

# STATE SOVEREIGN STANDING: OFTEN OVERLOOKED, BUT NOT FORGOTTEN

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*Critics of Virginia's challenge to the constitutionality of the Patient Protection and Affordable Care Act have asserted that Virginia lacked standing to even raise the issue. Such criticism is inconsistent with foundational understandings of the role of states in providing a check on federal power and with the modern standing jurisprudence of the Supreme Court, especially as reflected in the Court's decisions regarding a state's sovereign interest in defending its code of laws. This Article demonstrates that, as a matter of constitutional design and history, as well as under relevant precedents, Virginia clearly had and has standing to bring its challenge.*

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## INTRODUCTION

Much of the analysis and commentary regarding the various suits challenging the constitutionality of the Patient Protection and Affordable Care Act (PPACA), including Virginia's suit in *Virginia ex rel. Cuccinelli v. Sebelius*, have focused on the merits.<sup>1</sup> This is not surprising because, for both lay and legal audiences, the issue of exactly what, if any, limits remain on the powers of the federal government implicates an essential question regarding the nature of the American polity. Will the New Deal revolution now be read as having progressed to the point that we must forever abandon the civics lessons of our childhood that taught that the federal government was one of limited and enumerated powers?

However, procedural questions have also been raised, and, in many ways, these seemingly technical matters are as important in defining the limits on federal power as the underlying merits of the PPACA challenges. In the case of Virginia's challenge to PPACA, the most important procedural question is whether a state has standing to assert that, in attempting to override a duly enacted state statute that regulates in an area traditionally thought to be within the police powers of the states, an act of Congress violates the Constitution.

Obviously, Virginia believed at the time its lawsuit was filed, and continues to believe, that under both historical principles and modern standing doctrine, it had and has standing to bring its challenge to PPACA. Many in academia have disagreed with Virginia's position both in public comments and in amicus briefs filed in the Virginia case. On September 8, 2011, a panel of the United States Court of Appeals for the Fourth Circuit found that Virginia lacked standing to pursue its claim.<sup>2</sup> The purpose of this Article is to set forth in detail the reasons why Virginia does have standing to pursue its challenge to PPACA and to explain why those who question Virginia's standing are fundamentally incorrect.

In Part I of the Article, we briefly discuss the gravamen of Virginia's challenge and how it raises the issue of state sovereign standing. In Part II, we discuss the historical role of the federal courts in refereeing disputes between the federal government and the states over which sovereign has the right to act in a particular situation or area. In Part III, we examine the history of state sovereign standing, the case of *Massachusetts v. Mellon*, its role in the development of modern standing doctrine, how it is being misread by those who would deny Virginia's claim to standing, and how the Supreme Court and the Courts of

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1. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029; Complaint for Declaratory and Injunctive Relief, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10-cv-00188-HEH), 2010 WL 1038397.

2. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 266 (4th Cir. 2011), petition for cert. filed, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420).

Appeals have dealt with state sovereign standing after *Massachusetts v. Mellon*. In Part IV, we consider how the issue of state sovereign standing has been addressed in *Virginia v. Sebelius* and in the challenges to PPACA brought by other states. In Part V, we respond directly to the arguments raised by various academics regarding Virginia's claim to standing in *Virginia v. Sebelius*. In the Conclusion, we summarize the importance to our federal system of recognizing that states serve as a significant counterbalance to federal power and that, both historically and under modern standing doctrine, states have both the responsibility and the ability to defend their sovereign enactments against federal overreach.

### I. *VIRGINIA V. SEBELIUS*: VIRGINIA'S CLAIM OF SOVEREIGN INJURY

To understand Virginia's entitlement to sovereign standing in *Virginia v. Sebelius*, one must first understand the injury Virginia claims to have suffered. Unfortunately, in the popular press, the academic literature, and the present litigation, Virginia's claimed injury has been either misunderstood or intentionally mischaracterized as everything from nullification<sup>3</sup> to a disguised *parens patriae* claim on behalf of Virginia's citizens.<sup>4</sup> In reality, Virginia's claim is a classic example of a state simply defending its code of laws, which is one of the hallmarks of sovereignty.<sup>5</sup>

In 2010, the Virginia General Assembly enacted with the Governor's approval the Virginia Health Care Freedom Act (HCFA). The HCFA provides:

No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding. No provision of this title shall render a resident of this

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3. See, e.g., Memorandum in Support of Defendant's Motion to Dismiss at 1, *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010) (No. 3:10-cv-00188-HEH), 2010 WL 2315702 ("A state cannot, however, manufacture its own standing to challenge a federal law by the simple expedient of passing a statute purporting to nullify it." (emphasis added)); Timothy S. Jost, *Can the States Nullify Health Care Reform?*, 362 NEW ENG. J. MED. 869 (2010); Elizabeth Weeks Leonard, *Rhetorical Federalism: The Role of State Resistance in Health Care Decision-Making*, 39 J.L. MED. & ETHICS 73, 73-74 (2011); E.J. Dionne, Jr., *The New Nullifiers: Health Care Opponents Want to Take Us Back to the 1830s*, NEW REPUBLIC (Mar. 25, 2010), <http://www.tnr.com/article/politics/the-new-nullifiers>.

4. See, e.g., Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 3, at 12 ("Virginia cannot convert its political dispute with the federal government into a legal claim through the vehicle of a *parens patriae* suit brought on behalf of its citizens.").

5. See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (noting that the right to enact and enforce a code of laws is an incident of state sovereignty).

Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage. This section shall not apply to individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act. This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members.<sup>6</sup>

Although various bills were introduced by various legislators and amended by the Governor, the language of the bills was eventually reconciled. The version that was first enacted, Senate Bill 417, passed the Virginia House of Delegates by a margin of 90-3 and passed the Virginia Senate by a vote of 25-15.<sup>7</sup> Support for the HCFA crossed party lines; at the time of passage of the HCFA, the Virginia House of Delegates contained 59 Republicans, 39 Democrats and 2 Independents, while the Virginia Senate contained 22 Democrats and 18 Republicans.

Because Senate Bill 417 had been previously amended by the Governor, it became law without his signature when the House of Delegates adopted the Governor's amendment on March 10, 2010.<sup>8</sup> Thus, the HCFA was enacted nearly two weeks before President Obama signed PPACA,<sup>9</sup> and would have been the law of Virginia even if Congress had never passed health care "reform."

However, the Congress did pass PPACA and the President signed it, bringing the new federal enactment into conflict with the HCFA. As Virginia stated in its complaint in *Virginia v. Sebelius*, "The collision between the state and federal schemes also creates an immediate, actual controversy involving antagonistic assertions of right."<sup>10</sup> In short, PPACA requires citizens, with certain, limited exceptions, to purchase health insurance, while the HCFA establishes that, with certain, limited exceptions, no Virginian can be required by any person or entity to purchase health insurance.<sup>11</sup> Accordingly, it is impossible for the laws to operate at the same time.

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6. VA. CODE ANN. § 38.2-3430.1:1 (2011).

7. *SB 417 Individual Health Insurance Coverage*, VA. GEN. ASSEMBLY, <http://leg1.state.va.us/cgi-bin/legp504.exe?101+sum+SB417> (last visited Jan. 14, 2012).

8. See VA. CONST. art. V, § 6(b)(iii) ("The Governor may recommend one or more specific and severable amendments to a bill by returning it with his recommendation to the house in which it originated. The house shall enter the Governor's recommendation in its journal and reconsider the bill. If both houses agree to the Governor's entire recommendation, the bill, as amended, shall become law.").

9. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

10. Complaint for Declaratory and Injunctive Relief, *supra* note 1, at 2.

11. As Virginia has argued repeatedly throughout the litigation, the HCFA's prohibition does not apply just to the federal government. See *infra* notes 136-37 and accompanying text.

Because of this, Virginia filed suit on March 23, 2010, in the United States District Court for the Eastern District of Virginia seeking a declaration that PPACA was unconstitutional and seeking to enjoin its operation.<sup>12</sup> That the Attorney General of Virginia would bring a suit to defend the validity of a Virginia statute from a claim of federal preemption should not have been at all surprising. As the district court would later hold, “The mere existence of the [HCFA] is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it.”<sup>13</sup> In fact, the district court went on to note that the responsibility of the attorney general of a state to bring such a suit finds support in the Federal Rules of Civil Procedure.<sup>14</sup>

Given the inherent conflict in the statutory schemes, one of the enactments must yield. If PPACA is a valid exercise of Congress’s enumerated powers, it preempts the HCFA under the Supremacy Clause. On the other hand, if PPACA exceeds Congress’s enumerated powers, the HCFA is a valid exercise of the police powers reserved to the states under the Tenth Amendment.<sup>15</sup>

Because it is the federal government’s position that PPACA effectively invalidates the HCFA, the federal enactment is a direct attack on Virginia’s sovereignty. As the Supreme Court has emphasized, “‘the power to create and enforce a legal code, both civil and criminal’ is one of the quintessential functions of a State.”<sup>16</sup> While PPACA may cause other types of injuries to persons and businesses, its purported invalidation of the HCFA injures Virginia qua Virginia because it invades one of Virginia’s sovereign functions. It is this sovereign

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12. See Complaint for Declaratory and Injunctive Relief, *supra* note 1, at 6-7.

13. Virginia *ex rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 605-06 (E.D. Va. 2010).

14. See *id.* at 606 n.4.

15. Regardless of whether one believes the federal enactment is valid or not, it is important to recognize that neither the Supremacy Clause nor the Tenth Amendment provides the rule of decision in the case. The Supremacy Clause provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.” U.S. CONST. art. VI. However, the Supremacy Clause is silent as to what actually constitutes a “Law[] of the United States which shall be made in Pursuance” of the Constitution, causing the Supreme Court to comment in *Alden v. Maine* that “[a]s evident from its text, however, the Supremacy Clause enshrines as ‘the supreme Law of the Land’ only those Federal Acts that accord with the constitutional design. *Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power.*” 527 U.S. 706, 731 (1999) (emphasis added) (citation omitted). Similarly, while the Tenth Amendment reserves “powers not delegated to the United States by the Constitution” to the states, U.S. CONST. amend. X, it does not substantively specify that any particular power is reserved, causing the Supreme Court to state that the Tenth Amendment “states but a truism that all is retained which has not been surrendered.” *United States v. Darby*, 312 U.S. 100, 124 (1941). In short, the Supremacy Clause and Tenth Amendment are flip sides of the same coin, and they can only be used as a conclusion and not as a dispositive rationale in determining the merits of Virginia’s claim in *Virginia v. Sebelius*.

16. *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (quoting Alfred L. Snapp & Son, Inc., v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982)).

injury that Virginia alleged in *Virginia v. Sebelius*, and it is this sovereign injury for which Virginia seeks redress.<sup>17</sup> As will be discussed in greater detail below, this injury to Virginia's sovereignty is real, and similar sovereign injuries, at least historically, have been found to be more than sufficient to support a state's claim of Article III standing.

Because of the inherent conflict in the two statutory schemes and the insult to Virginia's sovereignty, the questions became how the conflict could and should be resolved and where Virginia could turn for redress of its sovereign injury.

The federal courts are the obvious and, in fact, the only answer. Pursuant to Article III of the Constitution, suits brought against the United States and its officers are properly within the jurisdiction of the federal courts.<sup>18</sup> In fact, when the United States recently *initiated* litigation to determine whether federal immigration policy displaced the laws of Arizona, it selected the federal courts as the proper forum.<sup>19</sup> As will be discussed in more detail below, the simple fact is that one of the foundational purposes of the federal courts was—and remains—to serve as the forum for resolving competing claims of power between the federal government and the states when the exercise of their sovereign powers collide.

## II. REFEREEING DISPUTES BETWEEN CO-SOVEREIGNS: THE HISTORICAL ROLE OF THE FEDERAL COURTS

It is accepted as a matter of American secular faith that the Founders tried to diffuse the power of the federal government by creating a system of checks and balances. When most think of these checks and balances, they think of the separation of powers arising from dividing the federal government into three distinct branches: the legislative,<sup>20</sup> the executive,<sup>21</sup> and the judicial.<sup>22</sup> The Founders viewed this division of power as necessary to protect the interests of individual liberty. As James Madison wrote in *The Federalist No. 51*:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist en-

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17. See, e.g., Appellee's Opening and Response Brief at 5, 10, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058), 2011 WL 1115016; Complete Transcript of Motions Before the Honorable Henry E. Hudson United States District Court Judge at 49-51, *Virginia v. Sebelius*, 702 F. Supp. 2d 598 (No. 3:10-cv-00188-HEH); Plaintiff's Memorandum in Opposition to Motion to Dismiss at 1-4, 14-17, *Virginia v. Sebelius*, 702 F. Supp. 2d 598 (No. 3:10-cv-00188-HEH), 2010 WL 2417176.

18. U.S. CONST. art. III, § 2.

19. See *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3090 (U.S. Dec. 12, 2011) (No. 11-182).

20. See U.S. CONST. art. I, § 1.

21. See *id.* art. II, § 1.

22. See *id.* art. III, § 1.

croachments of the others. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.<sup>23</sup>

As recently as the 2010 Term, the Supreme Court recognized Madison's point that the purpose of diffusing federal power over three distinct branches of government was to secure the liberty of individuals, with Chief Justice Roberts specifically referring to *The Federalist No. 51* and writing that "while a government of 'opposite and rival interests' may sometimes inhibit the smooth functioning of administration, '[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.'"<sup>24</sup>

However, separating the federal government into three distinct branches was not the only check on federal power that the Founders built into the structure of the Constitution. The preservation of the states as co-sovereigns was intended to allow the states to serve as a check on an overreaching federal government (and vice versa). In the same essay in which he recognized the importance of the separation of powers to secure individual liberty, Madison noted that the division of powers between the federal government and the states was intended to accomplish the same end. He wrote:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. *The different governments will control each other, at the same time that each will be controlled by itself.*<sup>25</sup>

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23. THE FEDERALIST NO. 51, at 318-19 (James Madison) (Clinton Rossiter ed., 1961).

24. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) (citation omitted) (quoting THE FEDERALIST NO. 51 (James Madison), *supra* note 23, at 319; *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)).

25. THE FEDERALIST NO. 51 (James Madison), *supra* note 23, at 320 (emphasis added).

As with the separation of powers, the Supreme Court has recognized Madison's wisdom in viewing the states, in the interests of preserving individual liberty, as serving as an additional check on the federal government. In its recently completed 2011 Term, a unanimous Court noted that "the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another" and "preserves the integrity, dignity, and residual sovereignty of the States."<sup>26</sup> The Court explained that the retention of sovereignty by the states serves the purpose of furthering individual liberty, recognizing that the sovereignty of the states "is not just an end in itself" but that structural federalism "secures to citizens the liberties that derive from the diffusion of sovereign power"<sup>27</sup> and "secures the freedom of the individual."<sup>28</sup>

Having set up a government with co-sovereigns designed to serve as a check and balance on each other, the Founders recognized that disputes would arise between the co-sovereigns over which of them had the right to operate in a particular manner or sphere. Thus, they specifically identified a forum in which these disputes should and would be resolved: the federal courts. Writing of the Supreme Court in *The Federalist No. 39*, Madison explained that the federal courts were, at least in part, created to resolve the inevitable disputes over claims of power between the states and the new federal government. Regarding disputes between the new national government and the states over which government retained authority in a particular area, he wrote:

*[T]he tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.*<sup>29</sup>

During the Nullification Crisis, Madison reiterated this view in no uncertain terms. In an 1830 letter to Representative Edward Everett that was intended for publication, Madison presented his "final, most carefully considered interpretation of the nature and powers of the federal constitution."<sup>30</sup> Regarding "the division of powers between the federal and state governments, Madison pointed out that the general government was no less sovereign, supreme in its prescribed realm, than the states themselves."<sup>31</sup> Likewise:

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26. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

27. *Id.* (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

28. *Id.*

29. THE FEDERALIST NO. 39 (James Madison), *supra* note 23, at 242 (emphasis added).

30. RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 642 (1971).

31. *Id.*



In the vital matter of “controversies . . . concerning the boundaries of jurisdiction,” Madison insisted that the clauses of the federal constitution making federal statutes the supreme law of the land, binding state judges to the federal constitution, and giving the federal judiciary jurisdiction in all cases arising under federal law indicated clearly that the Supreme Court of the United States was to be the final arbiter.<sup>32</sup>

In particular, Madison concluded that his view in *The Federalist No. 39* was “the prevailing view [at the time of ratification of the Constitution], that the same view has continued to prevail, and that it does so at this time notwithstanding the eminent exceptions to it.”<sup>33</sup>

This view, that one of the primary purposes of the federal courts was to serve as the arbiter in disputes between the states and the federal government, was neither unique to Madison nor has it become a relic of history. As Justice O’Connor, citing Hamilton’s *The Federalist No. 82*, noted in an opinion for the Court in 1992, a state that seeks the aid of the federal courts in resolving competing claims of state and federal power acts in accordance with the foundational and traditional function of the federal courts:

In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, *Alexander Hamilton observed: “The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the the [sic] establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties.”* Hamilton’s prediction has proved quite accurate. While no one disputes the proposition that “the Constitution created a Federal Government of limited powers,” . . . *the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court’s most difficult and celebrated cases. At least as far back as Martin v. Hunter’s Lessee, the Court has resolved questions “of great importance and delicacy” in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.*<sup>34</sup>

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32. *Id.* (omission in original) (quoting Letter from James Madison to Edward Everett (Aug. 28, 1830), in 9 THE WRITINGS OF JAMES MADISON 383, 388 (Gaillard Hunt ed., 1910)).

33. Letter from James Madison to Edward Everett, *supra* note 32, at 397. That this was Madison’s final view is significant because of his role in drafting the Virginia Resolution. That Madison would publicly confirm his original view was significant enough that it caused Chief Justice John Marshall to express “his ‘peculiar pleasure’ that Madison was ‘himself again, [avowing] the opinion of his best days.’” 3 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 1989 (James Morton Smith ed., 1995) (alteration in original) (quoting KETCHAM, *supra* note 30, at 643).

34. *New York v. United States*, 505 U.S. 144, 155 (1992) (emphasis added) (citations omitted) (quoting THE FEDERALIST NO. 82 (Alexander Hamilton), *supra* note 23, at 491; *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816)).

Thus, both as a matter of original intent and understanding, and as interpreted in modern Supreme Court cases, the Constitution contemplates that the states will play a significant role in limiting the excesses of the federal government by serving as a counterbalance, and that states will utilize actions in the federal courts in accomplishing that end. Accordingly, in seeking relief from the federal courts in *Virginia v. Sebelius*, Virginia is simply proceeding in the manner envisioned by the Founders as reflected in the grand constitutional design.

### III. STATE SOVEREIGN STANDING: *MASSACHUSETTS V. MELLON* AND THE MODERN STATE STANDING CASES

Despite the clear foundational underpinning for state sovereign standing, the claim that Virginia lacks standing in its challenge to PPACA continues to be the subject of litigation and public commentary. In large measure, critics of Virginia's claim to standing have rested their arguments on their interpretation of *Massachusetts v. Mellon*.<sup>35</sup> For example, in *Virginia v. Sebelius*, Secretary Sebelius has argued the suit is barred by *Massachusetts v. Mellon*.<sup>36</sup> Similarly, Virginia's claim to standing has been criticized by academics, with one going so far as to blithely and erroneously assert that *Massachusetts v. Mellon* stands for the remarkably broad proposition that "states have no standing to challenge the constitutionality of a federal law."<sup>37</sup> However, a review of *Massachusetts v. Mellon*, the cases that led to the Court's decision in *Massachusetts v. Mellon*, and the cases that have come since, reveals that critics of Virginia's position are misreading *Massachusetts v. Mellon* or are simply ignoring cases that defeat their position.

#### A. *State Sovereign Standing Before Massachusetts v. Mellon*

Given the historic function of the federal courts, it is not surprising that some of the Supreme Court's earliest and most famous cases deal with issues of state sovereign standing. In *McCulloch v. Maryland*,<sup>38</sup> the boundary-drawing function of the Supreme Court operated precisely as Madison and Hamilton had envisioned. Maryland, with the probable intent of creating a test case,<sup>39</sup>

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35. 262 U.S. 447 (1923).

36. See Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 3, at 1-2.

37. Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 139 n.193 (2010).

38. 17 U.S. (4 Wheat.) 316 (1819).

39. The suit was joined on an agreed set of facts, with the parties stipulating as follows:

It is agreed that either party may appeal from the decision of the County Court, to the Court of Appeals, and from the decision of the Court of Appeals to the Supreme Court of the United States according to the modes and usages of law, and have the same benefit of this state-

passed an act taxing the notes of non-Maryland-chartered banks at a time when the Bank of the United States was the only such bank in the state.<sup>40</sup>

John James, acting as an informant under the state law, brought suit on his own behalf and on behalf of the State of Maryland against James William McCulloch, a cashier of the Baltimore branch of the Bank of the United States, for issuing bank notes without either paying an annual lump sum tax or affixing state tax stamps to the notes.<sup>41</sup> As the case reporter recited:

This case involving a constitutional question of great public importance, and the sovereign rights of the United States and the State of Maryland; and the government of the United States having directed their Attorney General to appear for the plaintiff in error, the Court dispensed with its general rule, permitting only two counsel to argue for each party.<sup>42</sup>

Daniel Webster, Attorney General William Wirt, and former Attorney General William Pinkney argued for the Bank.<sup>43</sup> Although the former Federalist congressman and counsel for Justice Chase at his impeachment trial, Joseph Hopkinson, had been associated with Webster in *Trustees of Dartmouth College v. Woodward*,<sup>44</sup> he appeared for Maryland in *McCulloch*, directly opposing Webster.<sup>45</sup> He was joined, as in the Chase impeachment trial, by Luther Martin, then serving as Attorney General of Maryland for the second time.<sup>46</sup>

Chief Justice John Marshall, in deciding the case, began with a statement that a conflict between state and federal law triggers the boundary-drawing jurisdiction of the Supreme Court:

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the

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ment of facts, in the same manner as could be had if a jury had been sworn and empannelled [sic] in this cause, and a special verdict had been found, or these facts had appeared and been stated in an exception taken to the opinion of the Court, and the Court's direction to the jury thereon.

*Id.* at 320 (syllabus).

40. *See id.* at 392. As William Pinkney noted while arguing the case, “[t]here [wa]s, in point of fact, a branch of no other bank within that State, and there c[ould] legally be no other.” *Id.*

41. *See id.* at 317-19.

42. *Id.* at 322 n.a.

43. *See id.* at 322, 352, 377.

44. 17 U.S. (4 Wheat.) 518 (1819).

45. *See* 17 U.S. (4 Wheat.) at 330 (syllabus); Biography of Joseph Hopkinson, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000784> (last visited Jan. 14, 2012). Hopkinson was later appointed as a judge for the United States District Court for the Eastern District of Pennsylvania by John Quincy Adams. *See* Biography of Joseph Hopkinson, *supra*.

46. *See* 17 U.S. (4 Wheat.) at 372 (syllabus); *see also* *The Founding Fathers: Maryland*, NAT'L ARCHIVES & RECS. ADMIN., [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers\\_maryland.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers_maryland.html) (last visited Jan. 14, 2012). Martin had refused to sign the Constitution at the Constitutional Convention and represented Aaron Burr at his treason trial. *The Founding Fathers: Maryland*, *supra*.

legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.<sup>47</sup>

Three years later, in *Cohens v. Virginia*,<sup>48</sup> Chief Justice Marshall again characterized the boundary-drawing jurisdiction of the Supreme Court as obligatory, employing these famous words:

It is most true that this Court will not take jurisdiction if it should not. [B]ut it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.<sup>49</sup>

The story of how the obligatory jurisdiction of *McCulloch* and *Cohens* came to be temporarily curtailed lies in the rise of the political question doctrine in the nineteenth century. As far as the appearance of the doctrine in American constitutional law is concerned, we may begin with the exotically captioned English case *Nabob of the Carnatic v. East India Co.*<sup>50</sup> “In that case, the East India Company was being sued for a breach of contract with the Nabob.”<sup>51</sup> The holding was “that the East India Company, in making contracts with potentates, was acting as delegate of the sovereign power of England, and that therefore the matter could not be decided by a court of law.”<sup>52</sup> Because the Company ruled as a sovereign, its undertaking with a neighboring sovereign “[was] the same, as if it was a treaty between two sovereigns; and consequently [was] not a subject of private, municipal, jurisdiction.”<sup>53</sup>

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47. 17 U.S. (4 Wheat.) at 400-01.

48. 19 U.S. (6 Wheat.) 264 (1821).

49. *Id.* at 404.

50. (1793) 30 Eng. Rep. 521 (Ch.); 2 Ves. Jun. 56.

51. Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 340 (1924).

52. *Id.*

53. *Nabob of the Carnatic*, 30 Eng. Rep. at 523; 2 Ves. Jun. at 60.

The concept of a political question not susceptible to judicial treatment was discussed in dicta in *Cherokee Nation v. Georgia*.<sup>54</sup> When in *Luther v. Borden* the question of the identity of the rightful government of Rhode Island was presented to the Supreme Court in the context of a trespass action brought by a supporter of Dorr's Rebellion against militiamen of the Charter Government, the issue was avoided by applying the political question doctrine.<sup>55</sup> Concurring on that point in what was nonetheless styled a dissent, Justice Woodbury cited *Cherokee Nation* and *Nabob of the Carnatic*.<sup>56</sup> When Georgia sought to litigate in the Supreme Court its right to exist, in a challenge to the Reconstruction Acts, in *Georgia v. Stanton*,<sup>57</sup> the Court, citing *Nabob of the Carnatic* and *Cherokee Nation*, dismissed the case on the basis of the political question doctrine.<sup>58</sup> The attempt by a corporation in *Pacific States Telephone & Telegraph Co. v. Oregon* to challenge a tax adopted by popular referendum as a violation of the guarantee of a republican form of government was deemed to be a political question completely foreclosed by *Luther v. Borden*.<sup>59</sup>

#### B. Massachusetts v. Mellon

*Massachusetts v. Mellon*<sup>60</sup> dealt with an attempt by the Commonwealth of Massachusetts to have a federal law declared unconstitutional. Specifically, Massachusetts sought to challenge the constitutionality of the 1921 Maternity Act, which aimed to reduce maternal and infant mortality by providing for federal disbursements to state governments that complied with the Act's terms.<sup>61</sup> Significantly, Massachusetts brought its challenge despite the fact that the Maternity Act did not conflict with any law passed by Massachusetts and despite the fact that "the statute impose[d] no obligation but simply extend[ed] an option which the State [was] free to accept or reject."<sup>62</sup>

As will be explained in detail below, *Massachusetts v. Mellon* can only be properly understood when two points are recognized. First, although the case could have been decided solely on the basis of the Court's finding that Massachusetts had not suffered an injury and therefore lacked standing, it was not. Having noted that the lack of injury was potentially dispositive, the Court went on to discuss the political question doctrine. Second, commentators originally viewed the case as a political question decision and members of the Court con-

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54. 30 U.S. (5 Pet.) 1, 20 (1831).

55. 48 U.S. (7 How.) 1, 39-43 (1849).

56. *See id.* at 56 (Woodbury, J., dissenting).

57. 73 U.S. (6 Wall.) 50 (1868).

58. *See id.* at 71 n.†, 77.

59. *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 148-51 (1912).

60. 262 U.S. 447 (1923).

61. *Id.* at 478-79.

62. *Id.* at 480.

tinued to do so until 1962. In that year, in its decision in *Baker v. Carr*,<sup>63</sup> the Court both defined the political question doctrine and listed the relevant political question cases in a manner that excludes *Massachusetts v. Mellon*. Since 1962, the Court has read *Massachusetts v. Mellon* as an injury-in-fact standing case that permits states to sue the United States when a state has suffered an injury-in-fact, including injuries to a state's sovereign interests.

*Massachusetts v. Mellon* did not arrive at the Supreme Court like a bolt out of the blue. An article appearing in the *Harvard Law Review* on March 23, 1923, had reported that "there is to be a concerted effort on the part of certain states to challenge the constitutionality of the [Maternity Act]" for the purpose of resolving the question whether the spending power is limited to objects within the scope of the enumerated powers of Article I, Section 8.<sup>64</sup> By holding that neither Massachusetts nor an individual litigant had standing to mount the challenge, the Court avoided answering the question for more than a decade, until it did so in *United States v. Butler*<sup>65</sup> and *Helvering v. Davis*.<sup>66</sup>

*Massachusetts v. Mellon* and its companion case *Frothingham v. Mellon* were argued for two days, May 3 and 4, 1923, and decided in the same opinion on June 4 of that year. They rested on four doctrinal points regarding standing, three of which are established and remain noncontroversial. First, *Frothingham v. Mellon* denied taxpayer standing. Second, *Massachusetts v. Mellon* established the proposition that a state does not have *parens patriae* standing against the United States because citizens of the state "are also citizens of the United States."<sup>67</sup> Third, it also introduced modern standing concepts based on injury. Finally, and most controversially, *Massachusetts v. Mellon* dealt with the Court's ability to decide political questions. But on what precise basis was Massachusetts denied standing to challenge the Maternity Act?

Maurice Finkelstein, writing in the *Harvard Law Review* soon after the decision was handed down, identified the decision on Massachusetts's sovereign standing as an application of the political question doctrine:

What *is* significant is the fact that the Court seized upon the standard of "political questions" to avoid the necessity of deciding the constitutionality of a measure of Congress. When one takes into consideration the popularity of a law of this kind and also the fact that it would be difficult to reconcile the act in question with the probable attitude of the learned Justice [Sutherland] towards "due process of law," one can more easily apprehend the trend of the judicial psychology.<sup>68</sup>

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63. 369 U.S. 186 (1962).

64. Edward S. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548, 548-49 (1923) (footnote omitted).

65. 297 U.S. 1 (1936).

66. 301 U.S. 619 (1937).

67. 262 U.S. at 485.

68. Finkelstein, *supra* note 51, at 361. Interestingly, Justice Sutherland, one of the "Four Horsemen," had written the opinion in *Massachusetts v. Mellon*. Progressives of the

Melville Fuller Weston replied to Finkelstein in the *Harvard Law Review* in January 1925, taking issue with the assertion that the political question doctrine is an ad hoc and unprincipled response to circumstances which Finkelstein had described in these terms: “[W]hen a tribunal approaches a question, where on one horn of the dilemma is the trained moral sentiment of the judge, and on the other the ‘hypersensitive nerve of public opinion,’ it will ‘shy off’ and throw the burden of the decision on other shoulders.”<sup>69</sup> Weston thought the doctrine more principled than that,<sup>70</sup> but he too described *Massachusetts v. Mellon* as having been decided under the political question doctrine.<sup>71</sup>

Both men were correct that the political question doctrine was a ground of decision in that case. Justice Sutherland, writing for the Court, took care to contrast cases like *Georgia v. Stanton* with cases involving quasi-sovereign standing, such as proprietary standing and standing based upon a state’s interest in its natural resources.<sup>72</sup> Finally, he employed *Georgia v. Stanton*, *Cherokee Nation v. Georgia*, *Luther v. Borden*, and *Pacific States Telephone & Telegraph Co. v. Oregon*, among others, to dispose of the case under the political question doctrine.<sup>73</sup>

If *Massachusetts v. Mellon*, as it relates to a state suing the United States, is viewed as having been a pure political question case, subsequent cases such as *South Carolina v. Katzenbach*,<sup>74</sup> *New York v. United States*,<sup>75</sup> and *South Dakota v. Dole*,<sup>76</sup> where states were permitted to assert their sovereign “political” interests without reference to the political question doctrine, are explained by

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1920s referred to Justices Van Devanter, McReynolds, Sutherland, and Butler as the “Four Horsemen,” analogizing them to the Four Horsemen of the Apocalypse, because of their perceived hostility to governmental regulation and because their views were seen to limit the Progressives’ proposed solutions to the problems of the day. DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 49 (2011).

69. Melville Fuller Weston, *Political Questions*, 38 HARV. L. REV. 296, 297 (1925) (quoting Finkelstein, *supra* note 51, at 339).

70. *See id.* at 298.

71. *See id.* at 326.

72. *See Massachusetts v. Mellon*, 262 U.S. at 481-82. Another one of the cited cases, *Missouri v. Holland*, 252 U.S. 416 (1920), involved a Tenth Amendment challenge to the Migratory Bird Treaty Act of 1918, but the United States stipulated that Missouri had a proprietary interest in its wild birds which Justice Holmes denominated “quasi-sovereign.” *Holland*, 252 U.S. at 431.

73. *See Massachusetts v. Mellon*, 262 U.S. at 483-84.

74. 383 U.S. 301 (1966).

75. 505 U.S. 144 (1992).

76. 483 U.S. 203 (1987). South Dakota made almost the same argument that Massachusetts had made in *Massachusetts v. Mellon* and received the same direction on the merits that Massachusetts had received in dicta: the states remained free not to take the federal money. *See id.* at 210-11.

the Supreme Court's precipitous retreat from the political question doctrine after *Baker v. Carr*<sup>77</sup> and *Reynolds v. Sims*.<sup>78</sup>

With respect to joint sovereigns under a single constitution (unlike the unitary, unwritten constitution of Britain), a political question doctrine based upon *Nabob of the Carnatic* never made sense. With respect to joint sovereigns, *McCulloch* and *Cohens* set forth the correct approach. *Luther v. Borden* should remain viable in most applications because there is a textual basis for concluding that enforcement of the guarantee of a republican form of government is committed to the political branches in the first instance, with the judiciary following in their wake.<sup>79</sup>

The analysis, however, is made slightly more complex by the fact that *Massachusetts v. Mellon* is not a pure political question case. It is not even included in the list of political question cases reviewed by the Supreme Court in *Baker v. Carr*.<sup>80</sup> Deeming it a true political question case would be inconsistent with *Baker*'s magisterial conclusion that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"<sup>81</sup>

As befits a transitional case, *Massachusetts v. Mellon* looks backward and forward. It indisputably looks backward to political question cases. But it also turns on modern concepts of standing. Before engaging in its political question analysis, the Court in *Massachusetts v. Mellon* said this: "Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject. But we do not rest here."<sup>82</sup> Thus, at the conclusion of the Court's opinion, we find the following language:

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to

77. 369 U.S. 186 (1962).

78. 377 U.S. 533 (1964).

79. The Article IV, Section 4 guarantee would ordinarily operate by the President taking coercive action or the legislature declining to seat legislators. In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the Court did note that Congress, by statute, could involve the judiciary in the determination. *See id.* at 43.

80. *See* 369 U.S. at 208-37.

81. *Id.* at 210.

82. 262 U.S. 447, 480 (1923).



rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.<sup>83</sup>

If we trace the several propositions advanced by *Massachusetts v. Mellon* through subsequent Supreme Court cases, we discover that the case has been reinterpreted in the context of state sovereign standing in a way that emphasizes the modern standing language of the case to the exclusion of the political question language. Let us begin with the political question cases.

In *New Jersey v. Sargent*, a state seeking to sue the United States was turned away in partial reliance on *Georgia v. Stanton* and *Cherokee Nation*.<sup>84</sup> *Massachusetts v. Mellon* was cited as a case involving the denial of an injunction, where the act in question was “not shown to affect prejudicially any proprietary or other right of the State subject to judicial cognizance.”<sup>85</sup> No state legislation was threatened by the federal law at issue in *Sargent*, rendering the dispute merely abstract,<sup>86</sup> and thus unlike the dispute in *Virginia v. Sebelius*.

In *Florida v. Mellon*, Florida tried to enjoin collection of a federal inheritance tax based upon a *parens patriae* claim and the anticipated effect on its tax revenues.<sup>87</sup> The *parens patriae* claim was rejected under *Massachusetts v. Mellon*, while the revenue claim was deemed “purely speculative” and nonjusticiable under the same authority because Florida had not sustained or been threatened with “any *direct* injury as the result of the enforcement of the act in question.”<sup>88</sup> Although a state was turned away, no purely political question cases were cited, so this may be simply a lack-of-standing case, in the sense of there being no concrete injury. Somewhat inconsistently, Justice Cardozo, us-

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83. *Id.* at 488-89 (citation omitted).

84. *New Jersey v. Sargent*, 269 U.S. 328, 330-31 (1926).

85. *Id.* at 334.

86. *See* *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 75-76 (1927) (characterizing the relief sought in *Sargent* as “an abstract judicial declaration”).

87. 273 U.S. 12, 15-16 (1927).

88. *Id.* at 18.

ing the “*cf.*” signal, cited *Massachusetts v. Mellon* as a merits decision upholding the federal tax in *Steward Machine Co. v. Davis*.<sup>89</sup>

The last two times the Court cited *Massachusetts v. Mellon* as a political question doctrine case were in *Ex parte Keogh*<sup>90</sup> and in *Georgia v. Pennsylvania Railroad Co.*<sup>91</sup> The opinion in *Keogh* reads in its entirety:

The petition for the issue of a writ of mandamus herein is denied for the want of jurisdiction. *Luther v. Borden*, 7 How. 1, 42; *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 150; *Marshall v. Dye*, 231 U.S. 250, 256, 257; *Massachusetts v. Mellon*, 262 U.S. 447, 483, 488.<sup>92</sup>

In *Pennsylvania Railroad Co.*, Justice Douglas, writing for the Court, said: “The complaint of Georgia in those respects is not of a political or governmental character. There is involved no question of distribution of powers between the State and the national government as in *Massachusetts v. Mellon* and in *Florida v. Mellon*.”<sup>93</sup>

This treatment of *Massachusetts v. Mellon* was contrary to the 1933 case *Nashville, Chattanooga & St. Louis Railway v. Wallace*, permitting a state declaratory judgment action challenge to the collection of a state tax, wherein the Court separately distinguished cases like *Massachusetts v. Mellon* and *New Jersey v. Sargent* from those like *Luther v. Borden* and *Pacific States Telephone & Telegraph Co.*<sup>94</sup> The first class of cases was treated as ones in which there was no threat of immediate, direct harm redressable by a decree. The second class of political question cases was treated as inherently nonjusticiable.

In 1950, when the Sugar Act of 1948 was challenged, Puerto Rico sought to sue in its own right. The Court noted that “[t]he right of a State to press such a claim raises familiar difficulties,” citing, inter alia, *Massachusetts v. Mellon*.<sup>95</sup> Because the fact that Puerto Rico was not a state raised additional complications, the Court declined to reach the question of Puerto Rico’s standing to sue, instead resolving the case on the merits with respect to co-petitioners.<sup>96</sup>

Thereafter, the political question aspect of *Massachusetts v. Mellon* would be alluded to in the Supreme Court twice more in dissent. Justice Frankfurter’s dissent in *Baker v. Carr* expressly lumped *Massachusetts v. Mellon* together with cases like *Georgia v. Stanton* and *Cherokee Nation*.<sup>97</sup> Justice Douglas’s

89. 301 U.S. 548, 592 (1937).

90. 286 U.S. 529 (1932). *Keogh* was seeking to challenge the malapportionment of the Illinois legislature. See *Petition for Writ of Mandamus, Ex parte Keogh*, 286 U.S. 529 (1932).

91. 324 U.S. 439 (1945).

92. *Keogh*, 286 U.S. at 529.

93. 324 U.S. at 445.

94. See *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 261-62 (1933).

95. *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 619 (1950).

96. *Id.* at 619-20.

97. See *Baker v. Carr*, 369 U.S. 186, 286-88 (1962) (Frankfurter, J., dissenting).

dissent in *Schlesinger v. Reservists Committee to Stop the War* stated that *Frothingham v. Mellon*, the companion case to *Massachusetts v. Mellon*, “had in it an admixture of the ‘political question’” doctrine.<sup>98</sup>

Because Massachusetts had not been required “to do or to yield anything,”<sup>99</sup> it has always been possible to regard *Massachusetts v. Mellon* as a narrow holding on standing under the Article III requirement of a concrete and direct injury redressable by a judicial decree,<sup>100</sup> leaving the Court free to treat the political question doctrine discussion as dicta.

Ever since *Wallace* was decided in 1933, that is what the Court has done. In *Baker*, the majority opinion omitted *Massachusetts v. Mellon* from its list of political question cases and from the rationale of the doctrine.<sup>101</sup> Then, in *South Carolina v. Katzenbach*,<sup>102</sup> South Carolina was permitted to proceed with its challenge of the Voting Rights Act of 1965 because it was defending its own political rights instead of acting as *parens patriae*.

At least since *Baker*, *Massachusetts v. Mellon* has stood for three propositions. First, the power of a court to rule an act unconstitutional depends on the presence of an actual case or controversy defined in terms of a plaintiff with a direct redressable injury set within a concrete adversarial context.<sup>103</sup> Second, there are substantial limits on federal taxpayer standing.<sup>104</sup> Finally, *Massachusetts v. Mellon* establishes the proposition that a state may not sue the United States as *parens patriae*.<sup>105</sup>

That *Massachusetts v. Mellon* does not prevent a state from having standing to defend its enactments has been the consistent position of the Supreme Court and the circuit courts of appeals in their modern cases. As will be discussed in detail below, the modern state sovereign standing cases, all decided after *Massachusetts v. Mellon*, make clear that Virginia has standing to bring its

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98. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 230 (1974) (Douglas, J., dissenting).

99. *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923).

100. *See id.* at 488.

101. 369 U.S. at 208-37.

102. 383 U.S. 301 (1966).

103. *See Turner v. Rogers*, 131 S. Ct. 2507, 2514 (2011); *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011); *FEC v. Akins*, 524 U.S. 11, 23 (1998); *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983); *Warth v. Seldin*, 422 U.S. 490, 526 (1975) (Brennan, J., dissenting); *Reservists Comm.*, 418 U.S. at 220 n.8; *Cal. Bankers Ass’n v. Schultz*, 416 U.S. 21, 69 (1974); *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

104. *See Lance v. Coffman*, 549 U.S. 437, 440 (2007); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343-45 (2006); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 803 (1996); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574-75 (1992); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (plurality opinion); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 477 (1982); *Flast v. Cohen*, 392 U.S. 83, 85, 94 (1968).

105. *See Katzenbach*, 383 U.S. at 324; *see also Massachusetts v. Laird*, 400 U.S. 886, 887 (1970) (Douglas, J., dissenting from denial of leave to file complaint).

challenge to PPACA in *Virginia v. Sebelius*. Thus, to deny Virginia standing in *Virginia v. Sebelius* based on *Massachusetts v. Mellon* is simply to overread *Massachusetts v. Mellon*.

C. *State Sovereign Standing After Massachusetts v. Mellon: The Recognition of State Sovereign Standing in the Supreme Court and in the Circuit Courts of Appeals*

1. *The Supreme Court*

As noted above, the Supreme Court has repeatedly held that states, as an incident of sovereignty, have the ability to protect their enactments from being challenged in federal court. It was a state tax statute that was at issue in *McCulloch*, and the Court certainly reached the merits of the dispute. Indeed, try to imagine how different both American constitutional law and history would be if the Court had not reached the merits of the case in *McCulloch*.

Similarly, the Court has reached the merits in state challenges to federal attempts to override state election laws. In *Oregon v. Mitchell*, “certain States resist[ed] compliance with the Voting Rights Act Amendments of 1970 because they believe[d] that the Act [took] away from them powers reserved to the States by the Constitution to control their own elections.”<sup>106</sup> That the states had standing to defend their legislative enactments from the federal statute that allegedly preempted them was accepted by all of the parties and the Court. After noting that “[n]o question has been raised concerning the standing of the parties or the jurisdiction of this Court,”<sup>107</sup> the Court reached the merits of the dispute.

That the Court would reach the merits of the dispute was not a surprise. Just four years earlier, the Court had heard a challenge to provisions of the Voting Rights Act by South Carolina in *South Carolina v. Katzenbach*. The Court dismissed some of South Carolina’s claims in that case for lack of standing, citing *Massachusetts v. Mellon* and writing, “Nor does a State have standing as

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106. 400 U.S. 112, 117 (1970) (citation omitted). The Court noted that the consolidated cases that were styled *Oregon v. Mitchell* came to the Court through different routes, writing: Oregon and Texas, respectively, invoke the original jurisdiction of this Court to sue the United States Attorney General seeking an injunction against the enforcement of Title III (18-year-old vote) of the Act. . . . [T]he United States invokes our original jurisdiction seeking to enjoin Arizona from enforcing its laws to the extent that they conflict with the Act, and directing the officials of Arizona to comply with the provisions of Title II (nationwide literacy test ban) and Title III (18-year-old vote) of the Act. . . . [T]he United States invokes our original jurisdiction seeking to enjoin Idaho from enforcing its laws to the extent that they conflict with Title II (abolition of residency requirements in presidential and vice-presidential elections) and Title III (18-year-old vote) of the Act.

*Id.* at 117 n.1 (citations omitted). This strongly suggests that, in cases involving state sovereignty, it does not matter whether a state is the moving party, as in *Virginia v. Sebelius*, or the United States is the party that initiates the litigation, as in *United States v. Arizona*. See *supra* note 19 and accompanying text.

107. 400 U.S. at 117 n.1.

the parent of its citizens to invoke these constitutional provisions against the Federal Government . . . .”<sup>108</sup> However, the Court would then reach the merits of whether South Carolina’s sovereignty had been violated, asking and answering the question whether “Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States.”<sup>109</sup> The fact that the Court recognized *Massachusetts v. Mellon*’s restriction on states suing as *parens patriae*, but still reached the merits of South Carolina’s sovereignty claim, should put to rest any questions of whether states have standing to bring such claims against the federal government.

The Court has repeatedly explained the rationale behind states being allowed to defend their sovereign interests in proceedings in federal court. The states are not mere administrative agencies of the federal government, but rather are co-sovereigns who can rightfully exercise sovereign powers, such as the fundamental power of a sovereign to enact and enforce a code of laws. The Court has summarized two core sovereign powers that remain with the states:

First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction—*this involves the power to create and enforce a legal code, both civil and criminal*; second, the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders. *The former is regularly at issue in constitutional litigation.* The latter is also a frequent subject of litigation . . . .<sup>110</sup>

This unique, sovereign power of states—to enact and enforce a code of laws—makes them unlike any other litigant. Thus, in defending its code of laws, a state has standing that others might lack. As the Court has held:

“[T]he power to create and enforce a legal code, both civil and criminal” is one of the quintessential functions of a State. *Because the State alone is entitled to create a legal code, only the State has the kind of “direct stake” identified in Sierra Club v. Morton in defending the standards embodied in that code.*<sup>111</sup>

Thus, the Court has *explicitly* recognized that a state defending one of its own enactments satisfies the standing requirements laid down in the modern, environmental standing cases. It is hard to imagine the Court being any clearer that states, as sovereigns, have standing to defend their challenged enactments.

The Court has not retreated from this holding. In fact, in the recently completed 2011 Term, the Court reiterated the point, noting that standing requirements “must be satisfied before an individual may assert a constitutional claim; *and in some instances, the result may be that a State is the only entity capable*

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108. 383 U.S. at 324.

109. *Id.*

110. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (emphasis added).

111. *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (emphasis added) (citations omitted) (quoting *Alfred L. Snapp & Son*, 458 U.S. at 601; *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)).

of demonstrating the requisite injury.”<sup>112</sup> Simply put, the Supreme Court recognizes the right of a state, as sovereign, to defend its legislative enactments from attack, even those attacks rooted in claims of federal preemption.

## 2. *The courts of appeals*

The concept of states having sovereign standing to defend their enactments from challenge, even challenges caused by actions of the federal government, is well recognized in the various circuit courts of appeals. The United States Court of Appeals for the District of Columbia Circuit has recognized the validity of state sovereign standing, holding that when the “preemptive effect [of federal regulations] is the injury of which petitioners complain, we are satisfied that the States meet the standing requirements of Article III.”<sup>113</sup> The United States Court of Appeals for the Fifth Circuit has also recognized the doctrine, allowing the State of Texas to challenge FCC actions that allegedly intruded on the sovereign prerogatives of Texas.<sup>114</sup> The United States Court of Appeals for the Sixth Circuit recognized state sovereign standing, holding that because Ohio, in a declaratory judgment action against the federal government, was “litigating the constitutionality of its own statute, duly enacted by the Ohio General Assembly, Ohio ha[d] a sufficient stake in the outcome of this litigation to give it standing to seek judicial review” of a federal rule that preempted state law.<sup>115</sup> Finally, the United States Court of Appeals for the Tenth Circuit recognized the doctrine of state sovereign standing in finding that Wyoming had standing to defend its expungement statute that was essentially vitiated by a federal agency’s interpretation of federal law.<sup>116</sup>

Despite extensive briefing by Secretary Sebelius and numerous amici, no case has been cited by either side in *Virginia v. Sebelius* that found a state lacked standing to defend one of its statutes from a claim that an action of the federal government preempted that statute. Although often overlooked by commentators and academics, the doctrine of state sovereign standing is well grounded in the case law of both the Supreme Court and in the various circuit courts of appeals.

While no party or amicus was able to cite such a case while arguing *Virginia v. Sebelius*, a panel of the United States Court of Appeals for the Fourth Circuit, in *Virginia v. Sebelius*, became the first of the circuit courts of appeals to reject a sovereign state’s claim of standing to defend one of its legislative

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112. *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011) (emphasis added).

113. *Alaska v. U.S. Dep’t of Transp.*, 868 F.2d 441, 444 (D.C. Cir. 1989).

114. *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) (“[S]tates have a sovereign interest in ‘the power to create and enforce a legal code.’” (quoting *Alfred L. Snapp & Son*, 458 U.S. at 601)).

115. *Ohio ex rel. Celebrezze v. U.S. Dep’t of Transp.*, 766 F.2d 228, 232-33 (6th Cir. 1985).

116. *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008).

enactments. As will be discussed in more detail below, the decision is inconsistent with the traditional roles of both the states and the federal courts as envisioned by the Founders, misunderstands *Massachusetts v. Mellon*, and ignores dispositive decisions of the Supreme Court.

#### IV. STATE SOVEREIGN STANDING IN *VIRGINIA V. SEBELIUS*

Despite the historical role of the federal courts in resolving disputes between the states and the federal government over conflicting assertions of power by the co-sovereigns, and despite state sovereign standing's general acceptance in both the Supreme Court and the circuit courts of appeals, Secretary Sebelius has repeatedly raised the issue of Virginia's standing in *Virginia v. Sebelius*.

In the district court, she argued Virginia lacked standing because *Massachusetts v. Mellon* bars a *parens patriae* claim by a state against the federal government and because Virginia had suffered no injury, despite the concededly preemptive effect of PPACA on Virginia's HCFA.<sup>117</sup> The thrust of her argument was based on *Massachusetts v. Mellon* and its progeny.

In response, Virginia addressed the Secretary's *Massachusetts v. Mellon* argument by noting that the Secretary had made a category error—namely, that her assertion that Virginia was bringing a *parens patriae* claim was incorrect. Specifically, Virginia noted:

[The Secretary's error] is based upon the assumption that Virginia is proceeding in *parens patriae*. While Virginia has a *parens patriae* statute, the Commonwealth is not suing under it. Furthermore, Virginia recognizes that *Massachusetts v. Mellon* stands for the proposition that States cannot sue the federal government under *parens patriae* principles because their citizens are also citizens of the United States.<sup>118</sup>

Furthermore, Virginia argued that the basic thrust of *Massachusetts v. Mellon* and its progeny cited by the Secretary—that the federal courts will not entertain “abstract” theoretical disputes between the co-sovereigns when the federal enactment does not require the states to yield or give way<sup>119</sup>—did not apply to Virginia's claim. After all, in *Massachusetts v. Mellon*, the Court found that the federal statute at issue did not “require the States to do or to yield anything,”<sup>120</sup> while Virginia was required by PPACA to yield and give way because no one disputes that PPACA, if constitutional, would preempt the HCFA. Because PPACA forces Virginia to yield and give way, Virginia's claim fell outside of the rule of *Massachusetts v. Mellon*.

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117. See Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 3, at 12-16.

118. Plaintiff's Memorandum in Opposition to Motion to Dismiss, *supra* note 17, at 12 (citation omitted) (citing VA. CODE ANN. § 2.2-111 (2011)).

119. See *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923).

120. *Id.* at 482.

The district court agreed, noting:

In the immediate case, the Commonwealth is exercising a core sovereign power because the effect of the federal enactment is to require Virginia to yield under the Supremacy Clause. Unlike *Mellon*, irrespective of its underlying legislative intent, the Virginia statute is directly in conflict with Section 1501 of the Patient Protection and Affordable Care Act.<sup>121</sup>

After citing Rule 5.1(a)(2) of the Federal Rules of Civil Procedure,<sup>122</sup> which provides that any party that challenges the constitutionality of a state statute must give notice to the attorney general of that state,<sup>123</sup> and observing that states are “often accorded ‘special solicitude’ in standing analysis,”<sup>124</sup> Judge Hudson gave a detailed explanation as to why Virginia had standing to bring its action, writing that “[r]eviewing courts, in their standing analysis, have distinguished cases where the individual interests of citizens are purely at stake from those in which the interest of the state, as a separate body politic, is implicated.”<sup>125</sup> After discussing the difference between true state sovereign standing and quasi-sovereign standing doctrines, such as *parens patriae* standing, Judge Hudson noted that “courts have uniformly held that ‘where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign’s individual interests are harmed, wholly apart from the alleged general harm.’”<sup>126</sup> Judge Hudson also recognized the general acceptance of state sovereign standing in the courts of appeals, with explicit reference to the Tenth Circuit’s decision in *Wyoming ex rel. Crank v. United States*,<sup>127</sup> which held that the State of Wyoming had standing to challenge federal regulations which conflicted with Wyoming law.<sup>128</sup> Judge Hudson completed his analysis by noting that “[t]he Commonwealth, through its Attorney General, satisfies Article III’s standing requirements under the facts of this case.”<sup>129</sup> From a litigation perspective, perhaps the most interesting part of the Secretary’s state sovereign standing argument in the district court was her refusal to engage the question, preferring instead to mischaracterize the claim as a *parens patriae* claim. Remarkably, in eighty-one pages of briefing in her motion to dismiss, the Secretary did not cite or even attempt to address *Diamond v. Charles* even a

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121. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 603 (E.D. Va. 2010).

122. *Id.* at 606 n.4.

123. FED. R. CIV. P. 5.1(a)(2).

124. *Virginia v. Sebelius*, 702 F. Supp. 2d at 606 n.5 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)).

125. *Id.* at 606.

126. *Id.* (quoting *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 563 F.3d 466, 477 (D.C. Cir. 2009)).

127. 539 F.3d 1236 (10th Cir. 2008).

128. *Virginia v. Sebelius*, 702 F. Supp. 2d at 606-07.

129. *Id.* at 607.



single time.<sup>130</sup> The lack of willingness to even engage with binding Supreme Court authority on the concept of state sovereign standing certainly suggests that, in the end, the Secretary had and has no valid counterargument.

Judge Hudson's decision in *Virginia v. Sebelius* regarding the standing issue, while perhaps perplexing to those who have forgotten the concept of state sovereign standing or simply wish that it did not exist, was adopted by the only other federal court to address the state sovereign standing issue in the context of PPACA. In *Florida ex rel. Bondi v. U.S. Department of Health & Human Services*, Judge Vinson of the United States District Court for the Northern District of Florida, commenting on the existence of state statutes that conflicted with PPACA, wrote:

Judge Henry Hudson considered similar legislation in one of the two Virginia cases. After engaging in a lengthy analysis and full discussion of the applicable law, he concluded that despite the statute's declaratory nature, the Commonwealth had adequate standing to bring the suit insofar as "[t]he mere existence of the lawfully-enacted statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it." I agree with Judge Hudson's thoughtful analysis of the issue and adopt it here. The States of Idaho and Utah, through plaintiff Attorneys General Lawrence G. Wasden and Mark L. Shurtleff, have standing to prosecute this case based on statutes duly passed by their legislatures, and signed into law by their Governors.<sup>131</sup>

Neither of these rulings on the issue of state sovereign standing should have been surprising. As noted above, the doctrine of state sovereign standing fits within one of the primary historical rationales for the existence of the federal courts as envisioned by the Founders. Furthermore, no party or amicus in the district court in *Virginia v. Sebelius* cited a single instance where a state had been denied standing in anything approaching an analogous context, that is, a situation where a federal enactment effectively erased a state statute in an area of traditional police power regulation.

Despite the loss in both district courts that had addressed the issue, the Secretary raised the standing issue again when she appealed Judge Hudson's ruling to the United States Court of Appeals for the Fourth Circuit. However, in her opening brief in the Fourth Circuit, she once again omitted any reference to *Diamond*.<sup>132</sup> She did concede in her opening brief that "[i]t may be assumed that,

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130. Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 3; Reply Memorandum in Support of Defendant's Motion to Dismiss, *Virginia v. Sebelius*, 702 F. Supp. 2d 598 (No. 3:10-cv-00188-HEH), 2010 WL 2661293.

131. 780 F. Supp. 2d 1256, 1272 (N.D. Fla. 2011) (alteration in original) (citations omitted) (quoting *Virginia v. Sebelius*, 702 F. Supp. 2d at 605-06), *aff'd in part, rev'd in part sub nom.* *Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.* *Florida v. U.S. Dep't of Health & Human Servs.*, 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

132. Brief for Appellant, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058), 2011 WL 686279.

in some circumstances, a state may have standing to challenge federal action that significantly disrupts that state's own regulatory scheme."<sup>133</sup> While this concession would certainly seem to vindicate Virginia's position that it has standing to defend its enactments from federal encroachment, the Secretary essentially posited that the HCFA was not a true law, arguing that the HCFA "applies to no entities other than the federal government"<sup>134</sup> and "serves no purpose other than as a tool for standing here."<sup>135</sup>

In response, Virginia noted that the Secretary had badly miscast the scope of the Virginia statute:

[A]s Virginia pointed out below, the Virginia statute prevents any private employer from requiring insurance. Because Virginia is a Dillon Rule State, the law also prevents any locality from requiring insurance. Nor is it true that "Virginia has not suggested that it serves any other function other than purportedly to create standing here." Virginia's law is one of broad application.<sup>136</sup>

Faced with the fact that the plain text of the Virginia enactment covered other entities, the Secretary would eventually concede that the enactment did more than simply apply to the federal government as she had earlier erroneously asserted.<sup>137</sup> Eventually, at oral argument, she conceded that she did not know why Virginia had enacted the HCFA, and thus, could not represent to the court that it served no purpose other than to confer standing on Virginia for the purposes of a suit regarding PPACA.<sup>138</sup> However, despite her repeated concession that "a state may have standing to challenge federal action that significantly disrupts that state's regulation of its own citizens,"<sup>139</sup> and her recognition that the Tenth Circuit had correctly decided *Wyoming ex rel. Crank v. United States*,<sup>140</sup> she continued to insist that Virginia was not entitled to defend the HCFA from PPACA's purported preemptive effect. Yet just as in the district court, she was unable to marshal a single case where a state had been denied standing to defend its lawfully enacted statute from the preemptive effect of a federal enactment or regulation.

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133. *Id.* at 29.

134. *Id.* at 24.

135. *Id.* at 29.

136. Appellee's Opening and Response Brief, *supra* note 17, at 14 (citations omitted).

137. See Response/Reply Brief for Appellant at 7-8, *Virginia v. Sebelius*, 656 F.3d 253 (Nos. 11-1057, 11-1058), 2011 WL 1338077 (for the first time recognizing Virginia's position that the HCFA "prevents local governments and private employers from requiring insurance"). The concession was made even more explicit at oral argument in the Fourth Circuit, where the Secretary explicitly conceded that the HCFA applied to entities other than the federal government. See Oral Argument at 5:30-6:30, *Virginia v. Sebelius*, 656 F.3d 253 (Nos. 11-1057, 11-1058), available at <http://coop.ca4.uscourts.gov/OAarchive/mp3/11-1057-20110510.mp3>.

138. See Oral Argument, *supra* note 137, at 5:15-5:50, 6:30-7:00.

139. Response/Reply Brief for Appellant, *supra* note 137, at 7.

140. See *id.*

As Virginia has noted throughout this litigation and as we have noted throughout this Article, the Secretary's position is at odds with the Founders' understanding of the role of the federal courts in resolving disputes between the co-sovereigns over which has the power to regulate in a particular area, and is at odds with precedents dating from Chief Justice John Marshall through Chief Justice John Roberts.

While the Secretary's position that Virginia lacks standing suffers from all of the flaws detailed above, a panel of the United States Court of Appeals for the Fourth Circuit adopted it, finding that Virginia "lacks standing to bring this action."<sup>141</sup> The decision is erroneous in multiple respects.

First, it makes the same category errors that others have made, asserting that the HCFA "does nothing more than announce an unenforceable policy goal"<sup>142</sup> and mischaracterizing the HCFA as an act of nullification.<sup>143</sup> Furthermore, any reading of the opinion makes clear that the panel, which cites *Massachusetts v. Mellon* and its pre-1962 progeny, still reads *Massachusetts v. Mellon* as a political question case, noting that the "Constitution does not permit a federal court to answer" abstract political questions.<sup>144</sup>

However, these purported justifications suffer from the flaws noted above. Furthermore, just like Secretary Sebelius and her amici, the panel's opinion was unable to cite a single case where a state was denied on standing grounds the right to challenge a federal enactment that invalidated a state statute.<sup>145</sup>

Perhaps the two most distressing aspects of the panel's opinion are its utter dismissal of the role states play in serving as a check on unconstitutional actions of the federal government, and the fact that it simply ignores significant, dispositive decisions of the Supreme Court.

Regarding the role of the states as a check on the federal government and as protector of the constitutional balance, the panel states that if it "were to adopt Virginia's standing theory, each state could become a roving constitutional watchdog of sorts."<sup>146</sup> Of course, as noted above, the Founders fully intended for the states to serve precisely that role, with Madison writing that the

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141. *Virginia v. Sebelius*, 656 F.3d at 266.

142. *Id.* at 271.

143. *See id.* at 270 (declaring that the HCFA "reflects no exercise of 'sovereign power,' for Virginia lacks the sovereign authority to nullify federal law").

144. *Id.* at 271.

145. The closest the opinion comes to such a citation is its citation to *Illinois Department of Transportation v. Hinson*, 122 F.3d 370 (7th Cir. 1997). *See Virginia v. Sebelius*, 656 F.3d at 271, 272 (4th Cir. 2011). However, *Hinson* does not actually involve a clash between federal and state statutes, but rather a policy disagreement over the expenditure of funds collected under a federal statute. *See Hinson*, 122 F.3d at 371. The panel of the Seventh Circuit found no conflict between the federal enactment and the relevant Illinois statutes and, in fact, explicitly recognized that a state would have standing "where a state complains that a federal regulation will preempt one of the state's laws." *Hinson*, 122 F.3d at 372.

146. 656 F.3d at 272.

state and federal governments “will control each other.”<sup>147</sup> Not only did the panel’s decision ignore the Founders’ views on this issue, it does not even acknowledge the Supreme Court’s recent pronouncement in *Bond v. United States* that “the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another.”<sup>148</sup>

In addition to ignoring *Bond*, the panel’s opinion also ignores perhaps the two most important post-*Massachusetts v. Mellon* state sovereign standing cases decided by the Supreme Court. Despite their obvious salience and the fact that they are essentially dispositive of the issue, the panel’s opinion does not distinguish or even mention either *South Carolina v. Katzenbach* or *Oregon v. Mitchell*. As discussed above, it is clear that, under these cases, Virginia has standing to bring its challenge to PPACA, and therefore, the panel’s decision is in error.

## V. A BRIEF REPLY TO PROFESSOR WALSH AND OTHERS

In the Fourth Circuit, the Secretary attracted multiple amici. Of particular relevance here, two amicus briefs that focused exclusively on the standing question were filed. One was filed by University of Richmond Law School Professor Kevin Walsh,<sup>149</sup> while the other was filed by a group styling itself the “Professors of Federal Jurisdiction.”<sup>150</sup> Because these amici either raised arguments different from the Secretary’s or emphasized authority not relied upon by the Secretary, they deserve special mention here.

### A. *Professor Walsh*

Both in his amicus brief filed in the Fourth Circuit,<sup>151</sup> and in his article published in this Issue of the *Stanford Law Review*,<sup>152</sup> Professor Walsh argues

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147. THE FEDERALIST NO. 51 (James Madison), *supra* note 23, at 320.

148. 131 S. Ct. 2355, 2364 (2011).

149. Brief of Amicus Curiae Kevin C. Walsh in Support of Appellant Seeking Reversal, *Virginia v. Sebelius*, 656 F.3d 253 (Nos. 11-1057, 11-1058), 2011 WL 773573 [hereinafter Walsh Brief].

150. Brief of Amici Curiae Professors of Federal Jurisdiction in Support of Appellant, *Virginia v. Sebelius*, 656 F.3d 253 (Nos. 11-1057, 11-1058), 2011 WL 792210 [hereinafter Professors Brief]. The group is composed of the following professors: Janet Cooper Alexander of Stanford University, Erwin Chemerinsky of the University of California, Irvine, Amanda Frost of American University, Andy Hessick of Arizona State University, A.E. Dick Howard of the University of Virginia, John C. Jeffries, Jr. of the University of Virginia, Johanna Kalb of Loyola University New Orleans, Lumen N. Mulligan of the University of Kansas, Edward A. Purcell, Jr. of New York Law School, Caprice L. Roberts of the University of West Virginia, Stephen I. Vladeck of American University, and Howard M. Wasserman of Florida International University. *Id.* app. at 35-36.

151. Walsh Brief, *supra* note 149.

that the district court lacked statutory jurisdiction to hear *Virginia v. Sebelius*. First, Professor Walsh relies upon language in *Franchise Tax Board v. Construction Laborers Vacation Trust*<sup>153</sup> to contend that “[t]he situation presented by a State’s suit for a declaration of the validity of state law is . . . not within the original jurisdiction of the United States district courts.”<sup>154</sup>

However, *Franchise Tax Board* is a removal case wherein, “for reasons involving perhaps more history than logic,”<sup>155</sup> removal jurisdiction is limited by the well-pleaded complaint rule of *Louisville & Nashville Railroad Co. v. Mottley*.<sup>156</sup> Under that rule, federal questions amounting to affirmative defenses to state law claims, although anticipated in the complaint, are not removable as federal question cases.<sup>157</sup> It is true that the limitation applies to primary jurisdiction as well as to removal jurisdiction, but Professor Walsh’s argument fails to appreciate the difference between Virginia’s claim and the defense anticipated in *Franchise Tax Board*.

In *Franchise Tax Board*, the Court granted certiorari to resolve the question of whether the Employee Retirement Income Security Act permits state tax authorities to collect unpaid state income taxes by levying on a vacation benefit plan.<sup>158</sup> After hearing argument on the merits, the Court dismissed on jurisdictional grounds, finding that removal from state court to federal court had been improper. In support of removal, the state taxing authority had set up the vacation trust’s preemption defense as the dispute giving rise to an actual case or controversy under the state’s declaratory judgment act. Because anticipation of federal defenses has always been held to be outside of the well-pleaded complaint rule,<sup>159</sup> the removal claim failed.

The source of the claim in *Franchise Tax Board* was state and not federal law.<sup>160</sup> In stark contrast, the sovereign right being asserted by Virginia is grounded in and arises directly from the Federal Constitution.

It must also be remembered that the well-pleaded complaint rule is applied in light of practical considerations.<sup>161</sup> In *Franchise Tax Board*, the Court noted

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152. Kevin C. Walsh, *The Ghost That Slayed the Mandate*, 64 STAN. L. REV. 55 (2012). We have focused our short critique on the arguments Professor Walsh made in his brief in the Fourth Circuit.

153. 463 U.S. 1 (1983).

154. Walsh Brief, *supra* note 149, at 2 (alteration and omission in original) (quoting *Franchise Tax Bd.*, 463 U.S. at 21-22).

155. 463 U.S. at 4.

156. 211 U.S. 149 (1908).

157. *See id.* at 152.

158. 463 U.S. at 3-4.

159. *Id.* at 10-11.

160. *Id.* at 13.

161. *Id.* at 20-21.

that the state's claims could be raised in the state's own courts.<sup>162</sup> Obviously, the same cannot be said of Virginia's challenge to PPACA.

Moreover, the factual predicate upon which Professor Walsh's argument is based is incomplete, rendering the argument logically unsound. Although Virginia did seek a declaration that its law was valid, that was not the only relief it sought. The district court did not declare the HCFA valid; rather it found that PPACA was invalid, writing, "On careful review, this Court must conclude that Section 1501 of the Patient Protection and Affordable Care Act—specifically the Minimum Essential Coverage Provision—exceeds the constitutional boundaries of congressional power."<sup>163</sup>

No serious argument can be made that the federal courts lack the jurisdiction to find federal enactments unconstitutional. Finally, it is worth noting that the Commonwealth, in addition to seeking a declaration that PPACA was unconstitutional, also sought injunctive relief, styling its complaint as a "Complaint for Declaratory and Injunctive Relief."<sup>164</sup>

Professor Walsh's second argument is predicated on *Skelly Oil Co. v. Phillips Petroleum Co.*, which stands for the proposition that the federal Declaratory Judgment Act "enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."<sup>165</sup>

According to Professor Walsh, this deprived the district court of jurisdiction because, in challenging the mandate outside of a declaratory judgment action, Virginia would be seeking to enjoin the application of PPACA to its citizens, a forbidden *parens patriae* claim, or would be seeking to enjoin application of PPACA to Virginia even though the challenged mandate provision does not apply to Virginia, a forbidden advisory opinion.<sup>166</sup>

The problem with this formulation is that it misunderstands and misstates the nature of the sovereign injury suffered and claimed by Virginia, and it thereby falls into the fallacy of the excluded middle. As developed throughout both the litigation and this Article, Virginia's injury is of a sovereign nature: Virginia claims a right to legislate and has actually legislated in an area that is now also occupied by PPACA's mandate and penalty. If the mandate and penalty exceed the limits of congressional power, the federal law is invalid. Thus,

162. *Id.* at 21.

163. Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010).

164. Complaint for Declaratory and Injunctive Relief, *supra* note 1, at 6-7 ("[T]he Commonwealth of Virginia prays this Court to declare that § 1501 of PPACA is unconstitutional because the individual mandate exceeds the enumerated powers conferred upon Congress. Because the individual mandate is an essential, non-severable provision, the entire act is likewise invalid. As a consequence, this Court should also declare that § 38.2-3430.1:1 is a valid exercise of state power. The Commonwealth additionally prays the Court to grant such further and additional relief as the ends of justice may require including an injunction against the enforcement of § 1501 in particular and PPACA as a whole.").

165. 339 U.S. 667, 671 (1950).

166. See Walsh Brief, *supra* note 149, at 11-13.

there is an actual concrete case or controversy with respect to that issue that is not dependent on the remedy provided by the Declaratory Judgment Act. The failure to recognize the true nature of Virginia's sovereign injury misinforms all of the nonstatutory arguments advanced by Professor Walsh in one way or another, resulting in continued question-begging.

In sum, once the nature of Virginia's claimed injury and the scope of the relief sought by Virginia are properly understood and characterized, all of Professor Walsh's arguments, whether statutory or nonstatutory, become untenable.

### B. *Professors of Federal Jurisdiction*

While not identical to the Secretary's arguments, the arguments made by the Professors of Federal Jurisdiction do track the basic arguments made by the Secretary. Like the Secretary, the Professors rely heavily on *Massachusetts v. Mellon* and the straw man argument that Virginia may not bring a *parens patriae* claim on behalf of its citizens.<sup>167</sup> As noted above, Virginia did not bring a *parens patriae* claim, but rather brought a claim based on the purported invalidation of its code of laws, which is a sovereign injury.

As Secretary Sebelius was ultimately forced to do, the Professors concede that "the Supreme Court has recognized a state's *sovereign* (not 'quasi-sovereign') interest in 'the exercise of sovereign power over individuals and entities within the relevant jurisdiction,' which 'involves the power to create and enforce a legal code, both civil and criminal.'"<sup>168</sup> In fact, although they consigned it to a footnote, the Professors did acknowledge two of the state sovereign standing cases discussed above, recognizing that both *South Carolina v. Katzenbach* and *Oregon v. Mitchell* allowed states to assert that Congress had exceeded its powers when it passed laws that allegedly interfered with state statutes governing state election processes.<sup>169</sup> Yet despite having made this concession and having recognized the existence of the state sovereign standing cases, the Professors still refuse to recognize Virginia's sovereign interest in passing and enforcing the HCFA, and therefore fail to recognize Virginia's sovereign injury.

The Professors' argument rests entirely on the unfounded assertion that the HCFA is at best an exercise of a "quasi-sovereign" interest.<sup>170</sup> The Professors can only advance their position by refusing to recognize that a validly enacted law, passed on a bipartisan basis by significant majorities in a bicameral legislature and approved by the Governor of Virginia, is an actual act of sovereign-

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167. See Professors Brief, *supra* note 150, at 6-12.

168. *Id.* at 3-4 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)).

169. See *id.* at 13 n.3.

170. See *id. passim*.

ty. Given that by any reasonable definition the enactment of the HCFA is an act of sovereignty, the Professors' argument necessarily fails.

In support of their position that the enactment of the HCFA does not represent an exercise of sovereign power, the Professors make the same error that the Secretary once did—namely, they argue the statute only applies to the federal government and no other person or entity. The Professors state that “the law exempts Virginia citizens from a requirement that, practically, could *only* be imposed by the federal government. Put simply, the statute serves no sovereign or quasi-sovereign interest *other* than to provoke a conflict with federal law.”<sup>171</sup>

The Professors' assertion that the law only applies to the federal government is simply incorrect. As Virginia has repeatedly noted, the HCFA “prevents any private employer from requiring insurance” and “prevents any locality from requiring insurance.”<sup>172</sup> Thus, Virginia's law is one of broad application.

While it is clear from the face of the statute that this interpretation of the scope of HCFA should be beyond any serious dispute, it is important to remember that, because this is Virginia's interpretation of the scope of its own enactment, it carries the day. It is not unheard of for those challenging a state's claim of sovereign standing based on a need to defend its code of laws to argue, as the Professors do here, that the state's view of its own statute is incorrect, and therefore that there is no case or controversy. Such a claim was made in *Alaska v. U.S. Department of Transportation*, one of the state sovereign standing cases cited above. The United States Court of Appeals for the District of Columbia Circuit quickly dispatched the argument, writing:

We decline DOT's invitation to reject, in the guise of standing analysis, the States' respective constructions of their own laws. The Department cites us to nothing in the various bodies of state decisional law that precludes or conflicts with the construction advanced by the States, represented by their chief law officers. In effect, DOT asks us to dismiss the States' claims on jurisdictional grounds because of some speculative possibility that the various Attorneys General do not understand state law. This we emphatically decline to do.<sup>173</sup>

Thus, even if the Professors' cramped reading of the scope of the HCFA were plausible, it is irrelevant because it conflicts with the interpretation of Virginia's “chief law officer,” and therefore must be rejected.

Of course, as the litigation has progressed, even the Secretary, despite having previously adopted the Professors' position, has finally conceded that the argument that the HCFA applies only to the federal government is without merit.<sup>174</sup> Given that the Professors' argument that the HCFA is not an exercise of

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171. *Id.* at 25.

172. Appellee's Opening and Response Brief, *supra* note 17, at 14.

173. 868 F.2d 441, 443 (D.C. Cir. 1989).

174. *See supra* note 137 and accompanying text.



sovereign power is based almost entirely on the erroneous suggestion that the HCFA has application only to the federal government, their argument fails.

One way in which the Professors' brief differed from the briefing of the Secretary was its repeated citation of two law review articles that discussed standing claims and states. The first is Alexander Bickel's *The Voting Rights Cases*,<sup>175</sup> and the second is *State Standing*<sup>176</sup> by Ann Woolhandler and Michael Collins. Both articles are central to the Professors' argument, being cited frequently enough to earn the "*passim*" designation in the table of authorities.<sup>177</sup> Unfortunately, the Professors' selective quotation of the articles gives the misimpression that the articles stand for the proposition that states do not have standing in cases such as Virginia's current dispute regarding PPACA. However, the articles, read fully and in context, make clear that Virginia does have standing.

The relevant portion of Bickel's article is his review of the Supreme Court's 1966 decision in *South Carolina v. Katzenbach*.<sup>178</sup> While the Professors accurately quote Bickel in their brief as saying that states should not have standing to challenge federal enactments that purportedly invalidate state enactments "not because the interests asserted are unreal or inadequately particular to the state, but because by hypothesis they should not, in such circumstances, suffice to invoke judicial action,"<sup>179</sup> they neglect to mention that this was Bickel criticizing the actual result reached by the Supreme Court in *Katzenbach*. In the article, Bickel reports that the Supreme Court "then proceeded to discuss at length on the merits [South Carolina's claim] that Congress exceeded its powers."<sup>180</sup> He did so only after noting:

The decisive issue, however, was whether South Carolina had standing. The only interests, if any, that could give South Carolina standing were *her functional interest as sovereign, her interest, that is, in the continued execution of her own laws without hindrance from national authority*, and her interest as protector of those of her citizens entitled to vote under her present laws . . . .<sup>181</sup>

Thus, while it is clear that Bickel, like the Professors here, wished that the law of standing would preclude a state from having standing to defend its laws from the preemptive effect of an allegedly unconstitutional federal enactment, the decision of the Supreme Court that he was commenting on confirms that states do have standing in such situations. With all due respect to the Professors and to Bickel, the Supreme Court's decision that South Carolina had standing

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175. Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79.

176. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995).

177. See Professors Brief, *supra* note 150, at v.

178. See Bickel, *supra* note 175, at 80-93.

179. Professors Brief, *supra* note 150, at 6 (quoting Bickel, *supra* note 175, at 88).

180. Bickel, *supra* note 175, at 87.

181. *Id.* at 85 (emphasis added).

to defend its election laws against alleged overreaching by the federal government makes their opinions to the contrary inconsistent with binding precedent, at best, and irrelevant, at worst.

Similarly, the Professors repeatedly cite to Woolhandler and Collins' *State Standing*. Unfortunately, the selective quotations from this article, like the selective quotations from the Bickel article, create the misimpression that the Supreme Court has rejected state sovereign standing when a state seeks to vindicate its own enactments. A review of the Woolhandler and Collins piece in its entirety reveals a completely different reality.

Representative of the Professors' use of the Woolhandler and Collins article is the following block quotation:

The Court's acceptance of an individual's ability to raise structural constitutional issues in contests with governments may be due at least in part to the nonrecognition of a sovereign's right to litigate such questions. This preference for having individuals rather than government police even structural guaranties expresses that individuals are the intended beneficiaries of those guaranties.<sup>182</sup>

However, the Professors neglect to mention that the quotation is taken from Part I of the article, entitled, "State Standing and the Early Court," which represents the authors' historical review of pre-twentieth-century standing doctrine.<sup>183</sup> Woolhandler and Collins readily concede that, to the extent that pre-twentieth-century doctrine barred state sovereign standing claims, such a bar has long since been abandoned. They write that "[u]nlike in the nineteenth century, however, today states can sometimes sue to vindicate some interests in governing . . . . Early Court decisions that disallowed litigation of such sovereignty interests have suffered a drubbing at the hands of current scholars."<sup>184</sup>

Later in the article, Woolhandler and Collins state that current doctrine recognizes state sovereign standing. Although they do not cite state sovereign standing cases like *Diamond v. Charles*<sup>185</sup> or *Maine v. Taylor*,<sup>186</sup> they do recognize the doctrine, recognize that it exists despite *Massachusetts v. Mellon*, and cite cases relied upon by Virginia. Specifically, they write that "despite *Mellon*, states can sometimes litigate conflicting claims to regulatory power against the federal government . . . if the state claims that its 'own' rights, rather than merely its citizens' rights or a claim of want of congressional power, are implicated."<sup>187</sup>

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182. Professors Brief, *supra* note 150, at 12 (quoting Woolhandler & Collins, *supra* note 176, at 440).

183. See Woolhandler & Collins, *supra* note 176, at 397-446. As should be clear from Part IV, we do not agree with Woolhandler and Collins's characterization of all of the pre-twentieth-century state standing cases.

184. *Id.* at 435.

185. 476 U.S. 54 (1986).

186. 477 U.S. 131 (1986).

187. Woolhandler & Collins, *supra* note 176, at 492.

They continue by noting that the Court's decisions in *South Carolina v. Katzenbach* and *Oregon v. Mitchell* are properly viewed as the Court's allowing states to "assert[] their own constitutional rights . . . rather than the rights of their citizens."<sup>188</sup>

While it is true that, like Bickel before them, Woolhandler and Collins suggest that it would be better if there were limitations on state sovereign standing, they realize that their suggestions do not reflect current law. In a section of their article entitled "New Directions," they set out what changes to current standing doctrine they support: specifically, they support a move to limit state sovereign standing claims.<sup>189</sup> However, in doing so, they are explicit that their proposed limitations would effectuate a change in modern precedent and that "[u]nder the Supreme Court's current injury-in-fact inquiry, any interest that government might legitimately pursue or protect could, if interfered with, provide a basis for standing for either a state or an individual."<sup>190</sup>

The Professors' use of these articles does accurately reflect their wish that the law of standing would deny states the ability to defend their sovereign enactments from alleged federal overreach. However, as the very articles they cite make clear, their wishes are not the law as it actually exists—that is, the Supreme Court recognizes state sovereign standing. Thus, Virginia has standing in its challenge to PPACA.

#### CONCLUSION

The states were never intended to be mere provinces or administrative arms of the federal government. Rather, our federal system is predicated on the status of states as co-sovereigns, serving as a significant check and balance on federal power and operating fully within the scope of authority left to them by the Constitution. The role of the states as a check on potential abuses by an overreaching Congress is every bit as important and every bit as ingrained in our constitutional system as the checks and balances that arise from the separation of the federal government into its three coordinate branches.

Because this was the Founders' view of the role of the states, it should come as no surprise that they created the federal courts, in part, to serve as the forum for resolving conflicting claims between the co-sovereigns. Because questions of whether the states or Congress have the power to govern or legislate in a particular area can be properly resolved only in the federal courts, the concept of state sovereign standing developed and has been recognized and widely accepted. Thus, the criticisms of Virginia's claim of standing in its challenge to PPACA are actually a statement of what the critics wish the law of standing to be as opposed to what it actually is.

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188. *Id.* at 493.

189. *See id.* at 502-17.

190. *Id.* at 504-05.

Ultimately, although a pure question of procedure, the right of states to bring challenges when state laws are seemingly invalidated by federal action is critical to preserving the constitutional balance struck in Philadelphia more than 200 years ago. Removing any of the Founders' checks on potential abuses of governmental power weakens our constitutional system and threatens individual liberty, and thus it is vitally important that states be allowed to continue to serve as a check on federal overreach through appropriate litigation in the federal courts.