

Federalism All the Way Up: State Standing and "The New Process Federalism"

Author(s): Jessica Bulman-Pozen

Source: *California Law Review*, Vol. 105, No. 6 (December 2017), pp. 1739-1750

Published by: California Law Review, Inc.

Stable URL: <https://www.jstor.org/stable/44630770>

Accessed: 29-01-2022 23:26 UTC

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# Federalism All the Way Up: State Standing and “The New Process Federalism”

Jessica Bulman-Pozen\*

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Heather Gerken’s Jorde Lecture, *Federalism 3.0*, is characteristically sage and stimulating. She urges us to accept thoroughgoing state-federal integration and to recognize the possibilities of state power even when the state is acting as a “servant” to the federal government. Gerken also argues that we need a “new process federalism.” Suggesting that we begin with the anti-coercion principle of *NFIB v. Sebelius*’s Spending Clause ruling, she calls on us “to rethink our account of the role judges play in policing state-federal tussles.”<sup>1</sup>

But what counts as a state-federal tussle? The very administrative and political integration Gerken embraces means that state-federal tussles will not necessarily be framed as such. To be sure, we will continue to see cases about state versus federal authority—challenges concerning the reach of the Commerce Clause, the extent of federal preemption, and the federal government’s possible violation of anti-commandeering principles, to name a few. And sensitivity to “multidimensional problems involving resource allocation, governance, and politics”<sup>2</sup> may point the way to sounder doctrine in these cases.

If we limit our gaze to disputes about state versus federal authority, however, we will miss many of the most important federalism tussles: fights

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DOI: <https://dx.doi.org/10.15779/Z38N29P65H>

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\* Professor of Law, Columbia Law School. I am grateful to the Brennan Center and NYU Law School for hosting the Jorde Lecture program and to Heather Gerken, Ernie Young, and the practitioners, scholars, and students who participated in the conversation. My thanks also to Henry Monaghan, David Pozen, and the editors of the *California Law Review* for very helpful comments on a draft of this commentary.

1. Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1696, 1703 (2017).
2. *Id.* at 1708.

about the distribution of authority *within* the federal government. A variety of state challenges with important consequences for twenty-first century federalism have not concerned the roles of states and the federal government as cohesive units. They have instead turned on questions we usually put under a distinct separation of powers rubric: What is the scope of congressional versus federal executive power? Has the President violated federal law, or has an administrative agency exceeded its statutory authority? These fights, which tend to involve some (but not all) states challenging some (but not all) federal government actors, take federalism “all the way up.”<sup>3</sup>

In prior work, Gerken has advocated taking federalism “all the way down” to cities and other local government units.<sup>4</sup> The jurisdictional interdependence and decline of sovereignty she cites should lead us to look up as well. Given the deep integration of state and federal actors along administrative and partisan lines, states play a role in calibrating the federal separation of powers and shaping the execution of federal law. If federalism all the way down suggests that states are less critical to the state side of the federalism relationship than conventional wisdom would have it, federalism all the way up suggests that states are more critical to the national side of the federalism relationship than conventional wisdom would have it.

This commentary considers what federalism all the way up means for Gerken’s proposed new process federalism. The state-federal integration she documents underscores why judicial policing of “conditions for federal-state bargaining”<sup>5</sup> cannot be limited to state-federal relations in the traditional sense. It must extend to state challenges to the allocation and exercise of authority within the federal government. The new process federalism would therefore do well to address when states will have standing to bring such cases in federal court. After Part I describes contemporary federalism-all-the-way-up litigation, Part II suggests that Gerken’s “Federalism 3.0” complicates both traditional *parens patriae* and sovereignty arguments for state standing but lends force to the recognition of states’ representative role within federal schemes.

## I.

### FEDERALISM UP TO THE SEPARATION OF POWERS

A foundational assumption of much federalism doctrine and scholarship is that states will check the federal government. In recent decades, however, many state challenges have assumed a novel form, contesting how the federal

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3. The few references to “federalism all the way up” in the literature refer to a different phenomenon: global federation. See Daniel Halberstam, *Federalism: Theory, Policy, Law*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 576, 605–07 (Michel Rosenfeld & Andrés Sajó eds., 2012); Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, 55 NOMOS 83, 106–09 (2014).

4. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 21–33 (2010); see also, e.g., Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191 (2016) (arguing that divisions within states are critical to understanding contemporary federalism).

5. Gerken, *supra* note 1, at 1704.

executive branch carries out federal law instead of contesting federal law itself. As some of my prior work has explored, states' administrative and political integration with the federal government gives them a variety of paths beyond litigation to contest and reshape federal executive policy.<sup>6</sup> But even as jousting beyond the courtroom critically informs national governance, the most heated debates often wind up in court, even if only as prelude to further negotiations.

Consider the state lawsuits filed in the early months of the Trump Administration. When Washington, Minnesota, and Hawaii sued to enjoin the various iterations of President Trump's first travel ban,<sup>7</sup> the states not only argued that the orders were unconstitutional, but further insisted that the President was violating several federal statutes, including the Immigration and Nationality Act.<sup>8</sup> Even as the states sued the federal government, they argued that they were *defending* federal statutes against a President who would flout them.<sup>9</sup>

Similar arguments arose in the federalism-all-the-way-down challenges by cities and counties, including San Francisco and Santa Clara, to President Trump's executive order seeking to strip funding from "sanctuary cities."<sup>10</sup> While these lawsuits also included claims about commandeering and coercion, they led with a separation of powers argument. San Francisco contended that "[i]n directing that sanctuary jurisdictions are not eligible to receive federal funds, the Executive Order asserts legislative power that the Constitution vests exclusively in Congress."<sup>11</sup> Santa Clara similarly maintained that "[b]ecause neither the Constitution nor an act of Congress grants the President the coercive spending powers he now claims, the Executive Order violates the separation of powers inherent in the Constitution."<sup>12</sup>

6. See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920 (2014).

7. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017); Presidential Proclamation 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

8. See, e.g., First Amended Complaint at 14–17, *Washington v. Trump*, No. 2:17-cv-00141-JLR (W.D. Wash. Feb. 1, 2017), ECF No. 18; Second Amended Complaint at 34–37, *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KJM (D. Haw. Mar. 8, 2017), ECF No. 64.

9. Agreeing with Hawaii, the Ninth Circuit decided the case on statutory grounds. *Hawaii v. Trump*, 859 F.3d 741, 755 (9th Cir. 2017) ("[I]mmigration, even for the President, is not a one-person show. . . . We conclude that the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress."), *judgment vacated* by *Trump v. Hawaii*, 2017 WL 4782860 (U.S. Oct. 24, 2017). The district court subsequently adopted the Ninth Circuit's statutory reasoning in Hawaii's challenge to the third iteration of the travel ban. See *Hawaii v. Trump*, 2017 WL 4639560 (Oct. 17, 2017). The litigation is ongoing as of this writing.

10. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

11. Motion for Preliminary Injunction at 9, *San Francisco v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal. Mar. 8, 2017), ECF No. 21.

12. Motion for Preliminary Injunction at 12, *Santa Clara v. Trump*, No. 3:17-cv-00574 (N.D. Cal. Feb. 23, 2017), ECF No. 26. The district court enjoined the relevant portion of the executive order. Order Granting the County of Santa Clara's and City and County of San Francisco's Motions to Enjoin

It is not surprising that state lawyers suing President Trump would distinguish presidential from congressional power and challenge only the former. It is a blue-state version of high-profile, red-state challenges to President Obama. Most notably, when Texas led a coalition of states seeking to invalidate the Deferred Action for Parents of Americans and Lawful Permanent Residents program (“DAPA”), the states associated themselves with Congress’s statutory framework and contended that the federal executive branch was violating federal law and the Take Care Clause.<sup>13</sup> The state challenge to the Obama Administration’s Clean Power Plan likewise did not contest the lawfulness of the Clean Air Act but rather maintained that the EPA was exceeding its power under that statute.<sup>14</sup>

Although state suits purporting to vindicate the federal separation of powers or otherwise check presidential overreach have grown more prominent, and more heated, in recent years, these suits find some precedent in prior administrations. During the George W. Bush presidency, for instance, states challenged both the EPA’s failure to regulate greenhouse gas emissions pursuant to congressional authorization<sup>15</sup> and its refusal to permit California to do so directly.<sup>16</sup> States also

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Section 9(a) of Executive Order 13768, No. 3:17-cv-00485-WHO (N.D. Cal. Apr. 25, 2017), ECF No. 98. The litigation is ongoing as of this writing.

A group of states also moved to intervene in litigation over cost-sharing reduction payments under the Affordable Care Act after the Trump Administration changed the government’s litigation position. Noting that previously the “States and their residents could rely on the Executive Branch to respond to this attack,” the states argued that they now had to defend their own interests under federal law. Motion to Intervene of the States of California et al. at 1, 23, *U.S. House of Representatives v. Price*, No. 16-5202 (D.C. Cir. May 18, 2017) (internal quotation marks omitted). The states further insisted that, in contrast to the federal executive branch (and the members of the House of Representatives who brought the suit), they were seeking “to defend a federal statute and thereby vindicate the Congressional will.” *Id.* at 23. The states are now pressing this argument in independent litigation following President Trump’s announcement that his Administration will not make the payments. See Plaintiffs’ Memorandum in Support of a Temporary Restraining Order, *California et al. v. Trump*, No. 4:17-cv-05895-KAW (N.D. Cal. Oct 18, 2017).

13. See Brief for State Respondents, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674). The Fifth Circuit agreed with the states and upheld the district court’s nationwide preliminary injunction, and the Supreme Court affirmed by an equally divided Court. In the other main immigration case of Obama’s presidency, *Arizona v. United States*, the state similarly attempted to associate itself with Congress, drafting state law provisions that mirrored federal law but would be enforced more stringently. 567 U.S. 387 (2012). Arizona argued that it was conforming to federal law while the federal executive branch was not. See *id.* at 435 (Scalia, J., concurring in part and dissenting in part) (“[T]o say . . . that Arizona contradicts federal law by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind”). In litigation instigated by the federal government, the Supreme Court held much of the state law preempted. *Id.* at 416.

14. See Brief of Petitioners on Core Legal Issues at 29–78, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 19, 2016).

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

16. See *California v. EPA*, No. 08-1178 (D.C. Cir. filed May 5, 2008) (challenging Decision Denying a Waiver of Clean Air Act Preemption, 73 Fed. Reg. 12,156 (Mar. 6, 2008)). The petitions were dismissed on the parties’ joint motion after the EPA reversed its decision. Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. Reg. 32,744 (July 8, 2009).

sued when the Attorney General attempted to prohibit doctors from prescribing drugs for physician-assisted suicide pursuant to the Controlled Substances Act.<sup>17</sup>

States focus their challenges on the federal executive branch for a variety of reasons. Sometimes, the exercise of federal power is unremarkable or has previously been litigated, so an argument that assumes the constitutionality of federal law—but not the lawfulness of the manner in which it is being executed—is the only viable claim. In other instances, separation of powers arguments about presidential versus congressional authority accompany more conventional federalism arguments about the power of the federal government as a whole vis-à-vis the states. In each case, however, the state strategically advances its particular objection to federal policy. Consider the following reflection by Senator Ted Cruz on his role as Texas Solicitor General in *Medellin v. Texas*, a case brought by a private litigant but that ultimately pitted Texas against the President.<sup>18</sup> Insisting on the importance of the “meta-battle of framing the narrative,” Cruz noted:

The other side’s narrative in *Medellin* was very simple and easy to understand. ‘Can the state of Texas flout U.S. treaty obligations, international law, the President of the United States, and the world? And, by the way, you know how those Texans are about the death penalty anyway!’ That’s their narrative. That’s what the case is about. When Justice Kennedy comes home and he tells his grandson, ‘This case is about whether a state can ignore U.S. treaty obligations,’ we lose.

So I spent a lot of time thinking about, What’s a different narrative to explain this case?<sup>19</sup>

Cruz offered a narrative about the separation of powers. Arguing that the President was ordering the state to act without the necessary congressional authorization, he framed the case as a matter of presidential versus congressional power rather than federal versus state power. He then cast Texas as Congress’s advocate—a more compelling role than wayward state, and one most of the fifty states have adopted in recent years.<sup>20</sup>

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17. *Gonzales v. Oregon*, 546 U.S. 243 (2006). Earlier state suits had similarly argued that federal agencies were not complying with federal law. *See, e.g.*, *Wash. Utils. & Transp. Comm’n v. FCC*, 513 F.2d 1142, 1153 (9th Cir. 1975), *overruled on other grounds by Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990) (“WUTC does not attack the constitutionality of the Communications Act on any ground; rather, it relies upon the federal statute, and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement.”).

18. 552 U.S. 491 (2008). Beyond its different procedural posture, *Medellin* is also the partisan outlier in the examples here. It is no surprise that blue states, including California and Hawaii, are leading the charge against the Trump Administration, nor that red Texas was at the forefront of challenges to the Obama Administration, but *Medellin* pitted red Texas against a Republican (and Texan) President.

19. Jeffrey Toobin, *The Absolutist*, NEW YORKER (June 30, 2014), <http://www.newyorker.com/magazine/2014/06/30/the-absolutist-2> [<https://perma.cc/UJX4-Q53U>].

20. *See id.*; *see also, e.g.*, Transcript of Oral Argument at 41–42, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2007/06-984.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2007/06-984.pdf) [<https://perma.cc/Z8L4-D2XW>] (“MR. CRUZ: Texas, of course, does not dispute that the Constitution,

We should expect to see more state challenges to federal executive action in the years ahead, and we should be prepared to recognize them as federalism challenges. This is not because such cases turn on questions of state versus federal power as traditionally conceived, or even because they neatly involve state actors suing federal actors. Instead, as I have suggested, states purport to defend federal legislative prerogatives against the federal executive branch. Moreover, once intervenors and amici are figured in, such litigation almost always involves state and federal actors on each side. Recognizing these cases as federalism cases follows instead from accepting the reality of what we might term “politics all the way down”—the fact that administrative and partisan integration has largely undermined the distinctive authorities and interests of state and federal governments.<sup>21</sup> The best predictor of contemporary litigation lineups is partisanship, but states and the branches of the federal government are where partisan fights play out. In a legal landscape shaped by the “rise and rise of the administrative state,”<sup>22</sup> the extensive overlap of state and federal governance domains,<sup>23</sup> and the thorough integration of state and national politics,<sup>24</sup> contests about the federal separation of powers are at the same time cases about state power.<sup>25</sup> While states can sometimes “bargain[] over the role

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laws, and treaties are the supreme law of the land. And Texas statutes must give way to any of these three. The President’s memorandum is none of those three.”).

21. See Bulman-Pozen, *From Sovereignty to Process*, *supra* note 6.

22. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

23. See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011); ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* (2009); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

24. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1 (2013); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017).

25. Or perhaps more accurately, we might say they are ultimately contests about neither federal nor state power. See generally Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 40 (2016) (“The foundational power holders in American democracy are the coalitions of policy-seeking political actors—comprising officials, voters, parties, politicians, interest groups, and other democratic-level actors—that compete for control of these government institutions and direct their decisionmaking. . . . [P]arsing power requires ‘passing it through’ government institutions to the underlying democratic interests.”). In keeping with Levinson’s argument, and as the shift above the line from states to partisan politics suggests, taking federalism all the way up pushes us to look beyond constitutional structure. Yet both the government institutions where political competitions are staged and the doctrines that establish rules for these competitions remain important objects of inquiry because they frame the actions of the power-holding “coalitions of policy-seeking actors.” *Id.* Moreover, focusing on structure instead of interests may aid the project of political community in a diverse and divided polity. Bulman-Pozen, *supra* note 24, at 1116–35. *But cf.* Louis Michael Seidman, *Substitute Arguments in Constitutional Law*, 31 J.L. & POL. 237 (2016) (recognizing the potential utility of “substitute arguments”—stated reasons for a conclusion that differ from the authentic reasons, including structural arguments motivated by partisanship—but expressing concerns about constitutional substitution).

they play inside the system” by invoking federalism doctrines designed “to preserve . . . the role they play outside of it,”<sup>26</sup> they often have to fight from within, choosing federal allies and parsing the federal government accordingly.

## II.

### STATE STANDING WITHIN FEDERAL LAW

If federalism cases frequently turn on the lawfulness of federal executive action, one question for the “new process federalism” is whether such cases can get into court in the first place—in particular, whether states can satisfy the Article III standing requirements to bring their claims in federal court.<sup>27</sup> A decade after the Supreme Court recognized “special solicitude” for Massachusetts’s standing claim in the state’s suit against the EPA,<sup>28</sup> the meaning and durability of such solicitude remain unsettled, especially following the Court’s 4-4 split in *United States v. Texas*.<sup>29</sup> Even the basic question of what warrants special solicitude remains unclear: “proprietary” interests, “sovereign” interests, and “quasi-sovereign” interests have traditionally been distinct bases for standing,<sup>30</sup> but *Massachusetts* invoked an injury to state property, the cession of state sovereign governance prerogatives to the federal government, and a *parens patriae* interest in citizen health and welfare.<sup>31</sup> Recent state suits would similarly amalgamate financial injuries, injuries to state sovereignty, and injuries to state residents’ welfare.<sup>32</sup>

Although legal scholarship has offered a variety of thoughtful and innovative arguments about state standing post-*Massachusetts*, what Gerken calls “Federalism 1.0”<sup>33</sup> continues to inform doctrine and commentary. The nationalist variant of Federalism 1.0 is captured by the *Massachusetts v. Mellon* rule that a “state does not have standing as *parens patriae* to bring an action

26. Gerken, *supra* note 1, at 1704; *see, e.g.*, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998) (arguing that the anti-commandeering rule facilitates state-federal bargaining in cooperative federalism programs).

27. Even a state deemed to have standing may face other obstacles, such as establishing a right of action. *See* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (“Whether a plaintiff comes within ‘the ‘zone of interests’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”); *see also, e.g.*, *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017) (holding that the City of Miami is an “aggrieved person” authorized to sue under the Fair Housing Act).

28. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

29. 136 S. Ct. 2271 (2016) (mem.).

30. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600–02 (1982).

31. *Massachusetts*, 549 U.S. at 518–21.

32. *See, e.g.*, Brief for State Respondents, *supra* note 13, at 18–31 (discussing the state’s financial injuries, sovereignty injuries, and *parens patriae* injuries); First Amended Complaint, *supra* note 8, at 2 (“The States bring this action to redress harms to their proprietary interests and their interests as *parens patriae* . . .”).

33. Gerken, *supra* note 1, at 1698.



against the Federal Government.”<sup>34</sup> Rejecting the state’s constitutional challenge to a federal law, the Court wrote: “While the State, under some circumstances, may sue [as *parens patriae*] for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them 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>35</sup> Defending the *Mellon* rule in the context of subsequent state challenges to the Voting Rights Act of 1965, Alexander Bickel argued that the states “are not to contest, as if between one sovereign and another in some quasi-international forum, the actions of the national institutions. For the national government is fully in privity with the people it governs, and needs, and should brook, no intermediaries.”<sup>36</sup> According to such doctrine and commentary, it is misguided or even incoherent to regard states as protectors of the nation’s people when considering federal law.

Against this limitation on *parens patriae* standing, some scholars have turned their attention from the state’s representative capacity to its governance prerogatives. Articulating a federalist variant of Federalism 1.0, they argue for state standing to sue the federal government to vindicate sovereign state interests. For instance, Stephen Vladeck suggests that “although states may not generally challenge the constitutionality of federal regulation on behalf of their citizens, there are a handful of constitutional provisions under which the federal government operates on the states *qua* states, and not merely as a proxy for their citizens.”<sup>37</sup> In particular, he defends state standing to press Tenth Amendment claims, such as an anti-commandeering argument or an anti-coercion argument.<sup>38</sup> Bringing a federalist approach to bear on claims against the federal executive branch in particular, Tara Leigh Grove argues that states should not have special standing to ensure the federal executive’s proper implementation of federal law; rather, standing should be premised on the protection of state law.<sup>39</sup>

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34. *Alfred L. Snapp & Son*, 458 U.S. at 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)).

35. *Mellon*, 262 U.S. at 485–86.

36. Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89 (1966). For a broader argument against state standing to sue the federal government, see Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995).

37. Stephen I. Vladeck, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845, 848 (2012).

38. *Id.* at 862–63; see also Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051 (2011) (arguing for state standing to vindicate sovereign interests).

39. Tara Leigh Grove, *When Can a State Sue the United States*, 101 CORNELL L. REV. 851, 855 (2016) (“States have broad standing to protect federalism principles, not the constitutional separation of powers.”). Focusing on the preemption of state sovereign power as a critical variable, a few commentators have argued for state standing to challenge the federal executive branch when federal law has displaced state regulatory authority yet the federal executive branch underenforces that law and leaves regulatory gaps. See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2037–39 (2008); Jonathan R. Nash, *Sovereign Preemption State Standing* (Emory Univ. Law

As some cases and scholarship recognize, state lawsuits that parse the federal government challenge both the *parens patriae*-focused nationalist account and the sovereignty-focused federalist account of state standing. If we take seriously state allegations that the federal executive branch is violating federal law, the federal government no longer appears as a single unit representing the people, as *Mellon* posits. Instead, disaggregated into (at least) its legislative and executive branches, the federal government becomes at once the target and the ally of the state challenger: the state contests federal executive decisions but purports to defend Congress in doing so. Recognizing the multiplicity of the federal government in these challenges, some courts have ruled that “a suit to ‘vindicate the Congressional will’ by preventing an administrative agency from violating a federal statute, unlike a challenge to the constitutionality of the underlying statute, does not implicate the federalism concerns behind the *Mellon* decision.”<sup>40</sup> *Massachusetts v. EPA* noted the “critical difference between allowing a State ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).”<sup>41</sup>

If disaggregating the federal government complicates a nationalist bar on state standing grounded in *Mellon*’s *parens patriae* logic, so too does state-federal administrative integration diminish the federalists’ sovereignty basis for state standing. As Gerken reminds us, “[T]here’s not much [room for state sovereignty] left anymore.”<sup>42</sup> The Court’s purported reliance on state sovereignty in *Massachusetts*, for example, was in fact a reliance on its absence. Noting that the state had “surrender[ed] certain sovereign prerogatives” to the federal government, the Court reasoned that the lodging of these sovereign prerogatives in the federal government gave the state a cognizable interest in ensuring the EPA’s compliance with federal law.<sup>43</sup> *Massachusetts*’s “sovereign”

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Sch. Legal Studies Research Paper Series Paper No. 17-427, Jan. 26, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906614](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906614) [<https://perma.cc/8PP7-TB8U>].

40. *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984) (internal quotation marks omitted); see also, e.g., *Kansas ex. rel. Hayden v. United States*, 748 F. Supp. 797, 802 (D. Kan. 1990) (“[U]nlike the plaintiffs in *Mellon*, the plaintiff in this case is not challenging the validity of the federal statutes. Instead, plaintiff is seeking to enforce the provisions of the [federal statute].”); cf. *Maryland People’s Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985) (“The prerogative of the federal government to represent the interests of its citizens . . . is not endangered so long as Congress has the power of conferring or withholding standing.”).

41. 549 U.S. 497, 520 n.17 (2007); see also, e.g., Calvin R. Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 268 (2009) (defending the Court’s recognition “that states may act for their residents by asserting the quasi-sovereign interest of preserving the well-being of their residents with respect to benefits to which they may be entitled under federal law”).

42. See Gerken, *supra* note 1, at 1701.

43. *Massachusetts*, 549 U.S. at 519–20; cf. Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 677 (2016) (“When states challenge federal actions (or inaction) under [cooperative federalism] schemes, they are playing the role of a sovereign state in a post-sovereignty world.”).

interest turned out to be ensuring federal legislative supremacy, not protecting its own autonomy.

Gerken's Federalism 3.0 suggests that the states' most important role going forward will be to bring challenges from within federal schemes instead of insisting on governing separate and apart. In standing parlance, the oxymoronic "quasi-sovereign" label best captures this role. On most conceptions of sovereignty, there should be no such thing as "quasi-sovereignty." But insofar as it recognizes states' persistent representative capacity rather than their diminished autonomous governance capacity, the "quasi-sovereign" label reflects states' ability to stand for their people's interests vis-à-vis federal actors—even when these interests are not particular to the people of that state, and even when they derive from or otherwise fall within federal law.<sup>44</sup> It rejects both an insistence on federal-state separation and a Bickelian confidence that "the national government is fully in privity with the people it governs."<sup>45</sup>

Further elaborating the basis for state standing to challenge federal executive action would be a productive task for the "new process federalism." Some might reply that a "new" process federalism is unnecessary. Ernest Young and other critics of administrative federalism have suggested that the good old process federalism provides a solid footing. If we accept the premise that states are represented by the House and especially Senate but not by the federal executive branch,<sup>46</sup> states might well forfeit their right to challenge federal law in court rather than in the halls of Congress,<sup>47</sup> but they should retain the ability to challenge executive compliance with federal law.<sup>48</sup> I am less confident in this premise. Given the power of partisanship—a partisanship that is national in scope and that largely eclipses state interests in Congress (as elsewhere)—the old process federalism takes congressional representation of states too seriously while neglecting other channels for state influence.<sup>49</sup> It may also too readily

44. Cf. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010) (considering how a new federal ideology allowed American founders to divide authority between the federal government and the states without running afoul of the prohibition on *imperium in imperio*).

45. Bickel, *supra* note 36, at 89.

46. See Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869 (2008) ("As the constitutional limits on national action fade into history, the primary remaining safeguards for state autonomy are political, stemming from the representation of the states in Congress, and procedural, arising from the sheer difficulty of navigating the federal legislative process. These safeguards have little purchase on executive action."); see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) ("Unlike Congress, administrative agencies are clearly not designed to represent the interests of States.").

47. See Bickel, *supra* note 36, at 89.

48. See, e.g., Brief of Amici Curiae Federal Courts Scholars and Southeastern Legal Foundation in Support of Respondents at 30–31, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) ("Because Congress's role supplies the bulwark protection for state interests, the circumvention of the legislative process that Respondent States allege here works a unique injury to their interests. And the United States cannot be heard to argue that this dispute . . . should be deferred to political resolution when the national Executive has made an end-run around that very political process in which Respondent States would otherwise have been represented.").

49. See Bulman-Pozen, *Executive Federalism*, *supra* note 6.

credit state arguments that vindicating congressional will is a straightforward task for the judiciary.<sup>50</sup>

Understanding judicial review as the beginning, not the end, of matters partially addresses these concerns. If we want to preserve “the correct conditions for federal-state bargaining over the role [states] play inside the system,” as Gerken advocates,<sup>51</sup> we should first note that such state-federal bargaining will generally involve the federal executive branch. Standing doctrine focused on state challenges to the executive branch makes good sense, then, not because Congress represents state interests, but rather because the President or federal agency officials must come to the table. Indeed, although engaging the federal executive has not motivated the doctrine to date, past cases recognizing state standing to challenge federal executive action have nonetheless shifted debate to the administrative realm. After Massachusetts prevailed in its suit against the EPA, for example, the Obama Administration granted California its previously denied waiver, reached an agreement with state officials and automakers on federal fuel efficiency standards, and crafted a federal rule that built on and extended existing state projects, such as the northeastern Regional Greenhouse Gas Initiative.<sup>52</sup>

Because there is no guarantee that courts will stimulate productive intergovernmental negotiation, ascertaining the conditions under which they are most likely to do so is an important project for any new process federalism.<sup>53</sup> Disaggregating the federal government is part of this work, though only a start. Insofar as it ultimately privileges politics over litigation, this project might also respond to a distinct separation of powers concern about liberalized standing: the aggrandizement of the federal judiciary.<sup>54</sup> If litigation between states and the federal executive branch precedes or temporarily interrupts administrative negotiation, courts need not arrogate to themselves the “[v]indicat[ion of] the

50. See *id.* at 1016–23; see also Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (noting complications of statutory obsolescence and congressional dysfunction in evaluating administrative responses to new problems).

51. See Gerken, *supra* note 1, at 1704.

52. See Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. Reg. 32,744 (July 8, 2009); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (Clean Power Plan). Some of these actions were then the subject of new state litigation. See, e.g., *supra* note 16 and accompanying text. As the Trump Administration seeks to undo the environmental commitments of the Obama Administration, states are pushing to retain and improve existing standards through both administrative action and litigation. See, e.g., Reid Wilson, *Blue States Rush to Block Trump's Emission's Rollback*, THE HILL (Mar. 15, 2017), <http://thehill.com/homenews/state-watch/324179-blue-states-rush-to-block-trumps-emissions-rollback> [<https://perma.cc/T4LC-B3Q2>]; *We Are Still In*, <http://wearestillin.com> [<https://perma.cc/ZV4R-HYUF>].

53. See Gerken, *supra* note 1, at 1704–05.

54. See, e.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984) (arguing that standing “is built on a single basic idea—the idea of separation of powers”). *But see* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008) (arguing that standing doctrine does not actually serve its purported separation of powers functions).

*public interest*<sup>55</sup> when entertaining such challenges. Federalism all the way up reminds us, however, that vindicating the public interest is a function usefully assigned not only to “the Congress and the Chief Executive,” but to the states as well.<sup>56</sup>

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55. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992).

56. *Id.*