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Standing for Nothing

Robert Mikos

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A growing number of courts and commentators have suggested that states have Article III standing to protect state law. Proponents of such "protective" standing argue that states must be given access to federal court whenever their laws are threatened. Absent such access, they claim, many state laws might prove toothless, thereby undermining the value of the states in our federal system. Furthermore, proponents insist that this form of special solicitude is very limited—that it opens the doors to the federal courthouses a crack but does not swing them wide open. This Essay, however, contests both of these claims, and thus, the normative case for protective state standing. It demonstrates that states do not actually need protective state standing to enforce or defend their laws. Rather, if states need it at all, it is for an altogether different and more controversial purpose: to attack federal law. Indeed, the Essay shows that notwithstanding the assurances of its proponents, protective standing could enable the states to challenge virtually any federal policy they find disagreeable in federal court, making them "roving constitutional watchdogs" over the federal government.

INTRODUCTION

Invoking a line of cases showing special solicitude toward the states in meeting Article III's jurisdictional requirements, some courts and commenta-

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tors have suggested that states have a special interest in the "power to create and enforce a legal code,"[1] threats to which give states standing "to enforce or to protect the continued enforceability of their laws" in federal court.[2] Put another way, the states suffer a concrete and particularized injury for purposes of Article III's standing requirements when the federal government undermines state law, say, by preempting a state statute. Importantly, this injury to the state's sovereign interests is distinct from other types of injury a state may allege to establish standing, including harm to the state's proprietary interests (roughly speaking, its finances) or to its quasi-sovereign interests (the "well-being of its populace").[3] Thus, standing to protect state law, which this Essay dubs "protective standing," expands state access to the federal courts, especially in litigation with the federal government.[4]

But *should* states be given special solicitude just to protect their laws in federal court? The normative case for protective standing appears to rest on two central claims.[5] The first claim is that the states *need* protective standing to fulfil their essential role in our federal system. The argument goes like this: if the states could not invoke federal jurisdiction whenever their laws are threatened, they could not pursue distinct policies, serve as the laboratories of democracy, provide a bulwark against federal tyranny, and so on. Professor Tara Leigh Grove, one of the leading proponents of protective standing, insists that "state governments *must* have the authority to enforce and to protect the continued enforceability of their laws in court; absent such a power, *States could not enforce many laws at all.*"[6]

While the first claim seeks to establish protective standing's value, the second claim seeks to defray concerns about its *costs*. The fear is that showing states special solicitude could give them too much access to the federal courts, elevating them into "roving constitutional watchdog[s]," able to liti-

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

2 Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 859 (2016). *See generally* Kenneth T. Cuccinelli, II et al., *State Sovereign Standing: Often Overlooked, but Not Forgotten*, 64 STAN. L. REV. 89 (2012); Bradford C. Mank, *State Standing in* United States v. Texas*: Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. ILL. L. REV. 211; Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017).

3 *Snapp*, 458 U.S. at 602 (providing a useful description of the grounds upon which a state might assert standing). For a different description of the interests giving rise to state standing, see generally Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995).

4 *See, e.g.*, Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 219 (2014) ("Deviating from the private [standing] analogy, . . . states have been able to use sovereignty interests as the basis for APA or related actions attacking agency determinations that purport to preempt state law.").

5 For articles defending protective state standing in some form, see *supra* note 2. Grove has provided the most robust and forceful defense of protective state standing to date, and this Essay focuses predominantly on her theory of protective standing. Although I remain unconvinced by that theory, I highly recommend her article, Grove, *supra* note 2, to anyone interested in the law governing state standing.

6 *See* Grove, *supra* note 2, at 855–56 (second emphasis added).

gate any dispute with the federal government, "no matter how generalized or quintessentially political."[7] Even defenders of protective standing acknowledge that there must be *some* limits imposed on state access to federal court.[8] But proponents of protective standing insist that this particular form of special solicitude *is* limited—that it opens the doors of the federal courthouses a crack but does not take them off of their hinges entirely. For example, Grove insists that protective standing only gives states the opportunity "to challenge federal statutes and regulations that preempt, or otherwise undermine the continued enforceability of, state law," but does not likewise enable them to challenge "the manner in which the federal executive enforces federal law."[9]

This Essay contests both of these claims, and thus, the normative case for protective state standing.[10] First, the Essay argues that proponents of protective standing have overstated the need for and value of standing to protect state law. It demonstrates that states can adequately enforce and defend their laws *without resort to protective standing*, either in state court, where federal standing rules do not apply, or in federal court, where other doctrines ensure that states can defend their laws. Canvassing all of the procedural circumstances in which state law might be threatened leads to the same conclusion: protective state standing does not appreciably enhance the states' ability to protect state law. It is, in other words, standing for nothing.

Second, while states may not need protective standing for its intended purpose, they could use it for another purpose: to attack federal law. Often, the only way for a state to "defend" its law is by challenging the federal policy that undermines it. Once we recognize this, it becomes clear that a state's professed desire to "protect" state law could serve as a pretext, i.e., as a way to establish protective standing and thereby air sundry political disagreements with the federal government in federal court. Indeed, such use (or abuse) of protective standing may be more common and more difficult to control than protective standing's defenders have recognized.

In short, protective state standing accomplishes little (or none) of what advocates use to justify it, and it invites the abuse even advocates hope to avoid.

The Essay proceeds as follows. Part I explains in greater detail why states do not necessarily need special standing rules to protect state law. It does so by surveying the universe of procedural circumstances in which state law might be threatened and demonstrating that states could adequately enforce

7 Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 272 (4th Cir. 2011). For criticisms of special solicitude regarding state standing, see, for example, Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79; Woolhandler & Collins, *supra* note 3, at 396 ("[S]tate standing has a serious potential to undermine rather than complement individual standing in constitutional cases.").

8 *See, e.g.*, Grove, *supra* note 2, at 895–99; Nash, *supra* note 2, at 230–36.

9 Grove, *supra* note 2, at 855 (emphasis omitted).

10 The Essay does not delve into the *descriptive* claim that protective standing exists as a matter of Supreme Court precedent. The main point here is to question the desirability of recognizing such standing, whether or not it is already part of standing doctrine.

and defend their laws in those circumstances without protective standing.[11] Part II then explains why the special solicitude shown by protective standing rules could give states broad latitude to attack federal law in federal court. It also suggests that defenders of protective standing have not yet devised any effective way to stop states from manufacturing protective standing and thus making every complaint they might have with the federal government a cognizable case to be heard and adjudicated by a federal court.

I. STANDING FOR NOTHING

This Part demonstrates that the case for protective state standing has been exaggerated. It does so by highlighting the ways states can enforce and defend their laws in different procedural circumstances *without resort to protective standing*. Section I.A examines circumstances in which the state is a party to litigation; Section I.B then examines circumstances in which the state is a bystander to litigation. The examination demonstrates that states are rarely (if ever) powerless to enforce or defend their laws, even if they are denied protective standing.

A. When the State Is a Party

This Section assesses a state's ability to enforce and defend its laws when the state is a named party in litigation. It discusses the state's options as plaintiff (or prosecutor), defendant, and appellant.

1. State as Plaintiff

To begin, consider the scenario where the state is the plaintiff (or prosecutor) in litigation—that is, situations in which the state initiates litigation to enforce its laws against another party.

Although the states plainly need the ability to enforce their laws in a court, that does not have to be a federal court. Indeed, in this context, states have little need for protective state standing. Against the vast majority of defendants, states can enforce their laws in their *own* courts (i.e., state courts) regardless of whether they would have standing (protective or otherwise) in *federal* court.[12] After all, state courts are not inherently bound by the same standing rules that limit access to the federal courts.[13] Put another way,

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11 As others have previously recognized, attention to procedural circumstances is critical for accurately assessing the need for any special standing rules. *See, e.g.*, Woolhander & Collins, *supra* note 3, at 397 ("Issues of state standing are highly dependent on the litigational role of the government in particular contexts.").

12 *See, e.g.*, *id.* at 392 ("When it prosecutes criminal and civil actions under its own laws in its own courts, no issue ordinarily arises as to its standing.").

13 For discussions of standing rules in state courts and how they differ from standing rules in federal courts, see, for example, Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001); Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003 (2001).

in the paradigmatic case involving the enforcement of state law, states have little need to invoke the jurisdiction of the federal courts, and, thus, little need for protective (or any other form of) standing. As the Supreme Court has recognized, states "have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the pre-emption questions such enforcement may raise are tested there."[14]

In fact, it appears the only time when a state might *need* to enforce its own laws in federal court—and thus, need to establish standing there—is when a defendant successfully removes the state's enforcement action to federal court. Congress has provided for the removal of a variety of state court cases when certain jurisdictional requirements are met, such as when the suit involves a federal question, diversity of parties, or is an action against a federal official or agency.[15]

However, the prospect of removal does not actually demonstrate a need for protective state standing. Perhaps most importantly, this is because most defendants cannot remove cases involving state-law causes of action. For example, defendants may not remove a case merely by invoking "a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case."[16] Instead, to remove a case on the basis of federal question jurisdiction, defendants must demonstrate that a "substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is 'really' one of federal law."[17] This well-pleaded complaint rule would be difficult to satisfy precisely when protective standing is thought to be most needed—namely, when a defendant challenges a state-law cause of action as preempted.

In any event, even if a defendant is able to satisfy the well-pleaded complaint rule (or is able to find some other basis for removal),[18] the *state* still does not need to establish standing to continue the case in federal court. That burden falls upon the *defendant*, who is the party invoking federal court jurisdiction. As the Seventh Circuit observed in *Collier v. SP Plus Corp.*, the defendant must "establish that *all* elements of jurisdiction—including [the

14 Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 21 (1983).

15 *See, e.g.*, 28 U.S.C. §§ 1441–45 (2012).

16 *Constr. Laborers Vacation Tr.*, 463 U.S. at 14.

17 *Id.* at 13. As discussed *infra* notes 21–23 and accompanying text, a small class of defendants (federal defendants) need not satisfy the well-pleaded complaint rule.

18 For example, under 28 U.S.C. § 1441(b), a defendant who is not a resident of the state could seek to remove the case against it on the basis of diversity jurisdiction. Although the well-pleaded complaint rule would not apply—that rule applies only when removal is based on federal question jurisdiction—other doctrines might foreclose removal. *See, e.g.*, Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84 (2005) ("Defendants may remove an action on the basis of diversity of citizenship if there is *complete* diversity between all named plaintiffs and all named defendants, and no defendant is a citizen of the forum State." (emphasis added)).

plaintiff's] Article III standing—existed at the time of removal."[19] Importantly, if the defendant fails to meet this burden—i.e., if the defendant fails to establish that the state would have standing to bring the action in federal court—the "district court *must* remand it to the state court from which it was removed,"[20] not dismiss the case. These limits on removal ensure that a state normally will be able to enforce its laws in state court without ever needing to establish standing in federal court.

Of course, there is a small subset of defendants to whom these limits do not apply: to simplify somewhat, federal officials and federal agencies.[21] These federal defendants need not satisfy the well-pleaded complaint rule.[22] Instead, to remove a case from state court, federal defendants need only allege "a colorable federal defense."[23] And against federal defendants who can satisfy this standard,[24] the state would have no *parens patriae* standing.[25]

But even *with* protective standing, the state still could not continue its case against these defendants. Defendants who can successfully remove a state case very likely also have immunity to the state action, such as sovereign immunity or Supremacy Clause immunity. The tests for removal and immunity are quite similar.[26] Hence, demonstrating "a colorable federal defense"

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19 Collier v. SP Plus Corp., 889 F.3d 894, 896 (7th Cir. 2018) (per curiam) (emphasis added).

20 *Constr. Laborers Vacation Tr.*, 463 U.S. at 8 (emphasis added); *see also* Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 78 n.4 (1991) ("If removal was improper, the case must be remanded to state court, where the requirements of Article III plainly will not apply.").

21 Congress has provided for the removal of such cases. 28 U.S.C. § 1442(a)(1) ("A civil action or criminal prosecution that is commenced in a State court and that is against or directed to [the United States or any agency thereof or any officer of the United States] . . . may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending . . . ."); *see also* Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 278 (2011) ("Building on a series of nineteenth-century statutes—the first as early as 1815—federal officer removal statutes today allow for removal to federal court of prosecutions commenced against federal officers in state courts for 'any act under color of' their office." (footnote omitted) (quoting 28 U.S.C. § 1442(a)(1) (2006))).

Congress has also provided more generous rules of removal in a limited class of civil rights cases involving defendants who are private citizens. 28 U.S.C. § 1443 (2012). However, because the state could proceed against such private citizens in federal court on the basis of its *parens patriae* standing, removal still does not create the need for protective state standing.

22 *See* Jefferson County v. Acker, 527 U.S. 423, 430–31 (1999).

23 Mesa v. California, 489 U.S. 121, 129 (1989).

24 Not all federal defendants are able to do so. In *Mesa v. California*, for example, the Supreme Court denied removal of a state manslaughter prosecution against a federal postal employee because the defendant failed to allege any federal defense against the charges. *Id.* at 139.

25 *See* Massachusetts v. Mellon, 262 U.S. 447, 485 (1923) (holding that states have no *parens patriae* standing vis-à-vis the federal government).

26 *Cf.* Collins & Nash, *supra* note 21, at 281 (explaining that "as a practical matter, removal under the federal officer statutes often spells dismissal on the merits" because "the

to a state cause of action also likely establishes the federal defendant's immunity to the state's claims. Put another way, protective standing would not enhance the state's ability to enforce its laws against federal defendants because, with or without standing, the state's case will be dismissed.[27]

Although removal coupled with immunity does prevent a state from trying and punishing federal defendants who break state law, it does not thereby deprive the state of the opportunity to defend its law in federal court. The state can defend its laws by contesting both removal and immunity in federal court. In challenging a defendant's assertion of Supremacy Clause immunity, for example, the state is, in effect, challenging preemption of the state charges against the defendant.[28] Contrary to what proponents of protective standing suggest,[29] the state does not need protective standing to mount that challenge. The deprivation of the state's interest in pursuing its claims in a particular court (state court) constitutes a cognizable injury that gives the state standing to contest removal and immunity before the federal district court.[30] The fact that the state's challenge to immunity is almost guaranteed to fail is immaterial for our purposes. Protective standing does not limit Congress's power to preempt state law. Simply put, under the Supremacy Clause, Congress is entitled to preempt state law claims against federal officials at any stage of the proceedings,[31] whether or not the state would have standing to sue those officials in federal court.

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federal defense that would allow for removal might also provide the basis for dismissal of the prosecution, based on the Supremacy Clause"). The commonality in the standards for removal and immunity may explain the apparent absence of any state criminal prosecutions against federal officers *in federal court.*

27 *See, e.g.*, Wyoming v. Livingston, 443 F.3d 1211, 1222 (10th Cir. 2006) ("Supremacy Clause immunity, when properly established, provides an absolute immunity to prosecution.").

28 *See* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2214 (2003) ("Whether a federally based conception of officer immunity may shield a federal officer from state criminal prosecution . . . is comparable to questions of preemption.").

29 *See* Grove, *supra* note 2, at 860 n.36 (noting that "the Supreme Court has not doubted state standing to appeal cases removed under [§ 1442]," but suggesting that the "State's only interest was the enforcement of state criminal law").

30 *E.g.*, Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 77 (1991) ("Petitioners' injury is clear, for they have lost the right to sue in Louisiana court—the forum of their choice."); *see also id.* at 78 ("The 'adverseness' necessary to resolving the *removal* question is supplied not by petitioners' [substantive] claims . . . but rather by petitioners' desire to prosecute their claims in state court.").

31 Indeed, it is easy to see why Congress would want to spare federal defendants from liability or even burdensome trials on those claims. *See, e.g.*, Waxman & Morrison, *supra* note 28, at 2231 ("[S]ubjecting federal officers to state criminal sanctions for carrying out their federally appointed duties could make it extremely difficult, if not impossible, for the federal government to function. Even the most dedicated federal servant would be reluctant to do his job conscientiously if he knew it could mean prison time in the state penitentiary.").

In sum, the possibility that defendants might seek to remove state enforcement actions to federal court does not demonstrate a need for protective state standing. Notwithstanding removal, a state can enforce or defend the enforceability of its laws without such standing.

States do, of course, sometimes *choose* to file suit in federal court, but that does not demonstrate that they *need* to do so, or, consequently, that they need protective state standing. Texas's challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program illustrates the point.[32]

Texas filed its lawsuit in federal court, likely the only permissible forum because it had named the United States and sundry federal officials as defendants. And because it was the party invoking the federal court's jurisdiction, Texas had to establish its own standing.[33] To meet its burden, Texas claimed two distinct injuries. First, it claimed that because DAPA had changed the legal status of some undocumented immigrants, the State would have to issue driver's licenses to DAPA beneficiaries.[34] But because the State charged license fees that did not cover the costs of issuing licenses (i.e., it subsidized driver's licenses), the State would suffer a financial loss as a result;[35] in other words, Texas claimed an injury to its proprietary interests.

Of course, the State could have avoided this first injury simply by raising its licensing fees. But the State claimed that having to change its law would constitute a *second* cognizable injury: an injury to its sovereign interests, i.e., the interests that trigger protective standing.[36]

Although Texas had to convince the court that it had standing to bring the suit, it is important to recognize that Texas did not *need* to initiate the suit in the first instance, at least if it was only interested in protecting state law or avoiding financial loss. After all, Texas could have just continued to deny driver's licenses to undocumented immigrants, including DAPA beneficiaries. To be sure, those beneficiaries (or the federal government) might have sued the state to change the state's policy. But in this scenario, as the *defendant* in the litigation, Texas would not have needed to establish standing to defend its laws or challenge DAPA (as discussed in the next subsection). That responsibility, of course, falls upon the party invoking federal jurisdiction (here, DAPA beneficiaries or the federal government).

Indeed, the State of Arizona was able to defend its own policy of denying driver's licenses to undocumented immigrants without ever establishing standing. Like Texas, Arizona's policy was threatened by a federal immigration program, Deferred Action for Childhood Arrivals (DACA). Unlike Texas, however, Arizona did not sue the federal government to challenge that program (and thus, ostensibly, defend its own law). Rather, the State

32 Texas v. United States, 787 F.3d 733 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

33 *Id.* at 747.

34 *Id.* at 748.

35 *Id.*

36 *Id.* at 749.

was sued by a group of DACA beneficiaries.[37] In contrast to *Texas v. United States*, where the Fifth Circuit devoted considerable attention to the state-standing issue (discussed below in Section II.B), standing was a nonissue in Arizona's case.[38] No one questioned Arizona's ability, *as a defendant*, to defend state law in federal court. In fact, the State put on a defense; it just lost.[39]

To be sure, a state may sometimes prefer to litigate in federal court rather than state court. Counterintuitively, a state might believe that a federal court (or a particular federal judge) would be more sympathetic to the state's claims in litigation. Or the state might want relief—such as a nationwide injunction—that only a federal court can provide.[40] But such considerations do not establish the state's need for a federal forum, and hence, a need for standing. For example, Texas did not *need* a national injunction to protect its own driver's license laws. Indeed, to the extent that states seek access to federal court for such reasons, it becomes apparent that states might use protective state standing to attack federal law rather than to defend their own—a point discussed in greater detail in Part II below.

2. State as Defendant

Now consider cases where the state finds itself on the other side of litigation, namely, as a defendant rather than a plaintiff in a lawsuit filed in federal court. Assuming the plaintiff has standing and challenges state law (say, as preempted or unconstitutional), will the state be able to defend its law from the attack?

The answer is clearly yes, whether or not the state would have standing to bring the action in federal court itself. When a state (or any other party) is dragged into federal court as a defendant, it generally does not need to worry about establishing standing to defend itself. It is the plaintiff, or, more precisely, "[t]he party invoking federal jurisdiction [that] bears the burden of establishing the[ ] elements [of standing]."[41] Or, to frame the argument slightly differently, a defendant in federal court obviously has standing

37 Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1059 (9th Cir. 2014).

38 Grove suggests that the silence on the standing issue demonstrates that all parties (and courts) agreed the state had protective standing. *See* Grove, *supra* note 2, at 894 n.213. But as discussed in subsection I.A.2 below, the more likely reason is that *defendants* do not need to establish standing (or can do so almost automatically, without resort to special solicitude) when they are sued in federal court.

39 *Ariz. Dream Act Coal.*, 757 F.3d at 1063–69 (imposing a preliminary injunction on Arizona's policy on the grounds that it was preempted by federal immigration law or alternatively that it violated equal protection).

40 For a helpful discussion of state efforts to obtain nationwide injunctions against the federal government, see Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985 (2019).

41 Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992); *see also* Warth v. Seldin, 422 U.S. 490, 498–99 (1975) ("As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial

because the threat of a judgment against it, such as an injunction ordering the defendant to take (or stop taking) some action or to pay damages, itself creates the concrete and particularized injury required for purposes of establishing the defendant's standing. Professor Matthew Hall explains:

> [D]oubts about a defendant's standing arise infrequently, because in the vast majority of cases, the defendant's standing is apparent. Any defendant against whom relief is sought will always have standing to defend, because the exposure to risk of injury from an adverse judgment is a sufficient personal stake to satisfy Article III.[42]

For example, in *Arizona v. United States*, the United States Department of Justice (DOJ) sued the state in federal court, claiming that a state statute (S.B. 1070) was preempted by federal immigration laws.[43] No one questioned Arizona's standing to defend itself against the federal government's claims or inquired into the source of such standing, even though the state's ability to initiate an antipreemption suit against the federal government would certainly have raised doubts.[44]

3. State as Appellant

Regardless of whether it would need standing before a district court as plaintiff or defendant, a state would need standing to appeal any judgment issued by that court. After all, as appellant, the state would be the party invoking the appellate court's jurisdiction.

However, a state should have little difficulty establishing standing to appeal from an adverse judgment, again without resort to protective standing. The adverse judgment itself constitutes an injury that establishes standing for the state qua appellant.[45] Any concerns about the state's ability to

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powers on his behalf." (emphasis omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

42 Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1551–52 (2012); *see also id.* at 1552 n.63 ("Indeed, the right to defend when faced with a possible deprivation is a component of due process. This right to be heard in one's own defense is necessarily a sufficient personal stake to create an Article III case or controversy." (citation omitted)). Grove acknowledges the point. *See* Grove, *supra* note 2, at 860 ("A State must often defend its laws in federal court against constitutional challenge. The State need not, of course, demonstrate standing when a private party invokes federal jurisdiction by bringing suit." (footnote omitted)).

43 Arizona v. United States, 567 U.S. 387, 393 (2012).

44 In the case, Arizona's standing was contested, but only with respect to counterclaims the State had raised against the United States. The district court dismissed those counterclaims on other grounds. *See* United States v. Arizona, No. CV 10-1413, 2011 WL 13137062, at *2 (D. Ariz. Oct. 21, 2011).

45 *See* 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902 (2d ed. 1996) ("Standing to appeal is not a problem in most cases. . . . The most obvious difference between standing to appeal and standing to bring suit is that the focus shifts to injury caused by the judgment rather than injury caused by the underlying facts."); *see also* Hall, *supra* note 42, at 1572 ("[A] defendant may establish the requisite injury for purposes

appeal from a judgment absent protective standing thus appear unfounded.[46]

B. State as Bystander

Section I.A explained why states do not need protective standing when they participate in litigation as named parties. This Section turns to those cases in which the enforceability of state law may be questioned in federal court but where the state is *not* a party; it is merely a bystander.

The paradigmatic case arises when a private plaintiff brings a state-law-based claim against another party who raises federal law as a defense. *Geier v. American Honda Motor Co.*[47] illustrates. In *Geier*, an injured driver sued Honda in federal court, claiming the manufacturer's failure to install a driver's side airbag in its car constituted a defective design under state common law.[48] Honda then moved for summary judgment, claiming the plaintiff's suit was preempted by federal regulations that sought to give manufacturers flexibility to choose which passive restraints they installed in their automobiles.[49] The district court, court of appeals, and Supreme Court all sided with Honda, finding the state tort action was preempted—and thus unenforceable.[50]

But when the state is not a party to litigation, it arguably has even *less* need for protective standing—even when its laws are challenged (as in *Geier*). First, if a lower federal court indeed finds that state law is preempted or unconstitutional, the state would not be bound by that judgment if it were not a party to the case. In practical terms, this means that the state could continue to enforce its laws in state court, which, likewise, is not bound by

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of an appeal simply by showing that he or she is subject to an allegedly incorrect lower court judgment.").

46 Grove suggests that states must rely on protective standing to appeal adverse judgments in federal court, using *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), to illustrate:

> The case arose out of a determination by a Minnesota state agency that the Jaycees, a private social club, had violated state antidiscrimination law by excluding women. The Jaycees brought suit in federal district court, seeking a declaration that the State's effort to force them to accept female members violated their First Amendment right to freedom of association. When the Jaycees prevailed in the lower court, no one doubted the State's standing to appeal to *defend its law* against that constitutional challenge.

Grove, *supra* note 2, at 860 (emphasis added) (footnotes omitted) (citing *Roberts*, 468 U.S. at 612–16, 623, 631).

However, the lack of doubt concerning the State's standing to appeal the judgment against it may simply reflect the understanding (noted in the text) that an adverse judgment gives the State standing to appeal. There is no need to recharacterize the State's concrete interest in contesting that judgment—and any orders accompanying it—as something more abstract, like an interest in protecting the enforceability of its laws.

47 529 U.S. 861 (2000).

48 *Id.* at 861.

49 *Id.*

50 *Id.*

lower federal court judgments concerning the validity of state laws.[51] Thus, while a state might have a "legitimate interest in the continued enforceability of its own statutes,"[52] it does not necessarily need to defend its laws in federal court to vindicate that interest.

Second, the state has little need to worry that its laws will go undefended before the federal courts. The state can usually rely on one of the named parties in a suit to defend its laws. For example, the plaintiff in *Geier* had a strong incentive to vigorously defend the state tort law against Honda's preemption challenge (and did so at each stage of the proceedings) because the state law provided the plaintiff's cause of action and only means of relief. And if the state fears that a party lacks the resources or incentives to defend state law adequately, the state can always subsidize that party's legal costs.[53]

Third, the state can also seek to intervene in litigation and thereby defend its laws itself before the federal court.[54] Importantly, when seeking to intervene, the state (like other intervenors) usually need not establish its own standing; it can simply piggyback on the standing of the original parties.[55] Thus, a state would not need protective standing in order to intervene in a case or controversy between other parties.[56]

There is, however, one very limited scenario in which a state's ability to intervene might be doubtful without the luxury of protective standing. Namely, if a federal court holds that a state law is invalid, but the original parties decline to appeal the judgment, the state would not be able to intervene without establishing its own standing. After all, the state could no longer piggyback on the standing of the original parties.[57] It is possible the state could have some other concrete interest upon which to assert standing, but since the state was not the target of the adverse judgment, that judgment does not give it the obvious interest in appeal it would have had as a named

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51 *See generally* Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53 (2015). A state is, of course, bound by the judgments of the United States Supreme Court.

52 Grove, *supra* note 2, at 861 (internal quotation marks omitted) (quoting Maine v. Taylor, 477 U.S. 131, 137 (1986)).

53 For a more detailed discussion on the idea of state indemnification of the legal expenses of private citizens see Robert A. Mikos, Essay, *Indemnification as an Alternative to Nullification*, 76 MONT. L. REV. 57 (2015).

54 The rules of such intervention are governed by Federal Rule of Civil Procedure 24.

55 Hall, *supra* note 42, at 1560–61 ("Courts have almost always held that the case or controversy that exists between the original parties satisfies Article III's jurisdictional requirement, and that intervenors need not independently establish Article III standing.").

56 It would, of course, need to satisfy the other requirements for intervention set forth by Federal Rule of Civil Procedure 24, but those requirements should be relatively easy to meet when state law has been challenged in the case.

57 *See* Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651 (2017) ("[A]n intervenor . . . must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing."); Hall, *supra* note 42, at 1561 ("[I]ntervenors . . . must independently satisfy Article III standing if they seek to litigate issues beyond those raised by the original parties, or if the case or controversy between the original parties ceases to exist . . . ." (footnote omitted)).

party (as discussed in subsection I.A.3 above). The judgment, for example, does not require the state to do (or not do) anything; indeed, as noted earlier, it probably does not even bind the state. Thus, in this scenario, it is plausible that the state's only interest in pursuing the appeal is to protect the continued enforceability of a state law in other cases.

Considered in context, however, the threat this scenario poses to the state's interest in protecting its laws is minimal. First, cases in which the original parties would abandon their appeal following an adverse lower court judgment are uncommon (to put it mildly). For the reasons discussed earlier, at least one of the original parties in litigation usually has the incentive to defend state law, all the way through appeal. This may be why intervenors are "[o]nly rarely . . . required to establish standing in their own right."[58]

Grove cites but a single case, *Maine v. Taylor*,[59] in which it appears that a state needed to establish standing as intervenor to appeal a lower court judgment invalidating one of its laws. The case involved some peculiar procedural twists. It began as a federal criminal prosecution of a Maine baitfish supplier in federal court.[60] The United States charged the defendant with violating the Lacey Act, a congressional statute that, in simplified terms, makes it a federal crime to transport wildlife in violation of state law.[61] Federal prosecutors accused the defendant of violating a Maine statute that banned the importation of live baitfish into the state.[62] The defendant moved to dismiss the prosecution in district court, arguing that the Maine law forming the basis for the federal prosecution was unconstitutional under the Dormant Commerce Clause.[63] Notified of the attack against its law, the State of Maine sought to intervene in the case, and its request was granted.[64]

Before the district court, the United States and Maine successfully defended the state law.[65] At that point, the defendant pled guilty, but he reserved the right to appeal the court's dismissal of his constitutional challenge to the Maine law. On appeal, both the United States and Maine again defended the constitutionality of the state law, but the U.S. Court of Appeals for the First Circuit reversed the district court's judgment.[66] It found that the Maine law violated the Dormant Commerce Clause, and it therefore dismissed the federal charges against the defendant.[67] At this point, the United States declined to appeal to the Supreme Court.[68]

What makes the case noteworthy, for our purposes, is that the Supreme Court allowed the State of Maine to appeal the First Circuit's judgment.

58 Hall, *supra* note 42, at 1560.
59 477 U.S. 131 (1986); *see* Grove, *supra* note 2, at 860–78 (discussing the case).
60 *Taylor*, 477 U.S. at 132.
61 *Id.* at 132–33.
62 *Id.*
63 *Id.*
64 *Id.* Notification and intervention were provided for by 28 U.S.C. § 2403(b) (1982).
65 *Taylor*, 477 U.S. at 133.
66 *Id.*
67 *Id.*
68 *Id.*

Grove suggests that since the United States had (apparently) abandoned the case, Maine had to establish its own standing qua intervenor to appeal.[69] Furthermore, she suggests that Maine did so by asserting no more than an interest in protecting the continued enforceability of its baitfish law.[70] Indeed, language in the Court's opinion—which reversed the First Circuit decision and upheld the state law—suggests as much. The Court noted that "a State clearly has a legitimate interest in the continued enforceability of its own statutes."[71] Thus, Grove suggests that *Maine v. Taylor* demonstrates not only the states' need for protective standing—after all, Maine's law would have been deemed unconstitutional by a federal court had the Supreme Court refused to hear Maine's appeal—but also the Supreme Court's endorsement of the doctrine.

But additional quirks in an already quirky case counsel against drawing such strong inferences from *Maine v. Taylor* about the states' need for, or even the Court's endorsement of, protective state standing. For example, even though the federal government had declined to appeal the First Circuit's judgment, it had not truly abandoned the case. The Court noted that the federal government "does not intend to seek dismissal of the indictment if Maine prevails in this Court."[72] This helps explain why the Court found that the "controversy . . . clearly remains live notwithstanding the Federal Government's decision to abandon its own appeal";[73] after all, reversal of the First Circuit's judgment would automatically reinstate the defendant's guilty plea. In addition, there are hints in the opinion that the Court may have considered Maine to be something more than a mere intervenor in the case—almost as if the State stood in for the federal government as prosecutor of the defendant. Most notably, the Court declared that "if the judgment of the Court of Appeals is left undisturbed, the State will be bound by the conclusive adjudication that its import ban is unconstitutional."[74] As discussed above, that statement would not be accurate if Maine really had been only an intervenor: it could have initiated its own state law prosecution against the defendant in state court, notwithstanding a lower federal court's judgment that the state law is unconstitutional. For all of these reasons, not to mention the rarity of the scenario it poses, *Maine v. Taylor* seems a particularly slender reed on which to base the case for protective state standing.

II. Standing to Attack Federal Law

Although states do not need special solicitude to protect state law, such solicitude would give them greater opportunities to appear in federal court for a very different purpose: to attack *federal* law. This Part explores this over-

69 *See* Grove, *supra* note 2, at 861.

70 *Id.*

71 *Taylor*, 477 U.S. at 137.

72 *Id.* at n.7.

73 *Id.* at 137.

74 *Id.* This statement appears right before the Court notes the State's "interest in the continued enforceability of its [law]." *Id.*

looked downside of protective state standing. It suggests that recognizing standing based solely on purported threats to state law gives states nearly unfettered ability to challenge federal policies in federal courts. What is more, there is little that federal courts can do to curb such abuse of this special solicitude.

A. Protecting State Law Means Attacking Federal Law

Proponents of protective state standing commonly insist that it gives states standing only to protect state law.[75] But what those advocates fail to acknowledge is that "protecting state law" almost of necessity entails "attacking federal law." In other words, they are two sides of the same coin. Giving states standing to "protect" state law thus necessarily means giving them standing to "attack" federal law as well.

The connection between protecting state law and attacking federal law is most obvious in preemption cases. When state law is challenged as preempted, the state's interest in preserving its law—ironically, the same interest behind protective state standing—is *utterly irrelevant* for the merits decision.[76] Namely, when a court is trying to decide whether a state law has been preempted by federal law, the court pays no attention whatsoever to the state's interests in preserving that law.[77] Instead, the court focuses exclusively on Congress's interest in blocking state law.[78] Thus, to defeat a preemption challenge stemming from a federal law, the state must challenge the federal law—i.e., to deny that Congress (or an agency) had the power to pass it in the first instance.

If it is to accomplish anything, then, protective state standing must enable states to mount this attack on federal law, e.g., to challenge the constitutionality of federal actions that purport to preempt state law.[79] Indeed, many of the cases on which proponents of protective state standing base their

75 *See, e.g.*, Grove, *supra* note 2, at 854–55 ("States are entitled to 'special solicitude' in the standing analysis *in only one context*: when they seek to enforce or defend state law." (emphasis added)).

76 *See* Robert A. Mikos, *Making Preemption Less Palatable: State Poison Pill Legislation*, 85 GEO. WASH. L. REV. 1, 12 (2017) [hereinafter Mikos, *Making Preemption Less Palatable*] ("[W]hen it comes to making preemption decisions, our current system utterly fails to balance the interests of the states against those of the federal government. It focuses almost exclusively on one side of the scale, namely, Congress's interest in blocking state law, and ignores the other side, the states' interest in preserving their regulatory authority.").

77 *Id.* As the Supreme Court has surmised, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Free v. Bland, 369 U.S. 663, 666 (1962).

78 Mikos, *Making Preemption Less Palatable*, *supra* note 76, at 12.

79 The state could also challenge an interpretation of federal law, to defuse any potential conflict between that law and the state's own law. But seeking to narrow the application of federal law is itself an "attack" of sorts. Like a constitutional challenge, it narrows the application of the federal law. *E.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (demur-

argument for special solicitude involve state attacks on federal laws. In these cases, concern for the ongoing enforceability of state law is often no more than an afterthought (if it is implicated at all). Consider *Missouri v. Holland*.[80] In the case, the State of Missouri challenged a federal treaty that regulated the killing of migratory birds that passed through the state.[81] Grove characterizes this as a quintessential case of a state protecting the continued enforceability of state law. For example, Grove writes that "Missouri had argued that the Migratory Bird Treaty Act preempted—and thereby rendered unenforceable—its state hunting laws."[82]

But *Missouri v. Holland* was not *really* a case about preemption or protecting the enforceability of a specific state law. Tellingly, the State itself does not mention "preemption" in its brief to the Court[83]—that just appears to be Grove's characterization of the State's claims. Furthermore, the Court only alludes to state law in passing a few times in its opinion, never discussing its content in any detail (odd for any preemption case).[84] It would be more accurate to say that *Missouri v. Holland* is a case about *power*, specifically, the scope of Congress's treaty power and the scope of the powers reserved to the states by the Tenth Amendment. The Court even describes Missouri's central claim largely in this way when it writes:

> The ground of the bill is that the [federal] statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes.[85]

Interestingly, Grove herself has suggested that states do *not* have standing to raise such broad claims about institutional power against the federal government.[86] The point here is to highlight the tension in these two positions and to recognize that these two interests of the state—the interest in

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ring on a constitutional challenge to the Age Discrimination in Employment Act, but still interpreting the statute not to apply to state judges).

80 252 U.S. 416 (1920).

81 *Id.* at 430–31.

82 Grove, *supra* note 2, at 870.

83 Brief of Appellant, *Holland*, 252 U.S. 416 (No. 609), *reprinted in* 20 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 303 (Philip B. Kurland & Gerhard Casper eds., 1975).

84 *Holland*, 252 U.S. at 431 (noting the State's claim that the treaty "contravene[s] its will manifested in statutes"); *id.* at 434 ("The State . . . founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute.").

85 *Id.* at 431.

86 Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. (forthcoming 2019) (manuscript at 5 n.18), https://ssrn.com/abstract=3134464 ("[G]overnment institutions should not have special standing to assert an 'injury' to their constitutional powers and duties. Government entities have no greater interest in the structural Constitution than any other member of society—and thus suffer no 'particularized' injury when their constitutional powers and duties are threatened." (emphasis omitted)).

preserving a particular law and the interest in preserving the power to enact such laws—may be inextricably intertwined and thus impossible to disentangle for standing purposes.

Once we recognize that protective standing enables states to attack federal laws, the danger posed by this form of special solicitude becomes apparent: states could use their interest in "defending state law" as a pretext for airing their political disagreements with sundry federal policies in federal court. The Fourth Circuit noted the danger of broad protective state standing when it warned that "each state could become a roving constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state's power to litigate in federal court."[87]

B. Limiting Attacks on Federal Law Is Unworkable

Furthermore, given the apparent ease with which states can invoke protective standing, this danger is potentially unlimited. For one thing, protective standing would enable states to challenge more than just federal actions that threaten to preempt state law, as that term is properly understood.[88] For example, Grove suggests that states may challenge federal laws "that preempt, *or otherwise undermine the enforceability of*, state law."[89] In fact, many of the cases she cites as precedent for protective state standing did not involve preemption.[90] In cases like *Missouri v. Holland*, *Colorado v. Toll*, and *Gonzales v. Oregon*,[91] federal laws undermined state law in a different sense: by making state law superfluous, *not unenforceable*. In essence, those federal laws banned activities the states had authorized—the hunting of migratory birds,[92] chauffeuring of tourists around a national park,[93] and prescribing of lethal overdoses of controlled substances.[94] The states could have continued to authorize these activities for purposes of state law, notwithstanding the fed-

87 Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 271–72 (4th Cir. 2011).

Some readers might welcome expanded federal jurisdiction, or at least, might not view it as much of a "downside." But many proponents of protective state standing appear to favor imposing some limits on state standing. *See, e.g.*, Grove, *supra* note 2, at 856 ("[A] more expansive definition of special state standing might threaten to erode the limits on the Article III judicial power—by enabling every dispute between a State and the federal government to wind up in court."). The point here is that they may get more than they bargained for (or want) with protective state standing.

88 *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 (2000) (recognizing that preemption is the equivalent of the repeal of a state statute).

89 Grove, *supra* note 2, at 857 (emphasis added).

90 *Id.* at 864–68, 873–76 (discussing cases).

91 Gonzales v. Oregon, 546 U.S. 243 (2006); Colorado v. Toll, 268 U.S. 228 (1925); Missouri v. Holland, 252 U.S. 416 (1920).

92 *Holland*, 252 U.S. 416.

93 *Toll*, 268 U.S. 228.

94 *Gonzales*, 546 U.S. 243.

eral bans.[95] The federal bans would only have deterred private parties from taking full advantage of the states' tolerance.

It is also important to recognize that with protective state standing, states could attack a variety of disagreeable federal actions, and not just acts of Congress or formal regulations, as proponents seem to suggest.[96] After all, sundry executive actions—including executive orders and even enforcement decisions—could "undermine" state law, especially in the broad sense proponents use that term (as just described).[97]

Furthermore, if some disagreeable federal policy did not undermine any existing state law, the state could always pass a new one that conflicts with the federal law. The threat posed to its law would thereafter give the state access to federal courts to attack the federal statute, regulation, order, enforcement proceeding, etc., all on the guise of "protecting" state law.

Indeed, Virginia recently used this ploy to wage a challenge to the Affordable Care Act (ACA) in federal court. It passed the Virginia Health Care Freedom Act (VHCFA), which declared that "[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage."[98] Citing the tension between the VHCFA and the ACA's individual mandate, Virginia claimed it had protective standing to challenge the constitutionality of the ACA in federal court.[99]

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95 Indeed, insofar as these state laws merely authorized activity, Congress could not have preempted them without violating the anticommandeering rule. *See* Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018) (holding that a federal law "prohibiting state authorization of sports gambling[ ] violates the anticommandeering rule"); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009) [hereinafter Mikos, *On the Limits*] ("[W]hen state law simply permits private conduct to occur[,] . . . preemption of such a law would be tantamount to commandeering."). And if these federal laws did command the states, the states could have challenged them without protective standing. Such commands would have injured the states' *proprietary* interests, e.g., because the states would have had to spend money to administer them. *See, e.g.*, Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 16 (2004) (noting that commandeering imposes financial costs on the states).

96 *Cf.* Grove, *supra*, note 2, at 857 ("States have no special interest in the federal executive's enforcement of federal law."). Not all proponents of protective standing would even seek to limit its availability in challenges to executive enforcement policies. *See* Nash, *supra* note 2 (suggesting that states have protective standing to challenge enforcement of federal policy when Congress blocks them from making their own).

97 For discussion of the executive branch's role in preemption (and federalism more generally), see, for example, Jessica Bulman-Pozen, Essay, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029 (2018); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011).

98 Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 267 (4th Cir. 2011) (alteration in original) (omission in original) (internal quotation marks omitted) (quoting VA. CODE ANN. § 38.2-3430.1:1 (West 2018)).

99 *See id.*

To be sure, the ploy did not work for Virginia. In *Virginia ex rel. Cuccinelli v. Sebelius*, the Fourth Circuit recognized what the Commonwealth was trying to do and the danger it posed:

> To permit a state to litigate whenever it enacts a statute declaring its opposition to federal law, . . . would convert the federal judiciary into a 'forum' for the vindication of a state's 'generalized grievances about the conduct of government.' . . . [A] state could acquire standing to challenge *any* federal law merely by enacting a statute—even an utterly unenforceable one—purporting to prohibit the application of the federal law.[100]

Noting that there was no consequence for violating the VHCFA,[101] the court suggested that the threat posed by the ACA to this particular Virginia statute did not create a cognizable injury for purposes of establishing the Commonwealth's standing:

> Virginia lacks standing to challenge the individual mandate because the mandate threatens no interest in the 'enforceability' of the VHCFA.
>
> Contrary to Virginia's arguments, the mere existence of a state law like the VHCFA does not license a state to mount a judicial challenge to any federal statute with which the state law assertedly conflicts. Rather, only when a federal law interferes with a state's exercise of its sovereign 'power to create and enforce a legal code' does it inflict on the state the requisite injury-in-fact.[102]

Grove has approved of a similar limitation, suggesting that protective standing "most reasonably applies only to regulatory, not declaratory, state laws."[103] According to Grove, the latter type of law is one that "merely declares that private citizens are not subject to legal requirements, and does not seek to regulate private citizens."[104] She justifies the distinction as follows:

> When a federal statute or administrative action purports to preempt a state law, that decision has an impact much like a judicial decision striking down the state law on constitutional grounds; the State is hindered in the enforcement of its law against future private parties. . . .
>
> By contrast, the State does not have the same interest in a law that merely declares private parties to be exempt from legal requirements. A State need not enforce such a law through the federal or state court system; nor is any private party likely to challenge a 'declaratory' law. In short, a State need not have standing—against a private party or the federal govern-

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100 *Id.* at 271 (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

101 *See id.* at 267 ("[T]he district court recognized that the VHCFA was only 'declaratory [in] nature . . . .'" (alteration in original) (quoting Virginia *ex rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 605 (E.D. Va. 2010), *rev'd* 656 F.3d 253)).

102 *Id.* at 269 (citation omitted) (emphasis omitted) (first quoting Maine v. Taylor, 477 U.S. 131, 137 (1986); and then quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982)).

103 Grove, *supra* note 2, at 877.

104 *Id.* (emphasis omitted).

> ment—to protect the 'continued enforceability' of a law that will never be enforced.[105]

Confining protective standing to the defense of "regulatory" or "enforceable" state laws, however, is unlikely to stop the states from manufacturing protective standing. For one thing, the practical challenge of distinguishing between state laws that should give rise to protective standing and those that should not may prove insurmountable. The criteria employed by the *Virginia ex rel. Cuccinelli* court, emphasizing the need for enforcement,[106] is a slippery one. In other contexts, courts have struggled to define with clarity what it means to "enforce" a law.[107] And notwithstanding the Fourth Circuit's summary conclusion that Virginia had "no interest in the 'enforceability' of the VHCFA,"[108] it is possible to conceive of a scenario where the state would have had such an interest. For example, suppose that a local government mandated the purchase of health insurance; in that scenario, the state might have invoked the VHCFA to preempt the local mandate, and the local government might have invoked the ACA to preempt the VHCFA.

The distinction between "declaratory" and "regulatory" laws may prove no less illusory. Consider again *Missouri v. Holland.* As already noted, Grove has suggested that the State's standing in the case was created by the conflict between Missouri's laws governing migratory birds and the Federal Migratory Bird Treaty Act. Neither Grove nor the Court discusses the content of the supposedly preempted state law in any detail, but it appears that the state law at issue may have done no more than assert the state's title to migratory birds.[109] If so, it is difficult to see why the threat to the state's law in *Missouri v. Holland* created the interest needed for protective standing, but the threat

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105 *Id.* at 878 (footnote omitted).

106 *See Virginia ex rel. Cuccinelli*, 656 F.3d at 269.

107 For example, a provision of the Federal Controlled Substances Act gives state officials immunity from federal prosecution for any actions taken while "engaged in the *enforcement*" of state drug laws. 21 U.S.C. § 885(d) (2012) (emphasis added). Section 885(d) has generated conflicting opinions about whether state employees are "enforcing" state law and can thus invoke immunity when they return wrongfully seized marijuana to a private citizen or operate a marijuana dispensary or safe injection site. *See* Alex Kreit, *Safe Injection Sites and the Federal "Crack House" Statute*, 60 B.C. L. REV. 413 (2019) (discussing application to safe injection sites); Mikos, *On the Limits*, *supra* note 95, at 1457–58 (discussing confusion over application of § 885(d) to state marijuana reforms).

108 *Virginia ex rel. Cuccinelli*, 656 F.3d at 269 (quoting Maine v. Taylor, 477 U.S. 131, 137 (1986)).

109 Missouri v. Holland, 252 U.S. 416, 434 (1920) ("The State . . . founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute."). A section of Missouri law in effect circa 1919 provides, in relevant part, that "[t]he ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the state of Missouri, not now held by private ownership, legally acquired, is hereby declared to be in the state . . . ." MO. REV. STAT. § 5581 (1919). Other provisions of state law did arguably regulate such birds, e.g., by prohibiting the killing of them without the state's permission, *see id.* §§ 5582, 5590, but the Court did not refer to those more regulatory provisions in its opinion, and so it is unclear whether any of them actually played a role in its standing analysis.

to the state's law in *Virginia ex rel. Cuccinelli* did not. After all, both seem to do no more than *declare* that the federal government may not regulate a particular subject—wild birds or insurance free riders.

Another reason this limitation fails to cabin protective standing is that most (if not all) "declaratory" state laws (or laws not requiring enforcement) could be redrafted as "regulatory" laws that require administration. To illustrate, suppose Virginia had passed a law providing a state subsidy to any state resident ordered by the Federal Internal Revenue Service to pay a tax penalty for refusing to buy minimum health insurance. (Or to make the example more generalizable, imagine a state law that indemnifies residents for the costs of any fines the federal government imposes for violations of federal laws the state finds disagreeable.) This version of Virginia's law would require some "enforcement"—for example, state officials would need to decide whether a given resident claiming the subsidy actually met the law's requirements. Under *Virginia ex rel. Cuccinelli* and Grove's regulatory/declaratory formula, then, passage of such a law would give the state the cognizable interest it needs to establish protective standing and proceed with its claim that the ACA individual mandate was unconstitutional. Of course, the federal court might find that the Virginia statute as rewritten is *preempted*.[110] It seems reasonable to suppose that Congress would not want a state subsidizing actions the federal government is seeking to curb (like foregoing health insurance). But that realization does not deprive the state of *standing* to make the claim anyway, and if Virginia convinces a court that the federal law is unconstitutional, the preemption concern dissolves.

Nor would other requirements, like causation, necessarily stop states from manufacturing protective standing to attack federal law. Under the causation requirement, the party invoking federal jurisdiction must allege that the other party in the dispute was the primary cause of its (cognizable) injury—i.e., that the party invoking federal jurisdiction did not inflict that injury on itself.

When the state alleges an injury to its proprietary interests, the causation requirement arguably does prevent the state from manufacturing standing. *Pennsylvania v. New Jersey* nicely illustrates this principle.[111] Pennsylvania sued New Jersey in the Supreme Court's original jurisdiction, claiming that New Jersey's discriminatory taxes on nonresidents (*viz.*, Pennsylvanians) who earned income in New Jersey violated the Constitution.[112] For purposes of standing, Pennsylvania claimed that New Jersey's law had deprived the Commonwealth of tax revenue, an injury to its proprietary interests, because Pennsylvania law allowed Pennsylvanians to deduct the taxes they paid to

110 *See* Mikos, *supra* note 53, at 71 ("[A] state could not indemnify the fines imposed by the federal government on convicted [federal] offenders. Indemnification of such fines would almost certainly be preempted because it would encourage the commission of federal offenses . . . .").

111 Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (per curiam).

112 *See id.* at 661–63.

New Jersey when calculating their tax liability to Pennsylvania.[113] The Court, however, found that Pennsylvania had caused its own financial injury and thus lacked standing: "No State can be heard to complain about damage inflicted by its own hand."[114] After all, as the Court noted, Pennsylvania was not required to let its own residents deduct the taxes they paid to New Jersey.

However, applying this particular limitation proves far more challenging when the state alleges an injury to its sovereign interests. Protective standing suggests that a state has a cognizable interest in preserving its laws, not just preserving its finances. Hence, telling a state to change its laws (the solution in *Pennsylvania v. New Jersey*) does not relieve all of the state's injuries: it just substitutes one injury (changing a law) for another one (suffering a financial loss).

Texas v. United States illustrates the weakness of the causation requirement for protective standing.[115] In the case, as discussed above, Texas challenged DAPA, claiming that under the policy, it would be forced to issue driver's licenses to some undocumented immigrants, at a financial loss to the state. The federal government claimed (correctly) that Texas had inflicted this financial injury on itself, by subsidizing the costs of driver's licenses.[116] Citing *Pennsylvania v. New Jersey*, the federal government suggested that Texas could avoid this financial injury by raising its fees to cover the full costs of issuing licenses.[117] The court, however, rejected this suggestion:

> The flaw in the [federal] government's reasoning is that Texas's forced choice between incurring costs and changing its fee structure is itself an injury: A plaintiff suffers an injury even if it can avoid that injury by incurring other costs. And *being pressured to change state law constitutes an injury.*[118]

Perhaps to assuage concerns raised by its dilution of the causation requirement, the Fifth Circuit hinted that it would scrutinize the State's motives to prevent it from manufacturing its own standing. In the case, it just found that Texas's motives were pure: "Texas's forced choice between incurring costs and changing its laws is an injury because those laws exist for the administration of a state program, not to challenge federal law, and *Texas did not enact them merely to create standing.*"[119]

But the court failed to explain how it reached this conclusion with respect to Texas's law, let alone, how it would discern pretext in future cases.

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113 *See id.* at 663.

114 *Id.* at 664.

115 Texas v. United States, 787 F.3d 733 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

116 *Id.* at 749; *see also* Brief for Professor Walter Dellinger as Amicus Curiae in Support of Petitioners at 8, United States v. Texas, 137 S. Ct. 285 (2016) (No. 15-674), 2016 WL 909413, at *8 (arguing that "voluntary choices by Texas, rather than any federal action, are the legally cognizable cause of any increased state expenditures on driver's licenses" following DAPA).

117 *Texas*, 787 F.3d at 749.

118 *Id.* (emphasis added) (footnote omitted).

119 *Id.* (emphasis added).

Commentators have fared no better in their attempts to elucidate this test. For example, Professor Bradford Mank has suggested that states should have standing to defend only those laws passed before adoption of the challenged federal policy.[120] However, this limitation is both underinclusive and overinclusive. It is underinclusive because it would allow states to defend laws passed *in anticipation of* federal policy, even laws adopted solely to give the states standing to challenge that policy. It is overinclusive because it would stop states from defending laws passed after adoption of the federal policy, even if those laws were adopted without any regard for standing. Ultimately, I see no way out of the predicament. If a state has a cognizable interest in protecting its law, the doctrine of causation either has too few teeth, as in *Texas v. United States*, or too many, if a court adheres to *Pennsylvania v. New Jersey*.

CONCLUSION

This Essay has made the case against protective state standing. Contrary to the claims of its proponents, states do not actually need protective standing to enforce or defend their own laws. It is, in other words, standing for nothing. Indeed, states are more likely to use this form of special solicitude for an altogether different and less benign (to most) purpose: to attack federal law. In particular, protective state standing could enable states to challenge in federal court virtually any federal policy they find disagreeable, making them "roving constitutional watchdog[s]"[121] over the federal government. And apart from rejecting this form of special solicitude altogether, there may be little the federal courts can do to stop them.

120 *See* Mank, *supra* note 2, at 224 ("Texas had not manufactured standing because the Texas legislature had adopted subsidized licenses a year before the government announced the DACA program and three years before DHS promulgated DAPA.").

121 Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253, 272 (4th Cir. 2011).