonconstitutional standing cases is whether the law grants parties a right to judicial relief); Fletcher, supra note 1, at 229 (stating that the true standing question is whether the plaintiff has "a legal right to judicial enforcement of an asserted legal duty" and claiming that the "question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked"); id. at 266-67 (arguing that standing in constitutional cases "should focus on the particular constitutional claims at issue"); Logan, supra note 1, at 82 (concluding that for constitutional cases the Court should base standing decisions on particular right asserted and for statutory claims the Court should defer to Congress' broad factfinding and remedial power); Nichol, Rethinking, supra note 1, at 83, 85, 87 (criticizing the injury-in-fact test; suggesting restriction of the test to assisting in the determination of which interests get standing because analogous to common-law rights, not in the determination of constitutionally and statutorily created legal interests; and arguing that in constitutional litigation one would look to whether the provisions on which the plaintiff relies created legal interests arguably violated by acts of defendant); Sunstein, Revisionism, supra note 1, at 132 n.9 (arguing that legislative instructions should determine when narrowly or broadly to characterize injuries); Sunstein, After \textit{Lujan}, supra note 1, at 235 (suggesting that in general, "standing depends on whether any source of law has created a cause of action").

There is some support for the continued use of the injury-in-fact test, even from some of its critics. See, e.g., Nichol, Disintegration, supra note 1, at 1919 (arguing that "the injury calculation should be a bifurcated one, exploring both the actuality of the alleged harm and the cognizability of the underlying interest alleged to have been harmed"); see also Nichol, Justice Scalia, supra note 1, at 1162 (arguing that using inquiry recommended by Sunstein and Fletcher that looks to whether the plaintiff has a cause of action may require courts to ask questions similar to those it asks under injury-in-fact test). Some of those who are less critical of the injury-in-fact test see recognition of new injuries as part of a common-law process of developing public values. See, e.g., Vluing, supra note 1, at 5, 20, 27-33, 39, 52 (criticizing legally-protected-interest test and viewing standing to sue as emanating from public values); Burnham, supra note 1, at 58 (arguing that injury determination reflects common-law determination of public values). Others, particularly Justice Scalia, view the individual injury requirement as required by separation of powers. See Scalia, supra note 1, at 886 (arguing that Article III limits congressional power to convert general benefits into legal benefits); see also Nichol, Disintegration, supra note 1, at 1916 & nn.14-15 (citing academics and judges who have praised injury requirement as essential to limited judicial role).
which surfaced in *The Chicago Junction Case*.\textsuperscript{466} Renewed focus on legally protected interests, although arguably narrower than the inquiry into injury-in-fact enshrined in *Data Processing*,\textsuperscript{467} would not imply that only traditional common-law interests in property and liberty are protected.\textsuperscript{468} Rather, the intended beneficiaries, including states, of statutory and constitutional provisions would receive standing. Congress, for example, could create legally protected interests by expressing its intention to give classes of potential litigants, including states, a cause of action.\textsuperscript{469} And the Court would identify the beneficiaries of particular constitutional provisions to determine what interests are legally protected.\textsuperscript{470}

\textsuperscript{466} 264 U.S. 258 (1924) (allowing standing for intended beneficiaries of congressional legislation).

\textsuperscript{467} See Currie, supra note 1, at 44; Nichol, Rethinking, supra note 1, at 83.

\textsuperscript{468} See, e.g., Nichol, Rethinking, supra note 1, at 90-93 (stating that judicially cognizable interest should include statutorily and constitutionally derived interests); Sunstein, Privatization, supra note 1, at 1438-39.

\textsuperscript{469} See Fletcher, supra note 1, at 253 (stating that "[w]hen Congress passes a statute conferring a legal right on a plaintiff to enforce a statutorily created duty, the Court should not require that the plaintiff show 'injury in fact' over and above the violation of the statutorily conferred right"). According to Sunstein, congressional intent to confer a right of action on parties would create a kind of property interest in the regulatory beneficiaries. See Sunstein, After *Lujan*, supra note 1, at 191.

\textsuperscript{470} Thus, to the extent that Congress intended citizens suffering shared and probabilistic injuries to be able to sue for environmental harm, the Court should recognize their ability to do so. With respect to standing in constitutional cases, the Court would look to the intended protections of the constitutional provision. See Fletcher, supra note 1, at 266-67 (suggesting that standing in constitutional cases should focus on particular constitutional claims at issue and is therefore difficult to describe as a coherent whole). Under this framework, an ordinary citizen or taxpayer could still sue in Establishment Clause cases. See *Flast* v. *Cohen*, 392 U.S. 83, 103-06 (1968) (recognizing taxpayer standing to contest congressional spending under constitutional provisions that explicitly prohibit congressional spending); Fletcher, supra note 1, at 267-68; Sunstein, After *Lujan*, supra note 1, at 210 n.218. A citizen or taxpayer, however, might not be able to sue in all other circumstances to prevent the government from making other expenditures that the citizen claims are beyond constitutionally conferred powers. See Sunstein, After *Lujan*, supra note 1, at 210. Justice John Harlan, while acknowledging that public actions are not forbidden by Article III, maintained that they strained the judicial function and that the Court should await congressional authorization to expand standing. *Flast*, 392 U.S. at 130-33 (Harlan, J., dissenting); see also Scott, supra note 283, at 686 (noting that where Congress has authorized judicial review there is less difficulty as to the policymaking role of courts). Professor Fletcher suggests that in some contexts, Congress could not expand standing to bring constitutional cases. See Fletcher, supra note 1, at 277-80.
Of course, attempts to define legally protected interests will not be simple.\textsuperscript{471} Traditionally protected common-law interests would presumably continue to be protected. But statutes are not always explicit about who has a protected interest under them, nor is the Constitution. To discipline the inquiry, the Court could apply interpretive canons of legislative explicitness to exclude or include particular interests.\textsuperscript{472} In addition, the Court could properly resort to a common law of standing in which certain interests are presumptively protected.\textsuperscript{473}

Although there will certainly be problems in marking out legally protected interests, those problems are less daunting in the state standing context than in the individual context. As part of the existing common law of standing, the fact that other potential litigants are the more immediate objects of alleged illegal behavior and have incentives to sue is a factor weighing against finding a litigable interest.\textsuperscript{474} A related and unexceptionable presumption is that constitutional rights ordinarily belong to people even when the question concerns the structure of government.\textsuperscript{475} To the extent

\textsuperscript{471} The legally-protected-interest test could be problematic from several perspectives. First, it may defy limitation. See Stewart, supra note 17, at 1735; supra note 465; see also Fletcher, supra note 1, at 290-91 (noting that standing law cannot be made easy because it involves “a question of law on the merits [of] whether the plaintiff has the right to enforce the particular legal duty in question”). Alternatively, to the extent the courts develop limits, attempts to find a narrow set of beneficiaries may be criticized as arbitrary. Cf. Vining, supra note 1, at 36, 103-04 (arguing that it is analytically arbitrary to view a regulatory scheme as enacted for benefit of a class of private individuals).

\textsuperscript{472} See Stewart, supra note 17, at 1736 (suggesting that standing based on legally protected interest should be limited “to those interests which the governing statute requires the administrator to consider”); Sunstein, Injuries, supra note 1, at 62 (suggesting possibility of clear statement principles).

\textsuperscript{473} Nichol, Disintegration, supra note 1, at 1936-37 (suggesting that the court appropriately considers not only which injuries are actual but also which are appropriately vindicated by the judiciary); Sunstein, Revisionism, supra note 1, at 132 n.9 (“A prime goal of standing doctrine for the next few years should be to explain when injuries can be characterized narrowly and when broadly.”); Sunstein, Injuries, supra note 1, at 56-59 (suggesting possible presumptions for determining standing).

\textsuperscript{474} One may argue that the states satisfy this standard in cases alleging damage to federalism interests. We discuss below why we do not believe that the state should be easily characterized as possessing legally cognizable interests. Direct targets of legislation, of course, have greater incentives to sue. See Trott, supra note 5, at 969 (noting that courts have considered whether private parties are more directly concerned when deciding whether to accord \textit{parens patriae} standing).

that individuals have legally protected interests and incentives to sue, state standing would usually be derivative of that of its citizens—as it is in tax collector standing and many applications of parens patriae standing. Accordingly, in these areas state standing need not readily be recognized.

For example, as discussed above, the Court in *Wyoming v. Oklahoma* allowed state standing based on a loss of severance tax revenues, even though the potential sellers and purchasers of Wyoming coal who were adversely affected by Oklahoma’s legislation limiting the use of out-of-state coal could themselves have brought suit against Oklahoma officials. It is of course true that state tax revenues may be reduced by the legislation of other states, but anything more than de minimis economic harm to a person or corporation in one state because of another state’s legislation may affect the tax revenue of the former. That the taxes and economic legislation of other states affect individual parties, that such parties have sufficient incentives to sue, and that intended beneficiaries of the Commerce Clause are participants in commerce all militate against recognizing the state rights vindicated by the Court in recent interstate commerce litigation such as *Wyoming v. Oklahoma*.

Even though states ordinarily should not have standing to contest the legislation of other states or of the federal government based solely on injuries to their citizens, courts should allow states standing to challenge federal legislation that regulates state administrative machinery directly. For example, courts should allow states standing where states contest the application of federal regulatory burdens directly on states, such as wage and hour legislation

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477 Id. at 447-50.

478 See Comment, Re-examination, supra note 5, at 1076 (suggesting that an injury to the economic well-being of its citizens will injure a state); see also Maryland v. Louisiana, 451 U.S. 725, 739 (1981) ("[D]irect injury is ... supported by [plaintiff] States' interest in protecting its citizens from substantial economic injury presented by imposition of [Louisiana's] First-Use Tax.").


480 A common law of standing that presumes that states have standing when directly regulated does not mean that states will always be able to state legally sufficient claims. States presumably will have few incentives to bring claims that are clear losers, and such claims can be disposed of early in the litigation.
respecting state employees.\footnote{481} In such cases, state officials are in the position of regulated parties, similar to individual objects of regulation who have had little trouble obtaining standing at least since \textit{Ex parte Young}.\footnote{482}

A similarly appropriate case for state standing is found in \textit{New York v. United States},\footnote{483} where the Supreme Court invalidated a federal law requiring states either to legislate provisions for the disposal of hazardous waste by a certain date or to take title to it.\footnote{484} The federal legislation therefore enlisted state governmental machinery to implement a federal program.\footnote{485} Moreover, the take-title provisions imposed a liability on the states that would have fit even traditional notions of injury to a state proprietary interest. Recognition of state standing in such cases would not undermine the prohibition on state \textit{parens patriae} suits against the federal gov-


\footnote{482} See Comment, Re-examination, supra note 5, at 1087-88 (suggesting that Massachusetts v. Mellon, 262 U.S. 447 (1923), be modified in light of increased state-federal consultation and cooperation). This presumption does involve a determination that there is a sort of "liberty" interest in the states in not becoming the arms of a federal bureaucracy.

\footnote{483} 112 S. Ct. 2408 (1992).

\footnote{484} Id. at 2414. Given that the challenged congressional scheme operated by imposing obligations on state government to regulate, individuals would not obviously have standing or incentives to sue.

A more difficult case was presented when states contested federal changes in voter qualifications. See supra notes 422-31 and accompanying text. These cases arguably involved litigable state interests not only because of constitutional language contemplating a large measure of state control of voter qualifications but also because the federal government regulated state officials by requirements such as preclearance of changes in voting districts. It could be argued that when federal law totally or partially preempts an area previously regulated by the states, the federal government alters the behavior of state officials. Extending federal standards and concomitantly federal bureaucracies and enforcement mechanisms, however, differs from extending federal standards that rely on state implementation. Where private parties have both legally protected interests against vote dilution and incentives to sue, the Court could decline jurisdiction. See, e.g., Davis v. Bandemer, 478 U.S. 109, 118-20 (1986); Baker v. Carr, 369 U.S. 186, 206-08 (1962).

\footnote{485} See \textit{New York v. United States}, 112 S. Ct. at 2428.
ernment, because the state as the party on whom federal legislation directly operates is asserting its own legally protected interests, a situation quite different from its asserting generalized federalism claims, as in *Massachusetts v. Mellon*.

Allowing state standing where state machinery is itself the object of federal regulation reinforces some of the same values as does the denial of state standing to contest the direct federal regulation of citizens. Disallowing state standing to contest federal regulation of citizens reinforced the norm that the state and federal governments act independently. Allowing state standing when the federal government acts on state governmental machinery similarly expresses the norms that governments should act independently and that the states may have certain constitutionally based rights to complain in federal court when Congress undermines that independence by forcing the states to legislate or to undertake other affirmative tasks.

Many commentators have forcefully argued for the desirability of maintaining separation between state and federal bureaucracies. In particular, they urge that accountability and citizen participation are enhanced by forcing the federal government, when it wishes to regulate, to face the costs of and visibility of establishing its own administrative machinery.

2. **Limiting Parens Patriae**

Limiting states to litigating their own legal interests and denying state standing where legislation more directly affects individuals implies that the federal courts should in large part discard *parens patriae* standing against states and private parties and retain current limitations on state *parens patriae* standing against the federal government. We therefore suggest disallowing suits contesting the protectionist legislation of other states to the extent that plaintiff

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486 See *Massachusetts v. Mellon*, 262 U.S. at 482, 484-85.
488 See, e.g., McConnell, supra note 194, at 1495.
states rely on a *parens patriae* theory. Standing for *parens patriae* suits would survive, however, where Congress so intended, for example, in antitrust suits against private parties. In addition, courts have historically allowed states standing as “aggrieved parties” that can contest federal administrative action under a variety of statutes. Continuing state standing in those contexts is most likely consistent with congressional intent and thus generally meets a legally-protected-interest test for standing.

In any event, states that now litigate on the basis of *parens patriae* often have an independent basis for standing, for example, as consumers of goods in interstate commerce that will have to pay more as a result of another state’s actions. Indeed, in some cases the Court has required states suing as *parens patriae* to show such an interest independent of its citizens’, although that independent interest often seems attenuated. Where a state has an independent legally protected interest, there is arguably no harm in allowing a state to sue additionally as *parens patriae*. Such stand-

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490 See, e.g., Pennsylvania v. West Virginia, 262 U.S. 553, 591 (1923) (relying partly on *parens patriae* theory).


492 See, e.g., Oklahoma v. United States Civil Serv. Comm’n, 330 U.S. 127, 137 (1947) (finding state was “party aggrieved” and therefore could contest federal agency order that state highway commissioner should be dismissed). States generally have been able to obtain broad review of administrative action under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-553 (1988). This tradition goes back to the ICC cases and likely comports with congressional intent. In other words, states may be among the intended regulatory beneficiaries. See Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973) (alleging jurisdiction under APA and federal question for state contest of impoundment of money that Congress had appropriated for state library programs).

493 See Maryland v. Louisiana, 451 U.S. 725, 739 (1981) (allowing state standing as consumer and as *parens patriae* to protect its citizens from substantial economic injury); Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (allowing, for claim of injunctive relief, state standing under antitrust laws in both proprietary capacity and as *parens patriae*).

494 See supra notes 353-59 and accompanying text; see also Standard Oil, 405 U.S. at 258-59 & 258 n.12 (stating that to invoke original jurisdiction properly the state must bring an action on its own behalf and not on behalf of particular citizens); Comment, Re-examination, supra note 5, at 1076 (noting the separate interest requirement, but suggesting that there are difficulties in distinguishing the interests of citizens from those of the state).

ing is analogous to that of private parties who have individually suffered harms suing as representatives of a class.

The *parens patriae* label, however, often merely dresses up actions that private parties could easily bring.\(^4\)\(^9\)\(^6\) Moreover, absent explicit statutory authority, state *parens patriae* claims generally are limited to actions for injunctive relief. In such cases, the Court has noted that it makes little difference whether the case is framed as a *parens patriae* suit or a suit by the state in its own right.\(^4\)\(^9\)\(^7\) States that assert *parens patriae* standing, however, may have bound their citizens to a decision lacking procedural and other safeguards ordinarily associated with privately maintained class actions, and without accomplishing much of substance for them.\(^4\)\(^9\)\(^8\)

Such preclusive effect is desirable only where there is an enhanced need for it and where the state is the party best situated to achieve a complete settlement. These conditions often exist in interstate resource allocation cases\(^4\)\(^9\)\(^9\) as well as in the traditional boundary cases, in each of which the state's ability to sue should be preserved.\(^5\)\(^0\) These cases tangibly fit the paradigm of a dispute over a "limited fund" or a specific piece of property—cases in which traditional equity practice favored a complete resolution of controversies.\(^5\)\(^0\)\(^1\) This reasoning also extends to conflicting claims

\(^4\)\(^9\)\(^6\) In some cases, however, others have no incentives to sue, because of diffuse costs. The Court applied this reasoning in part and allowed Maryland and other states to contest Louisiana's first-use tax on gasoline. *Maryland v. Louisiana*, 451 U.S. at 739. The pipeline companies from which the tax was exacted could pass on the tax and therefore arguably lacked litigation incentives. Id. at 737. A number of suits contesting the tax, however, were already pending in lower courts. See id. at 740.

\(^4\)\(^9\)\(^7\) See *Standard Oil*, 405 U.S. at 261.

\(^4\)\(^9\)\(^8\) Cf. General Tel. Co. v. EEOC, 446 U.S. 318, 323 (1980) (allowing EEOC to seek classwide relief without complying with Fed. R. Civ. P. 23); *Standard Oil*, 405 U.S. at 266 (noting that class actions protect against multiple recoveries); Mary E. Becker, Comment, Certification of EEOC Class Suits Under Rule 23, 46 U. Chi. L. Rev. 690 (1979) (suggesting that protections of Rule 23 should apply to government suits under federal employment discrimination statutes).


\(^5\)\(^0\) See Hart & Wechsler, supra note 5, at 318 (noting that boundary disputes have remained the most productive source of original jurisdiction, followed by conflicting claims to water in interstate streams).

\(^5\)\(^0\)\(^1\) A dispute over a limited fund or res traditionally allowed persons who might otherwise lack a direct legal relationship to be joined in one action, as in interpleader. See Federal Interpleader Act, 28 U.S.C. § 1335 (1988). Under the limited fund paradigm, state contests of census and apportionment for Congress arguably are appropriate. See, e.g.,
to escheat and to limited fund taxation claims, which should remain within the Supreme Court’s original jurisdiction.

3. **Limiting Original Jurisdiction**

Restricting the recognition of state standing may still allow for more state-as-plaintiff cases than the Supreme Court can comfortably accommodate within its original jurisdiction. As noted above, the Court employs several principles to limit its exercise of original jurisdiction over those cases in which a state does have standing. We propose that the Supreme Court retain certain of its “private law” limiting principles, such as declining jurisdiction over disputes based on local law and over state-versus-state disputes where the same issues could readily be litigated by others. But we propose deemphasizing the criteria that reinforce the Court’s tendency to embrace interstate disputes over the constitutionality of another state’s laws, such as focusing on federalism interests and looking to the availability of an alternative forum for the same parties in state-versus-state disputes.

With respect to state-versus-state disputes, we recommend that the Court adopt an alternative-forum inquiry that asks whether the same issues can be adequately litigated elsewhere rather than whether the same parties have an adequate alternative forum in

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Franklin v. Massachusetts, 112 S. Ct. 2767, 2776-77 (1992) (allowing standing where Massachusetts and two registered voters brought actions challenging method of apportionment for House of Representatives, with eight Justices apparently finding standing at least to contest the decision to include federal employees living abroad).


503 See, e.g., California v. Texas, 457 U.S. 164 (1982) (per curiam) (allowing suit to determine domicile of decedent in light of conflicting tax claims); Texas v. Florida, 306 U.S. 398, 411 (1939). But cf. California v. Texas, 437 U.S. 601 (1978) (per curiam) (denying leave to file despite allegation that taxes by two states claiming domicile would exceed estate); id. at 606, 610-11 (Stewart, J., concurring) (suggesting there was no constitutionally justiciable case or controversy between the two States). Absent a limited fund, the Court generally has not found a controversy between states with factually inconsistent tax claims. See Massachusetts v. Missouri, 308 U.S. 1, 15-17 (1939) (denying standing to Massachusetts where both states had tax exemptions for intangibles of out of state residents if the state of residence provided reciprocal privileges).

504 Rather than focus on federalism per se, our criteria focus on whether states’ interests distinct from citizens’ interests are implicated in a given case.
which to litigate the same issues.\textsuperscript{505} For example, in \textit{Maryland v. Louisiana}\textsuperscript{506} several states challenged in the Supreme Court Louisiana's first-use tax on natural gas, both as consumers and as \textit{parens patriae} for citizen-consumers. It would be illogical to say states cannot sue in such situations if they are affected by the legislation in the same way as are individuals who might also sue.\textsuperscript{507} But that private parties could litigate the same issues suggests that such a suit is not one with a strong claim to original Supreme Court jurisdiction.\textsuperscript{508} If individual suits can largely duplicate the results of the state-as-party suit, uniquely state interests that merit the Court's original jurisdiction are likely to have been absent from the state suit.

States to which the Supreme Court denies an original forum because the issues may be litigated elsewhere are not necessarily precluded from pursuing state court remedies\textsuperscript{509} or, in appropriate cases, from suing enforcement officials in lower federal courts.\textsuperscript{510} Although the plaintiff state in such a case might have to sue in state or federal courts sitting in the defendant state, it is not necessary to lose much sleep over whether it might elect not to sue in such cases. The Dormant Commerce Clause cases and other interstate constitutional cases that the Supreme Court has heard in its original jurisdiction often involve protectionist statutes inflicting eco-

\textsuperscript{505} In other words, we would allow the Supreme Court to decline jurisdiction both when the parties have alternative forums, as in antitrust suits, and when other parties can adequately litigate the same issues, as in challenges to state protective legislation.

\textsuperscript{506} 451 U.S. 725 (1981).

\textsuperscript{507} As noted above, however, we normally would not allow the state to sue as \textit{parens patriae}. In addition, we contemplate use of a legally-protected-interest test for individuals as well as states. Cf. Arizona v. New Mexico, 425 U.S. 794, 798 (1976) (Stevens, J., concurring) (arguing that unless tax has some impact on rates paid by electrical consumers in Arizona, consumers have no standing to challenge New Mexico tax).

\textsuperscript{508} See \textit{Maryland v. Louisiana}, 451 U.S. at 764 (Rehnquist, J., dissenting) (arguing that interest of state are of no greater dignity than those of other consumers).

\textsuperscript{509} Cf. Massachusetts v. Missouri, 308 U.S. 1, 20 (1939) (noting that Missouri attorney general represented that Missouri would allow Massachusetts to sue in its courts).

\textsuperscript{510} In such cases the lower federal court might be sitting in the offending state. See, e.g., \textit{Hunt v. Washington State Apple Advertising Comm'n}, 432 U.S. 333, 338-39 (1977) (reviewing case in which Washington state agency had sued in federal court in North Carolina); \textit{cf. Maryland v. Louisiana}, 451 U.S. at 742-45 (granting original jurisdiction and finding cases pending in Louisiana state and federal courts inadequate forums for state plaintiffs). The state might be able to sue in federal courts for monetary remedies that would be denied to individuals under the 11th Amendment. But \textit{cf. supra} note 457 (noting that states generally sue for injunctions).
nomic injury of a kind likely to provoke individual litigation. And as to a broad range of challenges to allegedly unconstitutional state taxes and rates, Congress has in fact seemed to prefer the regulating state's courts as the proper forum.\textsuperscript{511}

4. Results and Rationale

The net effects of implementing the above suggestions would not be dramatic. The main result would be a principled reduction in the number of cases in which states contested other states' or the federal government's legislation. Even here, the main difference from current practice would be in state-versus-state disputes rather than in state-versus-federal disputes, where state standing already is somewhat restricted. Reducing the states' ability and incentive to challenge legislation of other sovereigns would be accomplished by denying standing to states in some cases where it is now recognized and by disallowing original actions even when standing is proper, on the ground that the issues presented could be litigated elsewhere. The primary component of Supreme Court original jurisdiction would be state-versus-state cases that private parties cannot litigate elsewhere because the state seeks to vindicate interests that were more exclusively the state's.\textsuperscript{512} Original jurisdiction would continue to embrace controversies between states involving

\textsuperscript{511} For example, limiting state original suits may lead to closer compliance with the policies behind the antitax injunction statutes. See I.R.C. § 7421(a) (1988) (barring injunction against federal income taxes in any court by any person, "whether or not such person is the person against whom such tax was assessed"); 28 U.S.C. § 1341 (1988) (prohibiting district courts from enjoining state taxes where "plain, speedy and efficient remedy" is available in state courts). In South Carolina v. Regan, 465 U.S. 367 (1984), the Court allowed a state to bring an original suit without compliance with the Internal Revenue Code's anti-injunction provision, reasoning that Congress did not intend the provision to apply to actions brought by aggrieved parties for whom it had provided no alternative remedies. See id. at 378-80; see also Hart & Wechsler, supra note 5, at 296-97 (questioning whether the Court need have entertained the original suit and noting that Congress constitutionally might provide that only taxpayers may litigate validity of federal taxes).

\textsuperscript{512} Cf. Wyoming v. Oklahoma, 502 U.S. 437, 475-76 (1992) (Thomas, J., dissenting) (arguing that primary dispute was not between states); Maryland v. Louisiana, 451 U.S. at 766 (Rehnquist, J., dissenting) (arguing that Court should limit original jurisdiction to complaints of state qua state).
state contracts, debts, boundaries, interstate escheat, interstate limited fund taxation, and resource allocation.\textsuperscript{513} By preferring rights that belong more exclusively to the states, both for determining standing and for allocating cases to the Supreme Court’s original jurisdiction, our approach to state standing admittedly retreats somewhat from a public law model that favors shared interests and aggregated plaintiffs. We resort to a more private law model for standing, wherein rights are a form of property that implies the exclusion of others.\textsuperscript{514} Particularly, our proposals reiterate some of the results of the historical prohibition against litigating sovereignty interests. As discussed above, this principle is supported by attractive normative assumptions, which

\textsuperscript{513} Traditional state-versus-state actions for boundary settlement, contractual claims, and debt claims, rather than actions to enjoin the enforcement of allegedly unconstitutional laws of another state, thus constitute the heart of exclusive jurisdiction. The former group of suits lies at the core of suits “against the state” for 11th Amendment purposes when an individual initiates the action (even if framed as a suit against an enforcement official). See supra note 448. Current practices should continue whereby state enforcement suits are litigated in state courts and state suits against private parties under federal statutes are litigated in lower federal courts. Suits brought by states seeking review of federal administrative action would remain in lower federal courts. To the extent that states have standing to contest federal legislation by suing enforcement officials, states could continue to bring suit in both lower federal courts and the Supreme Court. Alternatively, all such suits could be relegated to lower federal courts on the theory that they are not within the Supreme Court’s exclusive jurisdiction and that therefore an adequate alternative forum is available. Cf. United States v. Nevada, 412 U.S. 534 (1973) (per curiam) (declining to hear case that was not within the Court’s exclusive original jurisdiction). See generally Samuel Estreicher & John Sexton, Redefining the Supreme Court’s Role 1-2, 4-5 (1986) (recommending changes in Supreme Court’s criteria for granting review that would de-emphasize error correction function in favor of selection of cases establishing definitive legal doctrine once cases have percolated from lower courts and of cases settling interbranch and federalism conflicts); id. at 62 (suggesting that certain interstate disputes within the Court’s original and exclusive jurisdiction be viewed as priority cases because they call for the Court’s unique capacity to settle disputes between equal sovereigns).

\textsuperscript{514} For criticism of Supreme Court standing decisions as attempts to return to a private law model for litigation, see, e.g., Chayes, supra note 11, at 1304-05 (charging that Burger Court decisions concerning standing, class actions, and public interest attorneys’ fees cohere as attempt to restore traditional forms of adjudication, but that they may also manifest lack of sympathy for substantive results); Monaghan, supra note 101, at 1369-70 (arguing that the public nature of constitutional adjudication is rooted in history and that the Court has a special function in this respect). See generally Sunstein, Privatization, supra note 1, at 1433 (arguing that “[f]or purposes of standing, the principal question should be whether Congress has created a cause of action, . . . not whether the plaintiff is able to [claim] a nineteenth century private right”).
we wish to reinvigorate. This principle asserts that people, not states, are the intended beneficiaries of constitutional provisions, including structural guaranties. It further assumes that the states and the federal government should operate in the main directly on citizens rather than through the bureaucracies and the courts of one another. Thus, citizens affected by federal or state regulation, rather than the states of which they are citizens, would have standing to challenge such regulation, and they could raise constitutional objections of both a structural and personal nature.\footnote{Cf. Michigan v. Meese, 853 F.2d 395, 398 (6th Cir.) (holding that under federal statute that forbade use of evidence derived from illegal wiretaps the state had no claim against attorney general who was not threatening enforcement, and stating that the state should have appealed the quashing of indictments through its own court system), cert. denied, 488 U.S. 980 (1988).}

Proponents of a public law model of litigation view broad representative standing as enhancing the federal courts’ role in elaborating public values by increasing courts’ opportunities to make pronouncements on the constitutionality of governmental action. The legally-protected-interest standard for states that we suggest, however, although providing more coherent principles for state standing and for the allocation of cases to the Court’s original jurisdiction, implies neither a grudging version of judicial review nor a sacrifice of public values. Because the proposals limit governmental standing to sue other sovereigns where individuals are more directly affected, the proposals channel challenges to government action into citizen-versus-government suits rather than government-versus-government suits. When states and individuals have parallel standing, the proposals simply relegate the states to lower courts like other litigants. Our proposals therefore reinforce that individuals hold rights against government and that even structural guaranties are intended to enhance the rights of individuals.

V. Conclusion

State standing offers a unique perspective on the historical evolution of the Article III case or controversy concept. From the early Republic through most of the nineteenth century, the Court rejected as a basis for a claim for relief a state’s interest in protecting the health, safety, and welfare of its people. Such concerns would have received judicial attention primarily through actions
originating in state courts to enforce state legislation. As we have shown, apart from boundary disputes, the Court initially recognized a state's standing to sue only when the state claimed the sort of common-law injury that would have allowed an individual to sue. It was a comparatively late development, traceable to the early stirrings of legal positivism, that permitted states' general interests in the protection of their citizens to suffice for federal court standing.

The advent of this "police power" standing around the turn of the century signaled that the interest of a state in exercising power to protect its citizens' various interests had gained a status comparable to that of an individual claim of right. This change exemplified the transition from an older common-law jurisprudence in which individual rights and governmental interests in exercising power for the common good were kept in separate categories, to a new Realist jurisprudence in which individual rights and the interests opposing them were increasingly commensurable. Individual freedom from government now would be balanced against governmental freedom to act according to the will of majorities.

We have argued that these state standing developments undermine the characterization of the era as one in which the Court adhered to a common-law baseline for standing. In fact, it was in the midst of the *Lochner* era—during which the Court is thought to have enshrined a private rights model of litigation—that the Court initially allowed the states to depart from the common-law menu of litigable interests. Originally the Court might have believed that this expansion of state standing was limited by a narrow range of interests in health, safety, and welfare on which states could legitimately legislate. But with the waning of Lochnerism, the Court all but gave up on attempts to restrict legitimate governmental ends, and state standing based on permissible governmental ends was then thrown wide open. Any interest that a legislature could appropriately seek to pursue or protect through legislation could confer state standing even without the state's having enacted such legislation. This expansive tendency foreshadowed trends in individual standing that progressed similarly.

The advent of the state as a litigant of group interests not traditionally protected at common law also provides an early example of what modern scholarship identifies as a public law plaintiff.
Public law litigation was thus early tied to giving rights-holder status to majoritarian interests in regulation. The new model's ability to treat rights and the interests opposing them as rough equivalents was particularly apparent in legislation allowing the Supreme Court to review state challenges to the alleged overenforcement of individual rights by state courts as well as in more recent examples of public law litigation by nontraditional rights claimants. The tendency of public law litigation to make traditional rights and the interests adversely affected by them into a common coin underscores the need to develop principles for determining which among competing interests will trump others.

Furthermore, the ease with which a state can, under modern doctrines, claim standing based on either an injury to its citizens or its own injury-in-fact threatens to give states the ability to claim litigable injuries whenever one of their citizens is economically harmed by the unconstitutional action of another state or the federal government. One result of such an open-ended approach is the anomaly of "tax collector standing." Such possibilities also threaten to displace the litigational role of individual rights-holders by securing to states the fast-track of judicial review in an original Supreme Court forum for claims that would otherwise be heard initially in lower courts. In following this approach, the Court may well come to see states as the preferred legal beneficiaries of constitutional guaranties against overreaching by other states or the federal government. To safeguard individual standing and to put state standing on a surer footing, we have therefore suggested narrowing state standing (and access to a Supreme Court original forum). We would do so by revitalizing the focus on the states' "legally protected interests" along the lines suggested by other scholars for individual standing more generally. We have argued that a focus on legally protected interests suggests that state standing to contest the constitutionality of legislation of other governments (state and federal) should be denied when individuals are the more immediate objects of such regulation. State standing should still be available, however, when the states are the direct objects of federal regulation or when the states are deprived of constitutional or statutory rights specifically secured to them as governmental institutions within our federal system.
Our recommendations reincarnate some aspects of older, private law doctrines that restricted the litigation of state sovereignty interests to enforcement suits within a state’s own courts. Although the private law model of litigation is often associated with a grudging view toward judicial review and constitutional rights, we believe that recourse to a narrower view of state standing will in fact enhance the status of individuals as the primary beneficiaries of constitutional guaranties while ensuring vigorous judicial review of unconstitutional governmental action.