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## CHAPMAN LAW REVIEW

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# State Standing to Constrain the President

*F. Andrew Hessick\* and William P. Marshall\*\**

Ambition, as it turns out, has not been able to counteract ambition.<sup>1</sup> Or at least this has been true when the ambition that was supposed to be countered was that of the President of the United States and the institution doing the countering was the United States Congress. Presidential ambitions now consistently overwhelm those of the Congress with the result that the power of the presidency has now become far greater than the framers may have imagined—both in absolute and in relative terms.<sup>2</sup> As far back as 1952, in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson observed that the president “exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.”<sup>3</sup> Subsequent developments have only served to increase the president’s leverage since that time.

Perhaps because it has recognized this reality, the Supreme Court in recent years has become notably less sympathetic to the notion that it should defer to the vagaries of the political wrangling between Congress and the Executive.<sup>4</sup> Consequently, the Court has become more active in reviewing separation of powers disputes.<sup>5</sup> This does not mean the Court always rules

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<sup>1</sup> *Cf.* THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>2</sup> *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1816–18 (1996).

<sup>3</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring).

<sup>4</sup> *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196–97 (2012) (rejecting the argument that recognition of foreign sovereigns is a political question not subject to judicial review) [hereinafter *Zivotofsky I*]; *see also* *Bush v. Gore*, 531 U.S. 98, 103 (2000) (per curiam) (resolving dispute about presidential electors instead of leaving the matter to Congress as prescribed by Article II).

<sup>5</sup> *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (holding that the legislature cannot infringe on the president’s sole power to recognize other sovereigns and nations) [hereinafter *Zivotofsky II*]; *see also* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556–57 (2014) (ruling that the president exceeded his authority by appointing a member to the National Labor Relations Board under the Recess Appointments Clause).

against the Executive.<sup>6</sup> In fact, many of the Court's recent cases have upheld the exercise of federal executive power against separation of powers challenges.<sup>7</sup> It does mean, however, that the Court has rejected the premise that political processes alone can protect against separation of powers encroachments. The Court, in short, has sent the message that it is ready to actively police structural constitutional issues.<sup>8</sup>

Against this background, it may not be surprising that there is a new sheriff in town aiming to challenge the exercise of federal executive power in the federal courts. Or, rather, there are new sheriffs. In recent years, state attorneys general have become increasingly more aggressive in seeking to patrol federal executive action. During the Obama Administration, for example, some state attorneys general instituted a series of cases, brought on behalf of their home states, challenging federal action in the areas of immigration<sup>9</sup> and environmental protection.<sup>10</sup> Since President Trump took office, other state attorneys general have filed actions against specific directives of his administration, most notably in the immigration area.<sup>11</sup> All signs suggest that

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6 See *King v. Burwell*, 135 S. Ct. 2480, 2488, 2495–96 (2015) (ruling in favor of the Internal Revenue Service's ("IRS") interpretation of the Affordable Care Act ("ACA"), which would allow a tax credit for those enrolled in either a Federal Exchange or State Exchange, despite the ACA's seemingly clear language limiting the tax credit for those enrolled in State Exchanges).

7 See *Zivotofsky II*, 135 S. Ct. at 2096 (holding that the president has the sole power to recognize other sovereigns); see also *Dep't of Transp. v. Ass'n of Am. R.R.s.*, 135 S. Ct. 1225, 1233 (2015) (remanding a nondelegation challenge to Amtrak rulemaking).

8 See *Zivotofsky II*, 135 S. Ct. at 2096; *Noel Canning*, 134 S. Ct. at 2577; see also Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1523 (2013) (criticizing the Court's willingness to resolve structural constitutional disputes); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 336 (2002) (arguing the Court is more willing to rule on structural matters).

9 See, e.g., *Texas v. United States*, 809 F.3d 134, 134, 146 (5th Cir. 2015) (twenty-three Republican state attorneys general, three Republican governors whose attorneys general were Democrat, and one Republican governor filed suit against the United States to challenge the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") initiative). *But see* Brief of the Amicus States of Wash., Cal., Conn., Del., Haw., Ill., Iowa, Md., Mass., N.M., N.Y., Or., R.I., and Vt., and D.C., in Support of Motion to Stay District Court Preliminary Injunction at 1–2, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238), 2015 WL 1285125, at \*2–3 (fourteen Democratic attorneys general for fourteen states and the District of Columbia filed briefs in support of the United States' amnesty policy).

10 See Brief for Petitioners at 1–2, *West Virginia v. EPA* (D.C. Cir. Nov. 26, 2014) (No. 14-1146), 2014 WL 6687575, at \*6 (twelve Republican attorneys general filed briefs against the Environmental Protection Agency ("EPA") in response to increased regulation of coal power plants). *But see* Final Brief for State Intervenor in Support of Respondent at 10, *West Virginia v. EPA* (D.C. Cir. Mar. 4, 2015) (No. 14-1146), 2015 WL 926748, at \*6–7 (eleven Democratic attorneys general and the District of Columbia filed in support of the EPA's increased regulation measures).

11 All briefs filed by state attorneys general—both in opposition and in support of the travel ban executive order—were done so strictly along party lines. See, e.g., Motion for Leave to File and Brief for N.Y. et al. as Amici Curiae in Opposition to Petitioners' Stay

this trend of state attorneys general challenging exercises of presidential power will continue.<sup>12</sup>

These state attorneys' general suits face a critical threshold barrier: standing to challenge federal executive power. Do the states have such standing and, if so, under what circumstances may they do so? This issue was central in *Texas v. United States*, a case in which the Fifth Circuit found that Texas had standing.<sup>13</sup> The question was ultimately left unresolved by the United States Supreme Court when the Fifth Circuit decision was affirmed by an equally divided Court.<sup>14</sup>

This essay examines the issue of state standing to constrain presidential power. Part I reviews why presidential power has so drastically expanded since the Founding. It further discusses why Congress has not been up to the task of checking the president and why expanded state standing might be a useful vehicle to constrain executive power. Part II canvasses the existing case law regarding state standing to challenge federal executive action and specifically includes recent cases brought against the Obama and Trump Administrations. Part III demonstrates how courts have found states to have standing to challenge federal executive action, but also discusses how the scope of that right is not yet clear. Part III(A) discusses why states might be appropriate parties to bring actions challenging federal executive power, including their role in diffusing power

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Application at 3, *Trump v. Hawai'i*, 138 S. Ct. 42 (2017) (No. 16-1540), 2017 WL 3049332, at \*5 (New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, and D.C. filed as amicus curiae in support of Hawai'i's action); see also *Profiles in Courage*, DEMOCRATIC ATTORNEYS GENERAL ASSOCIATION, <http://democraticags.org/profiles-2/> [<http://perma.cc/MUC2-65YC>] (last visited Aug. 1, 2017) (showing every state attorney general in the aforementioned brief who opposed both the current administration's travel ban and climate change deregulation are Democrat); Motion for Leave to File and Brief for Tex. et al. as Amici Curiae in Support of Petitioners and their Stay Application at 1, *Trump v. Int'l Refugee Assistance Project* (2017) (No. 16-1436), 2017 WL 2533119, at \*4 (Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and the Governor of the State of Mississippi filed as amicus curiae in defense of the administration's executive order); see also *Meet the Attorneys General*, REPUBLICAN ATTORNEYS GENERAL ASSOCIATION, [http://www.republicanags.com/meet\\_the\\_ags](http://www.republicanags.com/meet_the_ags) [<http://perma.cc/69TD-XXFN>] (last visited Aug. 1, 2017) (showing every state attorney general in the aforementioned brief who supported the travel ban executive order are Republican).

<sup>12</sup> See Juliet Eilperin, *NYU Law Launches New Center to Help State AGs Fight Environmental Rollbacks*, WASH. POST (Aug. 16, 2017), [https://www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496\\_story.html?utm\\_term=.a7c7b3e8b7b9&yoyolxmi](https://www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496_story.html?utm_term=.a7c7b3e8b7b9&yoyolxmi) [<http://perma.cc/UY2P-MQAT>] (reporting that Bloomberg Philanthropies funded a center to help state attorneys general bring environmental actions against the United States).

<sup>13</sup> *Texas*, 809 F.3d at 155–56.

<sup>14</sup> *Texas v. United States*, 136 S. Ct. 2271, 2272 (2016).

within the federal system. Part III(B) offers some reservations, such as the fact that the states' motivations in maintaining these suits may be based more on partisan interests than on structural concerns with constraining the federal executive. Part IV proposes that states should enjoy a modicum of liberalized standing by allowing a more generous construction of injury-in-fact as applied to them than would be applied to other entities. It suggests, however, that even this modest grant of standing should be subject to further prudential review in light of the potential problems that state standing engenders. Part V offers a brief conclusion.

## I. THE EXPANDING POWER OF THE PRESIDENCY

As numerous participants in the Symposium have noted, presidential power has expanded exponentially since the Founding.<sup>15</sup> There are many reasons for this expansion.<sup>16</sup> Some are simply the unavoidable effects of forces inherent in modern government dynamics. For example, as Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*, the fact that the office of the president has a unique hold on public and media attention means that in “drama, magnitude and finality” its decisions far overshadow those of any other.<sup>17</sup> In addition, the need for modern government to respond quickly to national crises necessarily invests power in the presidency because only that institution has the ability to act expeditiously.<sup>18</sup> The growth of the administrative state<sup>19</sup> and the power of the armed forces has inevitably empowered the president, who stands at the head of

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<sup>15</sup> See Randy Beck, *Promoting Executive Accountability Through Qui Tam Legislation*, 21 CHAP. L. REV. 41–42 (2018) (discussing a shift and rebalancing of power from the legislative to the executive branch); Gary Lawson, *Representative/Senator Trump?*, 21 CHAP. L. REV. 115–19 (2018) (demonstrating how executive branch's power has expanded through subdelegation of legislative authority); Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 168 (2018) (noting the large power of the “[c]ontemporary” president); see also Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 555–56 (2017) (noting expansions of executive power).

<sup>16</sup> See William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507–19 (2008); see also Flaherty, *supra* note 2, at 1816–19; Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) (“Now, it is the President [instead of Congress] whose power has expanded and who therefore needs to be checked.”).

<sup>17</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

<sup>18</sup> See Flaherty, *supra* note 2, at 1806.

<sup>19</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587 (1984) (describing the degree to which administrative agencies are centrally managed by the president).

both the Executive Branch and the military.<sup>20</sup> The president has unique access to and control over information in a world where information is power.<sup>21</sup>

Other factors have contributed to this expansion. Presidents, for example, are able to build upon the collective actions of their predecessors in justifying their own actions—creating a one-way ratchet that consistently expands presidential power from administration to administration.<sup>22</sup> The legal limits on presidential power are defined in the first instance by the president's own appointees in the Justice Department<sup>23</sup> who, even if committed to providing objective legal advice, are often predisposed to finding ways in which the president can further his agenda.<sup>24</sup> Finally, presidents are interested in building legacies and they well understand that history judges leaders by their actions and not by their forbearance. They are therefore constantly exploring new avenues and methods to get things done.<sup>25</sup> After all, the last president celebrated for *not* exercising power may very well be George Washington and his decision not to run for a third term.<sup>26</sup>

Another key reason why presidential power has so drastically expanded rests not with the presidency but with

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<sup>20</sup> See also Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 338 (2005) (discussing presidential control of the military).

<sup>21</sup> See Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 737 (2002).

<sup>22</sup> See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1458–60 (1997); see also John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 429–30 (2008).

<sup>23</sup> See LUTHER A. HUSTON, ARTHUR S. MILLER, SAMUEL KRISLOV & ROBERT D. DIXON, JR., ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 51 (1968).

<sup>24</sup> See GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 103, 107 (2001) for a discussion about how the ability (and motivation) of the attorney general to challenge a president is likely to be particularly diminished in times of crisis. The most famous documented example of this involves Attorney General Francis Biddle and the evacuation of Japanese Americans during World War II. Although Biddle had considerable doubts as to the constitutionality of the evacuation order, he ended up dropping his opposition in the face of military objections and a president who had, nonetheless, decided to go through with the action. See *id.*

<sup>25</sup> President Bush, for example, was particularly aggressive in claiming that he had inherent powers that justified his taking unilateral actions on key matters. See *Bush Says He Signed NSA Wiretap Order*, CNN (Dec. 17, 2005, 8:07 PM), <http://www.cnn.com/2005/POLITICS/12/17/bush.nsa> [<http://perma.cc/9Y44-LF7H>]. President Obama, in turn, relied on his expansive reading of statutes to support his unilateral decisions. See Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html?mcubz=3>.

<sup>26</sup> See Rufus King, Personal Memorandum (May 3, 1797), in 3 THE LIFE AND CORRESPONDENCE OF RUFUS KING: COMPROMISING HIS LETTERS, PRIVATE AND OFFICIAL, HIS PUBLIC DOCUMENTS, AND HIS SPEECHES 545, 545 (Charles R. King ed., 1896).

Congress.<sup>27</sup> An effective system of separation of powers requires Congress to protect its institutional prerogatives to check the Executive. Yet the relationship between Congress and the president has become instead, in the words of Darryl Levinson and Richard Pildes, separation of parties.<sup>28</sup> Members of Congress see their primary role as advancing the interests of their party and not protecting Congress's institutional prerogatives.<sup>29</sup>

This dynamic has reduced the power of Congress and increased the power of the president. When the same party holds Congress and the presidency, congressional majorities often stand behind their president even when doing so might diminish their own institution's authority, a practice that directly serves to expand presidential power. Less obviously, even when there has been a divided government, the dynamic of hyper-partisanship has indirectly led to increased presidential power. In times of divided government, of course, Congress is motivated to attempt to check the president because it is in its partisan interests to do.<sup>30</sup> Yet presidents have become adept at characterizing this resistance as Congress not doing its job to justify exercising executive power unilaterally. They have thus been able to turn congressional efforts to block their agenda into a mechanism for enhancing their own powers.<sup>31</sup> Congress, meanwhile, has had no effective response.

In contrast to Congress, one institution that has been able to block the president thus far is the Supreme Court. In cases such as *Youngstown*,<sup>32</sup> *United States v. Nixon*,<sup>33</sup> and the war-on-terror decisions,<sup>34</sup> the Court has imposed important limits on the Executive. Equally important, even in cases in which the

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<sup>27</sup> See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2222 (2013).

<sup>28</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329–30 (2006).

<sup>29</sup> See Jeff Flake, *My Party is in Denial About Donald Trump*, POLITICO MAG. (July 31, 2017), <http://www.politico.com/magazine/story/2017/07/31/my-party-is-in-denial-about-donald-trump-215442> [<http://perma.cc/UX7H-RPBY>] (condemning both parties for blindly engaging in partisan behavior).

<sup>30</sup> See Franita Tolson, *The Union as a Safeguard Against Faction: Congressional Gridlock as State Empowerment*, 88 NOTRE DAME L. REV. 2267, 2267–68 (2013) (describing an instance where Republican senators blocked a veteran jobs bill to prevent President Obama from signing beneficial legislation before the 2012 election).

<sup>31</sup> See William P. Marshall, *Warning: Self-Help and the Presidency*, 124 Yale Online L.J. F. 95 (2014); William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 786 (2014).

<sup>32</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>33</sup> *United States v. Nixon*, 418 U.S. 683, 713 (1974).

<sup>34</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557, 646 (2006); *Boumediene v. Bush*, 553 U.S. 723, 794 (2008).



president has prevailed, the Court has indicated it is fully willing to subject exercises of presidential power to judicial review.

Courts can hear cases only when parties have requisite standing. This means that presidential actions may be able to escape judicial review because of standing limitations. For example, if the lower courts had not granted standing to Texas to challenge President Obama's Dreamers initiative, which declared a policy of not enforcing immigration laws against a large class of immigrants, then it is likely no party would have been able to maintain that suit.<sup>35</sup> To establish standing to challenge a policy, an individual must show he suffered an injury in fact because of that policy.<sup>36</sup> The Dreamers policy of not enforcing the law does not obviously injure anyone; instead, it confers a benefit on the immigrants covered by it. Giving the states standing to sue, therefore, may be the only way through which a president's actions can be subject to judicial scrutiny. The next sections accordingly examine the current law governing state standing and discuss whether the scope of state standing should be adjusted so as to provide an additional check on the expansion of presidential power.

## II. STATE STANDING TO SUE THE EXECUTIVE UNDER CURRENT LAW

### A. The Law of State Standing

State suits against the president and other federal executive officials seeking to force compliance with the Constitution and federal law invariably raise questions of Article III standing.<sup>37</sup> Standing is one of the various doctrines that implement the "cases" and "controversies" provision in Article III.<sup>38</sup>

Ordinarily, to have standing, a person must demonstrate that he has suffered, or is imminently about to suffer, an "injury in fact."<sup>39</sup> That injury must be to a "legally protected

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<sup>35</sup> Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 786 (2013).

<sup>36</sup> See WRIGHT, ET AL., *infra* note 49 and accompanying text.

<sup>37</sup> Although the most heavily litigated, standing is not the only obstacle states face in suits against federal actors. For example, states must also demonstrate their claim is ripe and not moot. Although the United States and its officials also enjoy sovereign immunity in suits by states, *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983), section 702 of the Administrative Procedure Act waives that immunity for suits seeking non-monetary damages against an "officer or employee" of the United States. 5 U.S.C. § 702. Accordingly, so long as a suit does not seek damages, sovereign immunity should not be an obstacle to state suits against federal officials.

<sup>38</sup> U.S. CONST. art. III, § 2.

<sup>39</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

interest”—for example, the interest against unwanted physical harm—and it must be “concrete and particularized.”<sup>40</sup> The injury must also be “fairly traceable” to the actions of the defendant, and it must be susceptible to “redress[] by a favorable decision.”<sup>41</sup> Individuals who fail to satisfy these requirements cannot maintain suit in federal court.<sup>42</sup>

But for states, things are different. States can establish standing by demonstrating an injury to the same sort of interests held by private individuals such as the interest in holding property. But because they are sovereigns, states also have sovereign and quasi-sovereign interests, and the violation of those interests can also support standing.<sup>43</sup> Thus, states have broader potential standing than private individuals.<sup>44</sup>

A state’s sovereign interests include its interests in enforcing its criminal and civil laws. States can sue to enforce these sovereign interests even when they do not suffer an injury in fact.<sup>45</sup> A state has standing, for example, to prosecute Dan for assaulting Vicky in violation of state law, even though the assault does not hurt the state.<sup>46</sup> For similar reasons, states have sovereign standing to defend their laws against challenges that the laws are unconstitutional or preempted,<sup>47</sup> and they have standing to challenge federal laws pressuring the states to change their laws.<sup>48</sup>

A state’s quasi-sovereign interests are less well defined.<sup>49</sup> They include the state’s interest “in the well-being of its populace,”<sup>50</sup> such as by protecting its residents from pollution,<sup>51</sup> reducing unemployment in the state,<sup>52</sup> preserving wildlife in the state,<sup>53</sup> and ensuring that the state is “not . . . discriminatorily

40 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

41 *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992).

42 *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102–03 (1998).

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

44 *Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695 (2004).

45 *See Maine v. Taylor*, 477 U.S. 131, 136 (1986) (finding state standing based on the “interest in the continued enforceability of its own statutes”).

46 *See Ann Woolhandler & Caleb Nelson, State Standing*, 81 VA. L. REV. 387, 392 (1995) (finding there is no standing problem when a state “prosecutes criminal and civil actions under its own laws in its own courts”).

47 *See Taylor*, 477 U.S. at 137.

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

49 CHARLES ALAN WRIGHT ET AL., 13A FEDERAL PRACTICE AND PROCEDURE § 3531.11 (2d ed. 1984) (describing quasi-sovereign interests as “admittedly vague”).

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

51 *Id.* at 604–05.

52 *Id.* at 608 (finding *parens patriae* standing to reduce unemployment).

53 *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) (noting “the quasi sovereign right of the State to regulate the taking of wild game within its borders”).

denied its rightful status within the federal system.”<sup>54</sup> States have *parens patriae* standing—so-called because a state asserting these interests is seeking to protect its residents and resources—to vindicate these quasi-sovereign interests.

## B. State Suits against the Federal Executive

States’ standing in suits against the federal government, however, is more complex. Although states have standing to vindicate sovereign interests and *parens patriae* standing to vindicate quasi-sovereign interests in other contexts, neither form of standing provides a sound basis under current doctrine to sue federal officials to force compliance with a federal statute or the Constitution. States do not have a sovereign interest in federal compliance with a federal statute or the Constitution.<sup>55</sup> Federal law and the Constitution are not state law. Although states must enforce federal and constitutional law, it is because those laws trump state laws. The violation of federal law accordingly does not inflict injury on a state’s sovereignty. It is only if that violation *also* happens to violate, or interfere with, state law that a state suffers a sovereign injury supporting sovereign standing.<sup>56</sup>

States also likely do not have *parens patriae* standing to sue the president to force him to comply with federal law or the Constitution. This is not because states do not have a quasi-sovereign interest in ensuring that their residents are governed by a law abiding federal government. They do. The failure of the federal government to obey federal law can threaten a state’s property, resources, stability, and population. Rather, the problem is that, according to the Supreme Court, states cannot assert those interests of its citizens against the United States.<sup>57</sup>

The reason is that the point of a *parens patriae* suit is to allow a sovereign to protect its citizens, and the citizens of a state are also citizens of the United States.<sup>58</sup> According to the Court, the United States has the primary responsibility of managing the federal government and ensuring its compliance with federal

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<sup>54</sup> *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607.

<sup>55</sup> Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 886–87 (2016).

<sup>56</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 323–25 (1966) (upholding state’s standing to enforce state law against Attorney General).

<sup>57</sup> *Michigan v. EPA*, 581 F.3d 524, 529 (7th Cir. 2009) (“[A] State may not use [*parens patriae*] to sue the United States.”).

<sup>58</sup> *Mellon*, 262 U.S. 447, 485–86 (1923).

law.<sup>59</sup> Therefore, states cannot sue the federal government as *parens patriae* to protect state citizens from unconstitutional acts of the federal government.<sup>60</sup> For example, in *Massachusetts v. Mellon*, the Court held that Massachusetts lacked *parens patriae* standing to challenge, under the Tenth Amendment, a federal law giving money to states that took certain measures to protect mothers and infants.<sup>61</sup>

Under this logic, states likely do not have *parens patriae* standing to sue the president or other federal officers to force compliance with the Constitution or federal law. Such a suit seeks to protect state citizens from federal actions that violate federal law or the Constitution. To be sure, the suit targets executive actions instead of legislative ones, as in *Mellon*, but it is unclear why that distinction should matter. What matters is whether the suit challenges the acts of the federal government. One might argue the difference is that the suit is against an officer and not the United States. That difference, however, should not matter as to a state's *parens patriae* standing. The United States acts through its officers to protect its citizens as *parens patriae*. That is especially true for the president. Article II explicitly tasks him with seeing that federal law is enforced.<sup>62</sup>

Given the difficulties with states establishing sovereign or quasi-sovereign standing against the president, it is no surprise that courts that have recently found that state standing to challenge presidential actions have avoided the sovereignty and quasi-sovereignty question, and have instead based standing on factual injuries alleged by the states.<sup>63</sup> Consider *Texas v. United States*.<sup>64</sup> There, the Department of Homeland Security adopted a policy of not enforcing immigration laws against a large swath of

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<sup>59</sup> *Id.* (“[I]n respect of their relations with the [federal [g]overnment], it is] . . . the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.”).

<sup>60</sup> *Katzenbach*, 383 U.S. at 324 (“Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government.”); accord *Florida v. Mellon*, 273 U.S. 12, 18 (1927); see also WRIGHT ET AL., *supra* note 49, at § 3531.11.1 (“[I]t is settled that a state cannot appear as *parens patriae* to assert the rights of its citizens to be protected against unconstitutional acts of the federal government.”).

<sup>61</sup> *Mellon*, 262 U.S. at 486.

<sup>62</sup> U.S. CONST. art. II, § 1.

<sup>63</sup> See, e.g., *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015) (basing standing on increased costs from issuing licenses), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); *Washington v. Trump*, 847 F.3d 1151, 1158–61 (9th Cir. 2017) (applying *Lujan* factors in analyzing state standing based on alleged harm to proprietary interests).

<sup>64</sup> *Texas v. United States*, 809 F.3d at 155–56 (basing standing on increased costs from issuing licenses).

individuals illegally in the United States,<sup>65</sup> deeming these individuals to be “lawfully present in the United States.”<sup>66</sup> Texas and twenty-six other states challenged the policy, claiming that the Department’s policy violated the Administrative Procedure Act. Texas argued it had *parens patriae* standing and that it had suffered an injury in fact.

In finding Texas had standing, both the district court and the Fifth Circuit avoided the question whether Texas had *parens patriae* standing. Instead, they concluded that Texas had suffered an adequate injury in fact. The courts pointed out that, because Texas law authorizes lawfully present individuals to obtain a Texas drivers license, Homeland Security’s policy expanded the number of individuals eligible for Texas licenses, and Texas would incur costs in issuing these licenses. According to the courts, these costs supported Texas’s standing, even though Texas could have eliminated those costs by amending Texas law to bar those immigrants from obtaining licenses.<sup>67</sup>

The Ninth Circuit took a similar approach in *Washington v. Trump*.<sup>68</sup> There, Washington and Minnesota filed suit challenging President Trump’s Executive Order suspending entry of immigrants from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The states argued the policy violated the Establishment Clause, Due Process under the Fifth Amendment, the Immigration and Nationality Act, the Foreign Affairs Reform and Restructuring Act, the Religious Freedom Restoration Act, the Administrative Procedure Act, and the Tenth Amendment.<sup>69</sup> Washington and Minnesota asserted standing based on both a violation of their quasi-sovereign interests and an injury in fact to their proprietary interests.

Like the Fifth Circuit in *Texas v. United States*, the Ninth Circuit avoided the question whether the states had standing based on their quasi-sovereign interests.<sup>70</sup> Instead, the Circuit

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<sup>65</sup> *Id.* at 147 (“In November 2014, by what is termed the ‘DAPA Memo,’ DHS expanded DACA by making millions more persons eligible for the program and extending [t]he period for which DACA and the accompanying employment authorization is granted . . . to three-year increments, rather than the current two-year increments.”) (citing Memorandum from Jeh Charles Johnson, Sec’y Dep’t of Homeland Sec., to Leon Rodriguez, Dir. USCIS, et al. 3–4 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<http://perma.cc/U2NJ-2J26>]).

<sup>66</sup> *Id.* at 148 (emphasis omitted).

<sup>67</sup> *See id.* at 155–56 (holding the “financial loss[es]” that Texas would bear, due to having to grant drivers licenses, constituted a concrete and immediate injury for standing purposes).

<sup>68</sup> *See Trump*, 847 F.3d at 1157–61.

<sup>69</sup> *Id.* at 1157.

<sup>70</sup> *See id.* at 1161 n.5; *see also id.* at 1157 (concluding the States had Article III standing based on both proprietary and quasi-sovereign interests).

concluded the states had suffered an injury in fact. The court stated the executive order caused a concrete and particularized injury to the states' public universities by preventing nationals of the designated countries from entering the country to join the universities as faculty and students.<sup>71</sup>

### III. THE SPECIAL ROLE OF STATES IN SUING THE FEDERAL EXECUTIVE

#### A. The Role of the States

States have a special role in ensuring the federal executive's compliance with the Constitution because of their interest in preserving federalism. Federalism defines the boundary between the states and the federal government.<sup>72</sup> The federal government is one of limited powers.<sup>73</sup> For example, the Constitution empowers Congress to legislate in only a few designated areas.<sup>74</sup> States do not face comparable limitations. States have general government powers. They may broadly regulate in any area, including areas in which the federal government may also regulate,<sup>75</sup> and they may broadly enforce those laws.

States have an interest in protecting their domain from federal intrusion. That interest is most obvious when the federal executive takes actions that directly interfere with matters committed to the states.<sup>76</sup> An example is the promulgation of a rule by an executive agency that regulates completely local matters.<sup>77</sup>

But the states' federalism interest in ensuring that the Executive complies with the constitution is not limited to the executive actions that directly invade the province of the states. States have a federalism interest in preventing all unlawful executive actions, even if those actions do not directly touch on an area reserved to the states.<sup>78</sup> That is so for two reasons.

First, states have a political interest in ensuring that the president not exercise powers allocated to Congress because of

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<sup>71</sup> *Id.* at 1161.

<sup>72</sup> *See* Alden v. Maine, 527 U.S. 706, 748 (1999).

<sup>73</sup> *See* United States v. Morrison, 529 U.S. 598, 618 (2000).

<sup>74</sup> U.S. CONST. art. I, § 8.

<sup>75</sup> *But see* U.S. CONST. art. I, § 10 (the prohibition on states "coin[ing] [m]oney" is an example of how the Constitution imposes several discrete limits on state power).

<sup>76</sup> *See* Grove, *supra* note 55, at 887.

<sup>77</sup> *See id.*

<sup>78</sup> *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 359, 462 (2012) (observing that "cooperative federalism schemes provide a check on federal executive power" and that "[t]he very growth of the federal administrative state has swept states up as necessary administrators of federal law").

their better representation in Congress.<sup>79</sup> Although the president is elected through a nationwide election, he does not represent a particular state; he represents the nation collectively. By contrast, each state has representatives in Congress who can defend their state's interests. Pushing actions from the Executive to Congress thus gives states a larger say in federal policy decisions.<sup>80</sup>

Second, states have a direct regulatory interest in preventing unlawful executive action because a declaration that a federal executive action is unlawful prevents that action from preempting state law or from otherwise affecting how states conduct themselves. Consider an executive order that regulates interstate commerce. That order does not impermissibly touch an area left to the states because the Constitution authorizes the federal government to regulate interstate commerce.<sup>81</sup> Instead, the constitutional objection is that the order violates separation of powers because the Constitution commits to Congress, not the president, the power to regulate that commerce. But states have a federalism interest in challenging that executive order, because that executive order would preempt inconsistent state laws on commerce. Voiding the executive order removes the possibility for preemption and accordingly leaves the states in a better position to issue regulations on commerce.

The same argument applies to executive actions that fail to comply with the Administrative Procedure Act and other requirements imposed by statute. Those actions can preempt state law. Even when they do not preempt, those agency actions can influence the way states act—by, for example, administering spending programs that condition the disbursement of funds on the state's meeting requirements imposed by the agency.<sup>82</sup> Because they interfere with state autonomy, states have a

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<sup>79</sup> See Margaret H. Lemos & Ernest A. Young, *State Public Law Litigation in an Age of Polarization*, at 19 (manuscript on file with authors) (“[I]t’s terribly important for federalism that Congress make the laws, not executive actors.”).

<sup>80</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954). To be sure, especially in recent times, Congress has not been particularly effective at policymaking because of gridlock. But that gridlock may be a function, at least in part, of the divergent views of states.

<sup>81</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>82</sup> See, e.g., Jonathan H. Adler, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 82 (2007) (acknowledging, in the context of environment agency action, that “federal agency actions can . . . have preclusive effect” and that “[t]he most straightforward way to encourage state activity is to offer financial support for state programs that meet federal requirements or to otherwise confer benefits on compliant state governments”).

federalism interest in challenging executive actions that violate the APA or other statutory procedures.<sup>83</sup>

This state interest in limiting the federal government to protect the states' prerogatives is a critical part of the constitutional design. The principal reason for dividing power between state and federal government is to check abuses of federal power and to prevent the establishment of a federal tyranny.<sup>84</sup> The idea is not simply that sharing power with the states results in the federal government not having the complete authority necessary to establish a tyranny. It is also that state officials seeking to protect their own power "stand ready to check the usurpations"<sup>85</sup> of the federal government. As Madison put it in *Federalist* No. 51, the competition for power between the state and federal government ensures that the "different governments will control each other[.]"<sup>86</sup> The Constitution's design thus contemplates that the states stand as guardians against federal overreach.<sup>87</sup> All of these interests support enabling states to bring suits challenging unlawful executive actions.

In addition to having these federalism interests, states are particularly well suited to bring challenge to executive actions because of their democratic accountability. One reason for the standing doctrine is to prevent would-be litigants from undermining the political process by limiting their access to the courts. The premise of our Constitution is that the elected branches make policy, and elections are the appropriate mechanism to seek to change government policies. Permitting individuals to resort to the court to challenge government policies short-circuits this political process. Standing seeks to avoid this problem by permitting individuals to go to court only if they have suffered direct injuries from the government's

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<sup>83</sup> This logic extends to federal executive actions that violate individual constitutional rights. A successful challenge to a federal action on the ground that it violates a constitutional right promotes federalism by barring federal action that preempts state law. To be sure, preventing the federal government from taking actions that violate rights would not let states take the same actions, because with only a few exceptions constitutional rights equally bar the federal government and the states. Still, removing the federal program would leave space for a state to regulate in that area.

<sup>84</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power.").

<sup>85</sup> THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>86</sup> THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

<sup>87</sup> A broad argument for state standing could be based on the premise that the Constitution should be viewed as a compact among the states. See John C. Calhoun, *Rough Draft of What Is Called the South Carolina Exposition, in UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 350 (Ross M. Lence ed., 1992) (advocating the state-compact theory of the Constitution). If so, states could arguably have standing to challenge all ultra vires federal actions as a breach of contract. Because the premise of this argument is so contestable and its potential implications so far-reaching, however, we do not advance that argument here.



actions. Individuals cannot, in other words, base standing on generalized grievances.

Broad state standing does not threaten the political processes to the same degree because states themselves are political entities. They are unlikely to bring suits that are inconsistent with the majority views of their constituency. Consistent with this view, states do not face the same standing restriction for generalized grievances. For example, unlike individuals, states can bring suit to enforce state criminal laws, even when the violation of the criminal law does not directly harm the state.<sup>88</sup>

There are also pragmatic reasons why states should enjoy broader standing than individuals. Unlike many individuals who might bring suit against the federal executive, states are prone to take a more deliberative and cautious approach to assessing when to bring suit. They are more likely to evaluate the merits more carefully to avoid spending their taxpayers' money on a suit that they cannot win. Moreover, unlike many individuals, states have the resources to launch and maintain a significant judicial challenge to executive actions.<sup>89</sup> As with any major litigation, pursuing a challenge to an executive action can be an expensive affair because of the scope of discovery, the breadth of the issues, and the intense motions practice. In addition, more than other types of suits, challenges to an executive action turn on sophisticated legal arguments that can be made most effectively by attorneys that specialize in the relevant field of law. Most private individuals lack the resources to maintain this type of litigation and to retain specialist attorneys who are more likely to prevail on a such a challenge.

To be sure, states are not the only ones with the interests and resources to challenge the federal executive. Congress also plays a significant role in constraining the federal executive. Just as with federalism, the reason that the Constitution divides power between Congress and the president is to prevent either branch from accumulating or abusing its power.<sup>90</sup> Conferring broader legislative standing on Congress to challenge federal executive actions would increase Congress's ability to play that role.<sup>91</sup>

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<sup>88</sup> See Woolhandler & Collins, *supra* note 46, at 392.

<sup>89</sup> See Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. (forthcoming 2018).

<sup>90</sup> See *Gregory*, 501 U.S. at 458 (“[T]he separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch[.]”).

<sup>91</sup> See, e.g., Campbell, *supra* note 15, at 603, 605 (arguing Congress should have broader standing to challenge executive decisions not to enforce the law).

Whether Congress should have greater standing to challenge the president is beyond the scope of this Article; but there are sound reasons to be cautious before proceeding too far down this route. The most significant is that broader congressional standing could threaten the balance of powers.<sup>92</sup> Although Congress has largely abdicated its function of checking the president, Congress has the potential to be extremely powerful, not only because it holds the legislative and other powers, but also because it has more direct popular support than the other branches of government.<sup>93</sup> For this reason, the Constitution imposes various limits on Congress's power. One limitation is that the Constitution specifically enumerates Congress's power. Another limitation is that the Constitution prescribes procedures that Congress must follow to exercise those powers. For example, for Congress to create a law, the bill must pass both houses of Congress and be presented to the president for his approval before becoming a law.<sup>94</sup> Similarly, Article I prescribes a specific procedure that Congress must follow to remove a federal officer through impeachment.<sup>95</sup>

Among the various powers given to Congress are a handful of tools with which Congress can respond to illegal executive action. The Constitution authorizes Congress to enact new legislation, bring impeachment proceedings, withhold appropriations, or refuse to confirm nominations. Conferring standing on Congress to challenge executive actions would add a new weapon to Congress's arsenal for challenging executive action. If Congress one day decided to begin using all of its tools for checking

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<sup>92</sup> The text of the Constitution does not explicitly answer whether Congress can bring lawsuits. On one hand, the Constitution specifically enumerates Congress's powers, such as the power to enact legislation, impeach federal officials, and approve treaties and nominations for various federal offices. U.S. CONST. art. I, §§ 3, 8, 10. One might argue that the enumeration of these powers implies that Congress cannot exercise powers not specifically enumerated, and bringing suit is not one of the powers enumerated in the Constitution. On the other hand, one might argue that the Necessary and Proper Clause authorizes Congress to enact legislation conferring standing on itself to challenge unlawful federal action. *But cf.* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 574 (2014) ("Congress may not delegate to itself the power to execute the laws.") (citing *INS v. Chadha*, 462 U.S. 919, 956 (1983)); *see also id.* at 577 (finding that "[t]he defense of federal statutes by [Congress]" offends the principle that "the Constitution carefully separates the enactment of federal law from its implementation, sharply constraining Congress's role in and control over the latter").

<sup>93</sup> *See* THE FEDERALIST NO. 48, at 309–10 (James Madison) (Clinton Rossiter ed., 1961) ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex. . . . [The legislature's] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.")

<sup>94</sup> U.S. CONST. art. I, § 7.

<sup>95</sup> *Id.* § 3, cl. 6–7.

executive power, the additional tool of broad standing could disrupt the balance of power.<sup>96</sup>

## B. Concerns with State Standing

Although there are obvious benefits in granting states standing to bring suits to challenge separation of powers, there are some serious concerns. To begin with, even if states are well situated as an abstract matter to challenge exercises of federal executive power, states, in the abstract, do not file lawsuits. A state officer or entity (usually the state attorney general) must bring such claims in the name of the states. And therein lies the rub. Any ideal of the states acting as platonic guardians standing against federal executive excesses needs to be tempered by political reality.

There are often raw political reasons why state attorneys general pursue actions against the federal government beyond their having serious concerns about the scope of federal executive power.<sup>97</sup> Challenging a president of the other party leads to its own series of rewards.<sup>98</sup> State attorneys general can earn favor with their constituencies, position themselves for running for higher office, and enhance their leadership standing within their political party.<sup>99</sup> They can raise money for their offices and their states in the form of damages and attorneys' fees, and they can raise money for their own political campaigns in the form of campaign contributions from supporters pleased by their actions.<sup>100</sup> They can stop, delay, harass, or hinder the implementation of federal policies that they ideologically oppose.

It is therefore not surprising that one must look hard and long to find a lawsuit brought by the states challenging the federal government that is motivated by deep-founded concerns for separation of powers rather than by partisan preference. It is, after all, no accident that Republican attorneys general led the actions against the Obama Administration and that

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<sup>96</sup> Moreover, while the checks provided by the Constitution can be politically costly for Congress to use, the filing of a lawsuit is relatively low cost. Expanding congressional standing could very well result in members of Congress using only lawsuits, and not the constitutionally prescribed procedures, to challenge executive actions.

<sup>97</sup> To be sure, not all suits by state attorneys general have partisan motivations. See Lemos & Young, *supra* note 79, at 25–26 (arguing that business interests and other considerations drive some state attorney general litigation decisions).

<sup>98</sup> See generally Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014) (arguing there are both personal and departmental incentives for state attorneys general to score significant legal victories, including political and reputational benefits, pleasing state constituencies for reelection purposes, and obtaining financial awards that can often be retained by enforcement agencies).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

Democratic attorneys general prosecuted lawsuits against President Trump.<sup>101</sup>

It was not always this way. For many years, state attorneys general worked across party lines to protect state interests;<sup>102</sup> including, on occasion, taking actions contrary to their own partisan interests.<sup>103</sup> No longer. Bipartisanship has become the rare exception<sup>104</sup> and institutional concerns have become subservient to partisan agendas.<sup>105</sup> The same polarization forces that once undermined Congress's ability to check the president now affect state attorneys general.<sup>106</sup>

This is not to say a suit filed for partisan reasons is somehow illegitimate or cannot have a substantial effect in checking against separation of powers abuses.<sup>107</sup> It does suggest, however, the states may not have such a uniquely pristine role in patrolling federal executive action that they can be distinguished from other interested parties for the purpose of standing. It also suggests that even if states are granted standing, the credibility and gravitas of their claims may be diminished,<sup>108</sup> thus undercutting one of the central reasons for granting states expansive standing in the first place.<sup>109</sup>

Expanded state standing may also bring to the forefront another difficult issue—determining who, for the purposes of such litigation, is the appropriate officer or entity to represent the state. Is it the state attorney general, the governor, the

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<sup>101</sup> See *supra* notes 9–10 and accompanying text (showing that Republican attorneys general and Republican states take action against Democratic presidents, while Democratic attorneys general and Democratic states take action against Republican presidents); see also Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General As Amici*, 90 N.Y.U. L. REV. 1229, 1251–52 (2015) (showing an overall increase in partisan amicus briefs filed by state attorneys general beginning in the 2000s).

<sup>102</sup> Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. (forthcoming 2018) (manuscript at 20).

<sup>103</sup> Lemos & Quinn, *supra* note 101, at 1256.

<sup>104</sup> See PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* (2015); see Johnstone, *supra* note 102, at 23 (suggesting the turning point of this may have been when then-Alabama Attorney General (now Judge William Pryor) created the Republican Attorneys General Association).

<sup>105</sup> See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1090–92 (2014) (noting that state objections to federal power are primarily based on partisan politics and not the protection of state prerogatives).

<sup>106</sup> *Id.*

<sup>107</sup> See Lemos & Young, *supra* note 79, at 30 (arguing that state litigation with partisan motivation still plays the useful role of checking federal power); Grove, *supra* note 55, at 897 (rejecting the notion that states should have expansive standing to sue the federal government but also noting that partisan motivations can lead “state officials to do a better job of representing the State in court”).

<sup>108</sup> Johnstone, *supra* note 102, at 22.

<sup>109</sup> See *supra* notes 36–71 and accompanying text.

leaders of the legislature, or even citizens who sponsor state initiatives? Should state attorneys general have the authority to bring such lawsuits on behalf of the state when the legislature or the governor opposes such actions? Should the attorneys general be required to bring such a claim if the governor or legislature presses her to do so, even if she opposes such action? And how, if at all, should a federal court hearing such a claim resolve this internal issue? Put simply, there is a Pandora's Box of state law issues underlying these lawsuits,<sup>110</sup> and federal courts will have to insert themselves in the thicket of intra-state divisions of power to be able to hear these cases. It is a project, we suspect, federal courts might want to avoid.<sup>111</sup>

Finally, expanded state standing to challenge federal executive action also means an expanded role for the courts. As discussed above, there are strong positive reasons why courts should be more involved in imposing constraints upon executive branch action, but also reasons to be cautious. After all, the theories that posit that disputes over federalism and separation of powers should be resolved by the political processes rather than the courts<sup>112</sup> presented more than just an abstract

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<sup>110</sup> See, e.g., William P. Marshall, *Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2455–67 (2006) (discussing cases addressing which state officer represents the state); Joseph Kanefield & Blake W. Rebling, *Who Speaks for Arizona: The Respective Roles of the Governor and Attorney General When the State is Named in a Lawsuit*, 53 ARIZ. L. REV. 689 (2011) (discussing the various issues surrounding which state official should represent a state and concluding that, for the purpose of unity and clarity, the state attorney general should be subservient to the governor in any case involving the state); but see *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 642–45 (W. Va. 2013) (ruling that state attorney generals have common law powers that are not specified by statute, despite the fact other courts and legal scholars disagree on this point); see also Press Release, Georgia: Governor Lifts Block Against Syrian Refugees (Jan. 4, 2016), <https://www.nytimes.com/2016/01/05/us/georgia-governor-lifts-block-against-syrian-refugees.html> (describing when Georgia's Governor Nathan Deal rescinded an executive order to block the placement of Syrian refugees within his state, after his attorney general officially announced that Governor Deal did not have the authority to issue such an order in the first place); Press Release, Office of Attorney General Mark Brnovich, Terry Goddard Declines to Join Lawsuits Against Federal Health Care Law (Mar. 24, 2010), <https://groupwise.azag.gov/press-release/terry-goddard-declines-join-lawsuits-against-federal-health-care-law> [<http://perma.cc/39PX-8U4J>] (describing Democrat Attorney General Goddard's refusal to join the Republican-led health care suit for its lack of merit); *State ex rel. McCollum v. U.S. Dep't of Health and Human Serv.*, No. 3:10-cv-91-RV/EMT, 2010 WL 2000518 (N.D. Fla. Apr. 8, 2010) (in which Republican Governor Jan Brewer represented Arizona in a suit when Arizona's attorney general publicly refused to join).

<sup>111</sup> Cf. *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 30 (1959) (holding the federal court should abstain in answering the question of whether a city had the power to initiate eminent domain proceedings under state law).

<sup>112</sup> See, e.g., JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980) (arguing the judiciary should not rule on constitutional questions regarding the allocation of powers between Congress and the president); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965) (arguing the Supreme Court

affirmation of the role of politics as a constitutional constraint on the exercise of federal power. They also offered the tangible advantage of extricating the judiciary from particularly difficult and often highly politicized determinations. Setting a standard for when separation of powers is violated consistently presents the judiciary with concerns of judicial management, as well as with questions of judicial enforceability and the challenge of maintaining political capital when issuing politically charged decisions. Accordingly, fashioning doctrines that could keep the courts out of federalism and inter-branch disputes was attractive on a number of counts. As Alexander Bickel taught long ago, there are significant benefits that may be gained from a modest judiciary.<sup>113</sup>

The value of avoiding the courts as the arbiters of politically-laden issues surrounding the scope of presidential power may have even greater resonance in the current climate in which the dynamics of polarization and judicial selection have infected the courts as well as the other branches.<sup>114</sup> First, if the courts' decisions regarding the exercise of presidential power are motivated by partisan concerns, they will hardly do much to constrain the Executive, particularly when the president is of the same party. Second, to the extent that court decisions seem to reflect partisan preferences, they will undercut the courts' legitimacy.<sup>115</sup> Third, even if the judicial system as a whole is able to insulate itself against partisan decision-making, particular judges may not be so self-constrained. Already, the experience with states bringing actions challenging federal action has reflected a substantial amount of judge shopping, and there is no reason to assume that savvy attorneys general will cease using this tactic in later cases. But the potential costs to the national interest of a partisan decision by an errant judge could be considerable. A single judge, after all, can do significant mischief in interrupting presidential actions—even if that action later turns out to be perfectly legal.

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must exercise restraint and neutrality, and that there must be limits on its ability to bind other branches and the states in its constitutional interpretation).

<sup>113</sup> See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (advocating that the Supreme Court use discretion to avoid deciding controversial issues); see also Flaherty, *supra* note 2, at 1828 (advocating that courts revisit and incorporate Bickel's notions of "passive virtues").

<sup>114</sup> See Johnstone, *supra* note 102, at 3–4.

<sup>115</sup> *Id.* at 5.

#### IV. RELAXING INJURY IN FACT FOR STATES TO CHALLENGE EXECUTIVE ACTIONS

What should be clear by this point is that states are particularly well positioned to constrain expanding executive power. States have a unique federalism interest in ensuring that federal executive officers comply with the Constitution and federal laws, and they have the resources and sophistication to bring successful suits of this sort. At the same time, however, there are concerns with granting states plenary standing to bring any suit against the Executive. One way to balance these benefits and concerns about empowering states to challenge executive actions is to relax the injury in fact test for states, but impose prudential constraints on standing. Easing the injury in fact test would expand the power of the state to bring suit. But it would still require states to demonstrate some type of actual injury that would ensure that states do not meddle in affairs that truly do not affect them. Moreover, continuing to enforce prudential limitations, such as third-party standing, would prevent states from bringing suits that others are better positioned to litigate. Finally, in order to further guard against hyper-partisanship, we also propose requiring states to show some level of bipartisan support to maintain their actions against the Executive.

The injury in fact test requires that a plaintiff show he has suffered, or is imminently about to suffer, an “injury in fact.”<sup>116</sup> That injury must be to a “legally protected interest,” and it must be “concrete and particularized.”<sup>117</sup> Moreover, the injury must be traceable to the defendant and of the sort that courts could likely redress through a ruling in favor of the plaintiff.<sup>118</sup> Ordinarily, a plaintiff satisfies this test by showing a loss of money or physical harm.<sup>119</sup> However, this is not always the case. Although courts purport to apply the same injury in fact test in all cases, in practice, different tests apply to different types of cases.<sup>120</sup>

For example, courts have often relaxed the injury requirement for Equal Protection Clause violations.<sup>121</sup> Thus, in

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<sup>116</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009).

<sup>117</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

<sup>118</sup> *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>119</sup> *But see Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (defining injury in fact to include injuries to “[a]esthetic and environmental well-being” and “economic well-being”).

<sup>120</sup> See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1065 (2015).

<sup>121</sup> *Id.* at 1075 (“[T]he Supreme Court does not always demand a redressable ‘Wallet Injury’ to ground standing . . . under the Equal Protection Clause.”); see also *Bowen v. Kendrick*, 487 U.S. 589, 618–19 (1988) (the Court notoriously relaxed standing for alleged Establishment Clause violations); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 328 (2002) (“[T]he Court often waves litigants complaining of government support for religious endeavor right past the injury hurdle.”).

*Adarand Constructors, Inc. v. Pena*, the Court held that a nonminority contractor had standing to challenge a government program that gave preference to minority businesses.<sup>122</sup> In doing so, the Court dispensed with the “concrete” requirement for injury and the requirement of redressability because the plaintiff could not prove that it would have received any contracts if race were not considered.<sup>123</sup> Instead, the Court explained the denial of the opportunity “to compete on an equal footing” constituted a sufficient injury for standing.<sup>124</sup>

At the other end of the spectrum, courts have been less willing to find standing in cases in which the plaintiff challenges government actions related to national security.<sup>125</sup> In *Clapper v. Amnesty International USA*, for example, the Court explicitly indicated the imminence requirement is particularly rigorous in suits challenging actions implicating national security.<sup>126</sup>

Similarly, and more salient to this essay, federalism concerns appear to have led to restrictions on standing. Consider *City of Los Angeles v. Lyons*.<sup>127</sup> There, an individual who had previously been choked by police sued the police, alleging he might again be subject to a police chokehold.<sup>128</sup> The Court denied standing on the ground the injury was too speculative. Given the Court’s willingness to find standing based on other low-probability injuries, one explanation for the denial of standing in *Lyons* is the Court sought to avoid interfering with the inner workings of state’s government.<sup>129</sup>

These decisions show that the rigor of the injury in fact test varies depending on certain considerations, such as separation of

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*But see id.* at 311 (discussing how the Court has not always been so generous with Equal Protection standing and listing cases as examples).

<sup>122</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210–12 (1995).

<sup>123</sup> *See id.* at 211.

<sup>124</sup> *Id.* (“The injury in cases of this kind is that a ‘discriminatory classification prevent[s] the plaintiff from competing on an equal footing.’”) (quoting *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 667 (1993)). For other examples of the same analysis, see *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 667–68 (1993), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978).

<sup>125</sup> F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 725 (2017) (arguing the standing test is stricter for national security cases than Equal Protection Clause cases).

<sup>126</sup> *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013); see Fallon, *supra* note 120, at 1079 (expanding on this point).

<sup>127</sup> 461 U.S. 95 (1983).

<sup>128</sup> *Id.* at 97–98.

<sup>129</sup> F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 76 (2012) (“The denial of standing in *Lyons* and the grant of standing in *Laidlaw* may reflect the Court’s unwillingness to interfere in the workings of state government.”).



powers, federalism, and the type of right asserted.<sup>130</sup> When a suit raises a challenge in an area that federal courts generally seek to avoid, such as national security or the military, the standing inquiry is more stringent.<sup>131</sup> By contrast, when a suit seeks to vindicate rights that federal courts have regarded as particularly important, the standing test is relaxed.<sup>132</sup>

In this light, the injury in fact test should be relaxed when a state sues to force executive officers to comply with the law.<sup>133</sup> As discussed above, states have a unique interest in preventing unlawful federal action. Permitting states to protect that interest is a fundamental component of the division of power in the Constitution. More pragmatically, state officials are prudent enough to bring only those suits that matter, that they may win, and that they have the resources to argue effectively. They accordingly should face a lower standing threshold when challenging unlawful executive action or inaction.

There are a variety of ways to operationalize a relaxed standing requirement. One way is to expand the types of injuries that suffice for state standing in such suits. For example, one could expand state standing to injuries for which the states are partly responsible. Courts have said individuals should not be permitted to base standing on injuries that are based on reactions to federal actions. Thus, in *Clapper*, the Court held that the costs that private individuals incurred to avoid federal surveillance was insufficient to confer standing on those individuals to challenge the surveillance program.<sup>134</sup> But one could discard this restriction when states sue the Executive.

The Fifth Circuit arguably adopted this approach in *Texas v. United States*.<sup>135</sup> There, the Republican Attorney General of Texas challenged President Obama's policies deeming various types of illegal immigrants to be lawfully present in the United

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<sup>130</sup> *Id.* at 77 (noting that separation of powers, federalism, and docket size affect standing decisions).

<sup>131</sup> See Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 73 (1984) ("In fact the law of standing has become so disjointed that the danger now exists that the Court will come to accept it as a manipulable doctrine whose primary value lies in its ability to serve nonjurisdictional ends.").

<sup>132</sup> See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 304 (2008) ("The Court has been hesitant to deny standing in cases involving the violation of a right that the Court deems particularly important even when the plaintiff has not suffered a perceptible injury.").

<sup>133</sup> See *Indiana v. EPA*, 796 F.3d 803, 810 (7th Cir. 2015) (suggesting that even though a state cannot sue the United States *parens patriae*, it should get "special solicitude" to sue the United States . . . if a quasi-sovereign interest of the state is at stake").

<sup>134</sup> *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417 (2013).

<sup>135</sup> See *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

States. To establish standing, Texas argued that under Texas law, these immigrants could obtain driver's licenses, and Texas would incur costs in issuing these licenses. The Fifth Circuit held these costs supported Texas's standing, even though Texas could have eliminated those costs by amending Texas law to bar those immigrants from obtaining licenses.<sup>136</sup>

This is not to say states should always be able to create an injury in fact. For example, Texas should not have had standing if it enacted its law authorizing immigrants to obtain driver's licenses *after* President Obama adopted his policies. In that situation, federal law would not have forced Texas to incur the costs of providing licenses to immigrants because, at that time of the adoption of the federal policy, Texas would not have been required to provide licenses to immigrants. Rather, Texas would have incurred the cost of providing licenses to immigrants through its own action of enacting the Texas law against the backdrop of the federal policy.

Nor is it fair to say that any federal action that conflicts with state law creates an injury in fact sufficient for the state's standing.<sup>137</sup> The state must point to some sort of factual effect on the state to establish an injury in fact.

Another way to soften the injury in fact test for state claims against the executive is to relax the requirement that the injury not be speculative,<sup>138</sup> requiring states to show only that there is a realistic possibility that they might suffer the threatened harm instead of a high probability. This approach finds support in the decision of the Supreme Court in *Massachusetts v. EPA*.<sup>139</sup> There, Massachusetts sued the EPA for failing to regulate carbon dioxide. Massachusetts claimed it had standing because federal law conferred a cause of action on the states to challenge the EPA's decision, and because the Environmental Protection Agency's failure to regulate carbon dioxide would result in global warming, which in turn would raise sea levels and erode

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<sup>136</sup> See *id.* at 155–57.

<sup>137</sup> See *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011) (concluding the preemption of Virginia law prohibiting individual mandates by the individual mandate provision of the Patient Protection and Affordable Care Act did not cause Virginia an injury in fact). It may be possible that federal preemption of state law creates standing based on the impairment of the state's sovereign interest, as opposed to being based on the state suffering an injury in fact. But we leave that issue for another day.

<sup>138</sup> *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992); see also *Diamond v. Charles*, 476 U.S. 54, 66 (1986) (rejecting standing based on “unadorned speculation”); *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (denying standing because the plaintiffs had not demonstrated a “substantial probability” of harm).

<sup>139</sup> *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

Massachusetts's land.<sup>140</sup> The Court concluded these considerations sufficed for standing, explaining when they have “quasi-sovereign interests” at stake, states are entitled to “special solicitude” in the standing analysis.<sup>141</sup> The Court did not explain what it meant by “special solicitude.” One might think from the reference to “quasi-sovereign interests” that the special solicitude referred to *parens patriae* standing. But that is not so. The Court did not base standing on Massachusetts's role as *parens patriae*. Instead, the Court pointed to the factual injury of the erosion to Massachusetts's land.<sup>142</sup>

Rather than referring to *parens patriae* standing, it appears that the special solicitude the Court afforded Massachusetts was to relax the restriction on speculative injuries. The erosion to Massachusetts's land would not occur for decades.<sup>143</sup> That distant and speculative injury would likely not suffice for standing.<sup>144</sup> The Court's conclusion that the possible erosion did suffice suggests that it applied the imminence requirement less rigorously. *Massachusetts v. EPA* thus supports the idea that, when a state alleges a quasi-sovereign interest, the standing inquiry should be relaxed, even when the state seeks to base standing on an injury in fact instead of *parens patriae* standing.<sup>145</sup>

At the same time, we also suggest that even this relatively modest proposal of relaxing the injury in fact requirement for states should be further qualified. As pointed out previously, expanded state standing creates its own set of concerns—specifically that many of these actions will be driven more by a motivation for political disruption than by a true concern with executive branch overreach.<sup>146</sup> Some, of course, might suggest this is fine—that the use of highly partisan attorneys general as a check against highly partisan presidents is fully consonant with Madison's notion of ambition counteracting ambition.<sup>147</sup> Perhaps. Yet the use of excessive

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<sup>140</sup> *Id.* at 518–22.

<sup>141</sup> *Id.* at 520.

<sup>142</sup> *Id.* at 521–24.

<sup>143</sup> *Id.* at 541–42 (Roberts, C.J., dissenting) (noting the possible loss of land as one harm supporting standing in the next few decades).

<sup>144</sup> As the Court explained in *Lujan v. Def. of Wildlife*, 504 U.S. 555, 565 n.2 (1992), the further off in time that an injury may occur tends to make the injury more speculative. *See id.* (stating the “purpose” of “imminence” is “to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is ‘certainly impending’)” (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

<sup>145</sup> For other instances in which federal courts have relaxed standing requirements for states, see Lemos & Young, *supra* note 79, at 11–12.

<sup>146</sup> *See supra* notes 36–71 and accompanying text.

<sup>147</sup> *See supra* note 1 and accompanying text.

partisanship as a method to reduce the effects of excessive partisanship does not seem to be the type of remedy that would help combat the polarization that lies at the heart of much of the dysfunction that has helped lead to the expansion of presidential power in the first place. More directly, the potential risk to the national interest engendered by overly partisan attorneys general bringing harassment or dilatory actions against the executive in front of overly partisan courts is not one that can be easily glossed over.

For this reason, we propose the courts demand some indicia of bipartisanship as a prudential matter before relaxing the injury in fact requirement for states.<sup>148</sup> To be clear, we are not suggesting that courts should deny standing if the state meets traditional injury in fact requirements.<sup>149</sup> But in cases in which the injury in fact requirement needs to be relaxed to find standing, there should be a showing that the action has some measure of bipartisan support to justify the “special solicitude” the Supreme Court had indicated may be warranted when a sovereign state is bringing the claim.<sup>150</sup> Thus, under our approach, both the state plaintiffs in *Massachusetts v. EPA*<sup>151</sup> and in *United States v. Texas*<sup>152</sup> would have had to demonstrate bipartisan support, since in both cases the injury in fact requirement was relaxed.<sup>153</sup> In *Washington v. Trump*,<sup>154</sup> on the other hand, no showing would have been needed because the state readily satisfied injury in fact requirements.<sup>155</sup>

Anthony Johnstone and Michael Solimine, writing separately, have advocated for a similar approach in the context of amicus briefs, contending that the Supreme Court should only give deference to briefs from the states that reflect some level of bipartisan support.<sup>156</sup> In fact, the National Association of Attorneys General (“NAAG”) already requires bipartisan action by attorneys general in order to invoke the authority of the states. Its constitution requires that in order for a sign-on letter

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<sup>148</sup> This does not necessarily mean more than one state will always be necessary to maintain an action. But if one state goes at it alone, it should be required to assert that the action has some bipartisan support.

<sup>149</sup> *E.g.*, *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

<sup>150</sup> *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *Indiana v. EPA*, 796 F.3d 803, 810 (7th Cir. 2015).

<sup>151</sup> *Massachusetts v. EPA*, 549 U.S. at 518.

<sup>152</sup> *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015).

<sup>153</sup> *See Massachusetts v. EPA*, 549 U.S. at 518; *Texas v. United States*, 809 F.3d at 155–56.

<sup>154</sup> *Trump*, 847 F.3d at 1158–61.

<sup>155</sup> *Id.*

<sup>156</sup> Johnstone, *supra* note 102, note at 29–30; Michael Solimine, *Retooling the Amicus Machine*, 102 VA. L. REV. ONLINE 151, 166 n.86 (2016).

to become NAAG policy (appearing on NAAG letterhead as a result), the letter must have at least the support of thirty-six attorneys general (a two-thirds majority of NAAG's overall state and territorial membership).<sup>157</sup>

These approaches make sense. As Johnstone indicates, the requirement of bipartisanship works to assure that the case is "a reliable signal of general state interests."<sup>158</sup> Further, because such a requirement would force attorneys general to work across party lines, it may, in that respect, have the additional benefit of helping work against the tide of partisan polarization.<sup>159</sup>

We also propose the courts should not allow states to maintain third-party standing cases absent a showing of cross party support. The Court has already held that whether a party can sue on behalf of the rights of third parties is a matter for prudential consideration.<sup>160</sup> Taking steps to assure that a lawsuit against the president brought by a state is more than only a partisan attack would seem to be a prudent exercise of judicial power.<sup>161</sup>

Finally, state standing should be allowed only upon a proper showing that the state officer or entity bringing the suit is the single correct party to maintain the action in the federal court. As noted previously, various state officials—the governor, attorney general, legislators, and even individuals who sponsor state initiatives—often dispute who has the authority to litigate on behalf of the state.<sup>162</sup> Those disputes are exacerbated when the officers disagree on the merits of the action. Both the state attorney general who thinks the president has violated the Constitution and the state governor who thinks that the president's action is lawful may each claim that he alone has the power to bring suit on behalf of the state. To avoid the embarrassment of resolving a suit against the president improperly brought by the wrong state official, federal courts should closely examine whether the official bringing the case has the authority to do so under state law. If state law does not authorize the officer who brought the suit to do so, or even if the law is unclear, courts exercise their discretion to deny standing. Dismissing on that ground would prevent unnecessary conflict

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157 CONSTITUTION AND BYLAWS OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL art. VIII, § 2.

158 Johnstone, *supra* note 102, at 29.

159 *See id.*; Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 393 (2012).

160 *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 504 (1975).

161 *Cf.* Elk Grove Unified School District v. Newdow, 542 U.S. 1, 11–12 (2004).

162 *See supra* note 115 and accompanying text.

with the president and avoid deciding many unnecessary constitutional questions.

## V. CONCLUSION

The vast expansion of presidential power in the twentieth and twenty-first centuries, as well as the possibility of a runaway presidency, calls for new ways for thinking about how to constrain the Executive. Granting the states standing to challenge federal executive action is one avenue deserving exploration. Expansive state standing, however, raises its own set of concerns—including further exacerbating the over-politicization issues that are currently plaguing both the state offices of the attorneys general and the federal courts. There is thus a legitimate question as to whether liberalized state standing may raise more problems than it solves.

In this essay, we offer a modest solution. We propose the states should not have standing to raise purely abstract issues but that a more generous notion of injury in fact should be applied to them than to other entities. Such an approach allows states to maintain actions against the Executive that might otherwise not be justiciable. We further suggest, however, even this limited grant of standing should be subject to prudential review because of the potential problems that expanded state standing generates.

We end with a final word of caution from the opinion by Justice Jackson in *Youngstown* that is cited at the beginning of this essay. Although the Court in *Youngstown* found the president's action in that case to be unconstitutional, Justice Jackson's opinion in that case was not optimistic that the decision would effectively constrain the Executive. As he wrote:

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.<sup>163</sup>

Expanded state standing to challenge federal executive action, in short, may be warranted; but it, by itself, will not be sufficient to seriously constrain presidential power. The broader solutions lie elsewhere.

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<sup>163</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952).