

# WHO'S LEFT STANDING FOR STATE SOVEREIGNTY?: PRIVATE PARTY STANDING TO RAISE TENTH AMENDMENT CLAIMS

**Abstract:** Although the U.S. Supreme Court in recent years has reaffirmed the substantive force of the Tenth Amendment, it has not resolved the fundamental question of who has standing to raise claims under the Amendment. The Court's reticence on the matter has sparked a rapidly intensifying split between those U.S. courts of appeals that allow private parties to raise claims under the Tenth Amendment and those—currently the majority—that allow only states to raise Tenth Amendment claims. This Note argues that circuit courts denying private parties standing erroneously rely on dicta from the Supreme Court's 1939 decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, and that other Supreme Court precedent implicitly recognizes private party Tenth Amendment standing. Because recent Supreme Court Tenth Amendment jurisprudence, along with the history and text of the Tenth Amendment, indicate that the Amendment safeguards an individual right, this Note concludes that private parties should be able to assert Tenth Amendment claims whenever they demonstrate distinct, personal harm and satisfy other traditional standing requirements.

## INTRODUCTION

Consider a situation where Congress passes legislation forbidding individuals convicted of certain crimes from carrying firearms.<sup>1</sup> As a result, a local police chief in a small town a thousand miles away finds himself forced to fire a veteran officer of twenty years because she has an arrest record for committing an assault thirty years earlier.<sup>2</sup> The assault conviction is covered by the federal legislation, and the officer cannot perform her duties without carrying a firearm.<sup>3</sup> The officer complains that the federal government has infringed upon the state's right to manage its own police department and militia, and thus vio-

---

<sup>1</sup> In 1999 the U.S. Court of Appeals for the Seventh Circuit decided a case, *Gillespie v. City of Indianapolis*, resembling the facts of this hypothetical. See 185 F.3d 693, 697–98 (7th Cir. 1999).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

lated the Tenth Amendment.<sup>4</sup> The police chief similarly complains under the same Amendment that the federal government has commandeered his office by requiring him to enforce the Act and dictating the make-up of his police force.<sup>5</sup> The state attorney general, however, supports the federal legislation and says that the state has no objection to the law.<sup>6</sup> Which of these parties has standing to have a complaint heard before the courts is a question that has plagued the U.S. courts of appeals for decades.<sup>7</sup>

For over 200 years, the Tenth Amendment has stood as a bulwark, alternately nominal and substantive, protecting the states and their citizens against encroachment by the federal government.<sup>8</sup> The Tenth Amendment succinctly prescribes that, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>9</sup> In the decades since its adoption, American courts have vigorously debated the substantive meaning of this Amendment,<sup>10</sup> and more fundamentally,

<sup>4</sup> See *id.* The militia claim is derived from the fact that as a local police officer, the officer is subject to being called to service in the National Guard, the state’s “militia.” See *id.* at 697.

<sup>5</sup> See *id.* at 697–98; see also *Printz v. United States*, 521 U.S. 898, 904 (1997) (granting standing, implicitly, to local chief law enforcement officers (“CLEOs”) to challenge a federal act for commandeering their office in violation of the Tenth Amendment).

<sup>6</sup> See *Gillespie*, 185 F.3d at 703.

<sup>7</sup> See *id.*; see also *infra* notes 123–223 and accompanying text. In *Gillespie*, the police officer was granted standing to bring his Tenth Amendment claim. See 185 F.3d at 703. The current majority of circuit courts, however, would deny such standing. See *infra* notes 160–215 and accompanying text. The U.S. Supreme Court, in its 1997 decision in *Printz v. United States*, implicitly recognized CLEOs’ standing to bring a Tenth Amendment claim over being “impressed” into federal service, although there the states did not oppose the CLEOs’ position. See 521 U.S. at 904, 933.

<sup>8</sup> See U.S. CONST. amend. X; *New York v. United States*, 505 U.S. 144, 181–82 (1992); *United States v. Darby*, 312 U.S. 100, 124 (1941); *Hammer v. Dagenhart*, 247 U.S. 251, 275–76 (1918); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 313 (3d ed. 2006). Supreme Court decisions have identified three main values of federalism, which the Tenth Amendment protects: (1) decreasing the likelihood of federal tyranny; (2) enhancing democracy by providing government that is closer to the people; and (3) as first articulated by Justice Brandeis, allowing states to function as laboratories for new ideas. See CHERMERINSKY, *supra*, at 313–15 (citing *New State Ice Co. v. Lieberman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>9</sup> U.S. CONST. amend. X.

<sup>10</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *Hammer*, 247 U.S. at 275–76; *Gibbons v. Ogden*, 22 U.S. 1, 196–97, 206 (1824). One major point of contention surrounds the question of whether it is the judiciary’s role to enforce the Tenth Amendment as a substantive limit on the power of Congress. See CHERMERINSKY, *supra* note 8, at 316. Although some legal theorists argue that states’ Tenth Amendment interests are represented in the national political process, others respond that the national political process protects only national voter interests, not those related to state or local governments. *Id.*; see also

who may enforce it.<sup>11</sup> This latter question has recently pitted the circuit courts in a sharp, rapidly crystallizing disagreement.<sup>12</sup> Six circuit courts of appeals now hold the increasingly popular majority position that only states and not private parties may enforce the Tenth Amendment.<sup>13</sup> Two circuit courts of appeals hold the once-majority position that private party standing to assert claims under the Tenth Amendment is permissible.<sup>14</sup> Further muddying the waters, even the circuit courts rejecting private party Tenth Amendment standing disagree over whether to grant an exception for private parties who bring a claim that aligns with state interests.<sup>15</sup>

The U.S. Supreme Court in recent years has made apparent that it will utilize the Tenth Amendment to restrict the power of the federal government,<sup>16</sup> but it has left in place a vague and contradictory precedent regarding private party standing under the Amendment.<sup>17</sup> Given the resurgence of the Tenth Amendment as a substantive force in

---

Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 952 (2001) (asserting that the judiciary should enforce federalism principles); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 588 (1954) (arguing that Congress—through the political process—is the branch entrusted with safeguarding federalism principles). This latter argument has had increasing intuitive appeal in the modern age when national elections focus on national issues and senators are elected by popular vote and no longer directly chosen by the states. See CHEMERINSKY, *supra* note 8, at 316.

<sup>11</sup> See *United States v. Parker*, 362 F.3d 1279, 1285 (10th Cir. 2004); *Gillespie*, 185 F.3d at 703; see also *infra* notes 123–223 and accompanying text.

<sup>12</sup> Compare *United States v. Bond*, 581 F.3d 128, 137 (3d Cir. 2009), *cert. granted*, 78 U.S.L.W. 3629 (U.S. Oct. 12, 2010) (No. 09-1227), and *United States v. Hacker*, 565 F.3d 522, 526 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 302 (2009), and *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005), with *Gillespie*, 185 F.3d at 703.

<sup>13</sup> Those courts are the U.S. Courts of Appeals for the First, Second, Third, Eighth, Ninth and Tenth Circuits. *Bond*, 581 F.3d at 137; *Hacker*, 565 F.3d at 526; *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009); *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, 462 F.3d 219, 234 (2d Cir. 2006); *Medeiros*, 431 F.3d at 34; *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761 (10th Cir. 1980).

<sup>14</sup> Those courts are the U.S. Courts of Appeals for the Seventh and Eleventh Circuits. *Gillespie*, 185 F.3d at 703; *Atlanta Gas Light Co. v. U.S. Dep't of Energy*, 666 F.2d 1359, 1368 n.16 (11th Cir. 1982).

<sup>15</sup> See *Bond*, 581 F.3d at 137–38; *Medeiros*, 431 F.3d at 34; *Parker*, 362 F.3d at 1284–85.

<sup>16</sup> See, e.g., *New York v. United States*, 505 U.S. at 157, 175; *Gregory*, 501 U.S. at 457–58.

<sup>17</sup> See *Printz*, 521 U.S. at 904, 933 (granting standing, implicitly, to chief local law enforcement officers); *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144 (1939) (making the ambiguous statement that absent state officers, the private party appellants bringing the claim lacked standing); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585 (1937) (granting standing implicitly).

American law,<sup>18</sup> deciding who may invoke the Amendment has become increasingly important. The time is ripe for a Supreme Court ruling to stop the splintering of the circuits and definitively decide private party standing under the Tenth Amendment.<sup>19</sup>

The circuit courts in the majority position have uniformly cited the Supreme Court's 1939 decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority* ("TVA")<sup>20</sup> as binding precedent prohibiting private party Tenth Amendment standing.<sup>21</sup> Yet the circuit courts in the minority position have persuasively reasoned that standing principles and Supreme Court precedent, including *TVA*, do not foreclose private party Tenth Amendment standing.<sup>22</sup> Other Supreme Court precedent on the question of Tenth Amendment standing implicitly supports this minority position, as do foundational principles of judicial review and standing.<sup>23</sup> Even some of the circuit courts in the majority position have implicitly questioned the binding power of *TVA*'s language.<sup>24</sup> Additionally, modern Tenth Amendment Supreme Court jurisprudence, along with scholarly opinion, not only has reaffirmed the substantive role of the Tenth Amendment, but also has delineated its specific protection of individual rights.<sup>25</sup> Accordingly, this Note argues that private parties are potentially invoking their own rights when bringing a Tenth Amendment claim, making them the correct parties to bring the claim and worthy of standing.<sup>26</sup> With the Tenth Amendment guaranteeing individual rights, private parties raising Tenth Amendment claims should not be barred as bringing generalized grievances or as violating the third-party standing bar, but instead should be granted standing once particular personal harm is demonstrated.<sup>27</sup>

---

<sup>18</sup> See *Reno v. Condon*, 528 U.S. 141, 149 (2000) (reiterating the need for federal legislation to comport with the federalism principles announced in *Printz* and *New York v. United States*); *Printz*, 521 U.S. at 935; *New York v. United States*, 505 U.S. at 156–57.

<sup>19</sup> See *Printz*, 521 U.S. at 904; *TVA*, 306 U.S. at 144; *Steward Mach. Co.*, 301 U.S. at 585; see also *infra* notes 123–223 and accompanying text. There has been a sharp increase in circuit court decisions on this issue since 2005. See *infra* notes 123–130 and accompanying text. The sudden increase in Tenth Amendment standing cases presents an intriguing development that may be attributable to the increased prominence of the Tenth Amendment itself in Supreme Court jurisprudence. See *Reno*, 528 U.S. at 149; *Printz*, 521 U.S. at 935; *New York v. United States*, 505 U.S. at 156–57.

<sup>20</sup> 306 U.S. at 144; see also *infra* notes 123–223 and accompanying text.

<sup>21</sup> See *infra* notes 160–215 and accompanying text.

<sup>22</sup> See *infra* notes 131–151 and accompanying text.

<sup>23</sup> See *infra* notes 230–264 and accompanying text.

<sup>24</sup> See *infra* notes 265–278 and accompanying text.

<sup>25</sup> See *infra* notes 42–295 and accompanying text.

<sup>26</sup> See *infra* notes 279–310 and accompanying text.

<sup>27</sup> See *infra* notes 279–310 and accompanying text.

Part I of this Note discusses the Supreme Court's oscillating view of the Tenth Amendment and how the Amendment's modern resurgence lays the foundation for private party standing to raise Tenth Amendment claims.<sup>28</sup> The development of the standing doctrine additionally presents requirements for—and obstacles to—standing that set the backdrop against which the current debate over Tenth Amendment standing unfolds, and illustrates how demonstrating personal harm is the centerpiece of the standing inquiry.<sup>29</sup> Part I concludes by presenting the central case *TVA* and other Supreme Court precedent regarding private party Tenth Amendment standing that together showcase the inconclusiveness of Supreme Court precedent.<sup>30</sup> Part II outlines how the circuit courts of appeals have responded to this precedent in contradictory ways: some permitting private party Tenth Amendment standing, some denying it outright, and some denying it unless alignment with state interests can be demonstrated.<sup>31</sup> Part III presents an analysis of the Supreme Court precedent on the question of private party Tenth Amendment standing.<sup>32</sup> It examines the language of the Amendment, standing doctrine, and the reasoning presented by the circuit courts in reaching divergent private party standing decisions, and concludes that the minority position should be vindicated and standing granted to private parties raising Tenth Amendment claims who demonstrate personal harm.<sup>33</sup> The Note argues that the Supreme Court should adopt the now-minority position that private parties may bring Tenth Amendment claims, regardless of alignment with the state's avowed interests.<sup>34</sup> Such a decision would be most consistent with the language of the Constitution and the Supreme Court's trend toward giving the Tenth Amendment substantive force and acknowledging that the Amendment exists to protect individuals.<sup>35</sup>

---

<sup>28</sup> See *infra* notes 36–74 and accompanying text.

<sup>29</sup> See *infra* notes 75–100 and accompanying text.

<sup>30</sup> See *infra* notes 101–122 and accompanying text.

<sup>31</sup> See *infra* notes 123–223 and accompanying text.

<sup>32</sup> See *infra* notes 224–328 and accompanying text.

<sup>33</sup> See *infra* notes 224–328 and accompanying text.

<sup>34</sup> See *infra* notes 224–328 and accompanying text. For a similar view, see generally Kristin Oickle, “But a Truism”: Why ‘the People’ Have Standing Rights Under the Tenth Amendment and How *Tennessee Electric Power Co. v. Tennessee Electric Authority* Led to Nearly Seventy-Five Years of Confusion (abstract of unpublished note), available at <http://aclaw.org/pdf/Student%20Chapters/Writing%20Competition/2010/Tenth%20Amendment.Abstract.pdf>.

<sup>35</sup> See, e.g., *New York v. United States*, 505 U.S. at 156–57; Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1082–88 (2000).

## I. DEVELOPMENT OF THE MODERN APPROACH TO THE TENTH AMENDMENT AND STANDING

The debate regarding Tenth Amendment standing flows directly from the evolution of the Tenth Amendment and the development of the standing doctrine; to understand who should be allowed to assert claims under the Amendment, it is first necessary to examine the scope and purpose of both the Amendment and of standing doctrine.<sup>36</sup> The Tenth Amendment was largely regarded as meaningless until 1918 when the Supreme Court gave it substantive force, a force that was again stripped away in 1941, and then vigorously revived by a series of Supreme Court decisions beginning in the early 1990s.<sup>37</sup> Although scholars largely agree on the history of the Tenth Amendment, they debate its scope and its intended beneficiaries.<sup>38</sup>

Like the Tenth Amendment, the standing doctrine has developed and shifted over time.<sup>39</sup> Requiring the presence of distinct, personal harm and that parties bring claims asserting only their own rights, the Supreme Court has imposed bars against third-party standing and generalized grievances, or “citizen-suits.”<sup>40</sup> The development of both modern standing doctrine and of the Tenth Amendment has directly impacted how the U.S. courts of appeals have interpreted the Supreme Court’s 1939 decision *Tennessee Electric Power Co. v. Tennessee Valley Authority*—which arguably prohibited private party Tenth Amendment standing—and therefore, both are discussed in turn.<sup>41</sup>

### A. Oscillating History and Conflicting Meanings of the Tenth Amendment

#### I. Substantive Force of the Tenth Amendment

The Supreme Court’s treatment of the Tenth Amendment is one marked by conflicting periods.<sup>42</sup> The Tenth Amendment succinctly provides, “The powers not delegated to the United States by the Constitu-

<sup>36</sup> See *infra* notes 42–100 and accompanying text.

<sup>37</sup> See *infra* notes 42–66 and accompanying text.

<sup>38</sup> See *infra* notes 67–74, 287–295 and accompanying text.

<sup>39</sup> See *infra* notes 75–100 and accompanying text.

<sup>40</sup> See *infra* notes 75–100 and accompanying text.

<sup>41</sup> 306 U.S. 118, 144 (1939); see *infra* notes 42–122 and accompanying text.

<sup>42</sup> CHEMERINSKY, *supra* note 8, at 313. Compare *New York v. United States*, 505 U.S. 144, 156–57 (1992) (giving substantive force to the Amendment), and *Hammer v. Dagenhart*, 247 U.S. 251, 275–76 (1918) (striking down an act of Congress for violating Tenth Amendment principles), with *United States v. Darby*, 312 U.S. 100, 124 (1941) (labeling the Amendment a mere “truism” lacking substantive force).

tion, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>43</sup> In the first quarter of the nineteenth century, the Supreme Court made it clear that despite the existence of the Tenth Amendment, concerns for state sovereignty would not provide a constitutional bar to congressional actions.<sup>44</sup> The Tenth Amendment was largely impotent until a dramatic shift occurred at the start of the next century when an act of Congress was struck down for infringing on state authority.<sup>45</sup>

The Court soon reversed its position once again, however, in 1941 when the Court labeled the Tenth Amendment a “truism,” merely included in the Constitution to placate the Antifederalists and their fears about the strength of the national government.<sup>46</sup> Besides a brief statement by the Court in 1975 that the Tenth Amendment “is not without significance,”<sup>47</sup> and an anomalous 1976 case where the Court wielded the Tenth Amendment to strike down parts of the Fair Labor Standards Act,<sup>48</sup> the Court continued to disregard the Tenth Amendment as a palpable restraint on congressional power for decades.<sup>49</sup> In 1985, the

---

<sup>43</sup> U.S. CONST. amend. X.

<sup>44</sup> See *Gibbons v. Ogden*, 22 U.S. 1, 196–97, 206 (1824).

<sup>45</sup> *Hammer*, 247 U.S. at 276. In the 1918 case of *Hammer v. Dagenhart*, the Supreme Court struck down a congressional act prohibiting the interstate shipment of goods made by child labor. See *id.* at 268, 276. It deemed the act unconstitutional for infringing on the authority of the states by regulating production. See *id.* at 276. This decision set the stage for subsequent Supreme Court cases striking down, under the Tenth Amendment, certain acts of Congress carried out pursuant to the Commerce Clause. See *United States v. Butler*, 297 U.S. 1, 69–70, 78 (1936); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 39–40 (1922); *Hammer*, 247 U.S. at 276. The evolution of the Tenth Amendment has largely been linked to the development of the Commerce Clause. Anthony B. Ching, *Traveling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99, 103, 110, 141–42 (1995). Historically, as Congress’s Commerce Clause powers waxed, the substantive force of the Tenth Amendment correspondingly waned. *Id.* The conflict between federal and state powers lodged in the Constitution’s structure creates this diametric relationship between increased federal power exerted under the Commerce Clause and a parallel decrease in state sovereignty safeguarded by the Tenth Amendment. *Id.* Writing as an assistant attorney general for the state of Arizona, Anthony Ching links the alternating weight accorded the Commerce Clause and the Tenth Amendment with varying judicial personalities, and with the social, political, and economic attitude of the American people. See *id.* at 106, 141–42.

<sup>46</sup> See *United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>47</sup> *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (holding nonetheless that the Tenth Amendment could not be used to strike down the federal legislation at issue).

<sup>48</sup> See Nat’l League of Cities v. Usery, 426 U.S. 833, 842, 845, 852 (1976). This was the sole Supreme Court opinion between *Darby v. United States* in 1941 and *Gregory v. Ashcroft* in 1991 to give the Tenth Amendment substantive force. See CHEMERINSKY, *supra* note 8, at 319; *infra* note 51 and accompanying text.

<sup>49</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545–47, 552 (1985) (declaring the *Usery* approach unworkable).

Supreme Court continued to relegate the Tenth Amendment to its mainly ornamental role, declaring the political process the only safeguard against federal encroachment on state sovereignty.<sup>50</sup>

In 1991, however, the Court, in an opinion by Justice O'Connor, initiated the resurgence of the Tenth Amendment when it decided *Gregory v. Ashcroft*.<sup>51</sup> The Court rescued the Tenth Amendment from meaninglessness when it employed the Amendment as a limit on how federal law may impose burdens on state government.<sup>52</sup> In that opinion, which established the Tenth Amendment precedent that the Court has followed ever since, the Court emphasized the crucial role of state governments in preventing federal tyranny and reaffirmed the Tenth Amendment as a substantive protector of state sovereignty.<sup>53</sup>

The *Gregory* opinion was bolstered the following year in 1992 when the Court decided *New York v. United States* and declared the Tenth Amendment to forbid the federal government from "commandeering" state legislatures.<sup>54</sup> The Court found the Commerce Clause power inadequate to save a federal act where the act violated the state sovereignty protected by the Tenth Amendment.<sup>55</sup> In *New York v. United States* the Court banned the federal government from directly compelling the legislative processes of the states to enact and enforce a federal regulatory program.<sup>56</sup> The Court distinguished "commandeering," which it held to be unconstitutional, from cases where Congress merely sought to subject state governments to generally applicable laws.<sup>57</sup> Thus, the distinction was crystallized between the acceptable federal government control of activity within the states—such as pre-empting state legislation or attaching conditions to funds—and unconstitutional "comman-

---

<sup>50</sup> See *id.* Other cases from that time like *Hodel v. Virginia Surface Mining & Reclamation*, decided by the Court in 1981, similarly undermined the power of the Tenth Amendment. See 452 U.S. 264, 287 n.28, 288 (1981) (refusing to give the Tenth Amendment substantive force in relation to congressional actions under Section 5 of the Fourteenth Amendment). *Hodel*, however, did identify impermissible "commandeering" actions of the federal government, laying the foundation for the Tenth Amendment's modern resurgence. See *id.* at 288.

<sup>51</sup> See 501 U.S. 452, 458 (1991). But see Elizabeth G. Patterson, *Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law*, 25 GA. ST. U. L. REV. 397, 401–02 (2008) (asserting that the substantive force of the Tenth Amendment is still diminished and great deference is afforded Congress in the arena of spending and the conditions that can be attached to federal grants).

<sup>52</sup> See *Gregory*, 501 U.S. at 458.

<sup>53</sup> See *id.*; see also *Reno v. Condon*, 528 U.S. 141, 149 (2000); *Printz v. United States*, 521 U.S. 898, 935 (1997).

<sup>54</sup> See *New York v. United States*, 505 U.S. at 175–76.

<sup>55</sup> See *id.* at 180.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

deering” where the federal government seeks to compel states to act or to administer a federal regulatory program.<sup>58</sup> Again writing for the Court, Justice O’Connor reiterated the substantive role of the Tenth Amendment in protecting states’ rights.<sup>59</sup> What is more, the Court in *New York v. United States* went on to define the relation of private parties to the Tenth Amendment when it specified that “the Constitution divides authority between federal and state governments for the protection of individuals . . . . ‘[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”<sup>60</sup>

*Printz v. United States* and *Reno v. Condon*, respectively decided by the Supreme Court in 1997 and 2000, reaffirmed the substantive power of the Tenth Amendment to protect state sovereignty.<sup>61</sup> In *Printz*, local chief law enforcement officers (“CLEOs”) complained that provisions of the Brady Act forced them to essentially work for the federal government and to execute federal laws.<sup>62</sup> The Court ruled that the constitutional separation of the federal and state governments must be preserved, and that the federal government could not command state officials to administer federal laws.<sup>63</sup> *Printz* expanded the definition of “commandeering” from *New York v. United States* to encompass federal statutory provisions that require administration by state executive officials.<sup>64</sup> In *Reno*, a statute regulating the state’s sale of driver’s license information was deemed valid, but only because it regulated without seeking to control or influence state activities.<sup>65</sup> Together, *Printz* and *Reno* affirmed the readiness of the Court in modern times to use the Tenth Amendment to substantively safeguard state autonomy from federal interference.<sup>66</sup>

---

<sup>58</sup> See *id.* at 176–78. In reaching its conclusion that commandeering is incompatible with the structure for governance set out in the Constitution, the Court referenced historical records of the Constitutional Convention and the *Federalist Papers*. Jared O’Connor, Note, National League of Cities *Rising: How the Telecommunications Act of 1996 Could Expand Tenth Amendment Jurisprudence*, 30 B.C. ENVTL. AFF. L. REV. 315, 337–38 (2003) (noting the need for political accountability and state citizens’ right to hold their local state officials responsible for governing decisions).

<sup>59</sup> See *New York v. United States*, 505 U.S. at 157.

<sup>60</sup> See *id.* at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991)).

<sup>61</sup> See *Reno*, 528 U.S. at 149; *Printz*, 521 U.S. at 935.

<sup>62</sup> 521 U.S. at 904–05.

<sup>63</sup> See *id.* at 935.

<sup>64</sup> See *id.*; *New York v. United States*, 505 U.S. at 176–78.

<sup>65</sup> See 528 U.S. at 150–51.

<sup>66</sup> See *id.* at 149; *Printz*, 521 U.S. at 935.

## 2. Scope and Text of the Tenth Amendment's Protections

The substantive force of the Tenth Amendment is not its only controversial aspect: although modern legal scholars widely agree on the history and purpose of the inclusion of the Tenth Amendment in the Constitution, they debate the meaning of its scope and text.<sup>67</sup> As for the settled history and purpose, the Tenth Amendment concludes the Bill of Rights portion of the Constitution that was intended to protect against abuses by the federal government.<sup>68</sup> It expresses the federalist distinction between national and local governments and recognizes the sovereignty of each—a distinction that was urged at the First Congress by the Antifederalists, who feared the creation of a strong national government that would jeopardize state sovereignty and lead to tyranny.<sup>69</sup> The Amendment thus specifies that the powers of government not enumerated as national powers in the Constitution belong to the states and the people.<sup>70</sup>

As for the scope and text, particularly relevant to the question of to whom the Tenth Amendment grants rights is the role of the Amendment's closing phrase "to the people," a phrase added to the Amendment without debate, but one that has sparked much since.<sup>71</sup> Because the Court presumes that every clause in the Constitution has meaning,

---

<sup>67</sup> See Ching, *supra* note 46, at 102; Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1350 n.68 (2009) (interpreting the use of "the people" in the Bill of Rights to signify enforceable, individual rights); Gershengorn, *supra* note 35, at 1083–87 (presenting the history of the Tenth Amendment's inclusion in the Constitution and arguing that the history and text of the Amendment demonstrate that it protects an individual right); Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1609–10 (2009). Compare *New York v. United States*, 505 U.S. at 181 (stating that the Tenth Amendment exists to protect individuals), with Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in the Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 7–8, 41 (2010) (criticizing the Court's description in *New York v. United States* of the Tenth Amendment as safeguarding an individual right).

<sup>68</sup> See *Bute v. Illinois*, 333 U.S. 640, 650 (1948) (identifying the Tenth Amendment as part of the Bill of Rights, the purpose of which was to restrict the federal government's power); see also *Adamson v. California*, 332 U.S. 46, 70 (1947) (Black, J., dissenting). But see *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring) (citing generally *Baron v. City of Baltimore*, 32 U.S. 243 (1833)) (identifying only the first eight amendments as inserted to pacify Antifederalist concerns about federal government power); *In Re Winship*, 397 U.S. 358, 384 n.11 (1970) (Black, J., dissenting) (citing H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 95 (1908)) (citing various debating scholars, one of whom identifies only the first eight amendments as constituting the Bill of Rights).

<sup>69</sup> Lash, *supra* note 67, at 1609–10; see Ching, *supra* note 46, at 102.

<sup>70</sup> U.S. CONST. amend. X; Ching, *supra* note 46, at 102.

<sup>71</sup> See Gershengorn, *supra* note 35, at 1085–87.

this clause must convey something.<sup>72</sup> Scholars have put forward the following three potential meanings: (1) that the Amendment safeguards certain powers of the people, separate from those possessed by the state and federal governments; (2) that the phrase really means “to the people of the several states” and just divides the powers between the federal and state governments; or (3) that the phrase indicates that the people themselves hold the rights secured by the Amendment.<sup>73</sup> This disagreement about the text and scope of the Amendment gives rise to disagreement over who holds rights under the Amendment, and thus over who may potentially bring a Tenth Amendment claim.<sup>74</sup>

### B. *The Modern Standing Doctrine*

The standing doctrine demonstrates the role of particularized, discrete harm in determining Tenth Amendment standing, and the general requirements of the doctrine present a separate hurdle for parties seeking to bring claims under the Amendment.<sup>75</sup> At its core, standing ensures that a plaintiff is the correct party to bring the case at hand, apart from the examination of the merits of the case.<sup>76</sup> The Supreme Court has offered several justifications for the standing doctrine, including safeguarding the separation of powers and ensuring that ideological plaintiffs do not consume court resources.<sup>77</sup> Three constitutional requirements must be satisfied to have standing to bring a case: first the plaintiff must have suffered or imminently will suffer an injury; second, the injury must be caused by the defendant’s conduct; and third, a favorable court decision must be likely to redress the injury—the “redressability prong.”<sup>78</sup> Rooted in the Constitution’s provision that Article III courts may only decide “cases” and “controversies,” the standing doctrine requires that parties have a personal stake in the litigation and be truly adversarial.<sup>79</sup>

---

<sup>72</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

<sup>73</sup> See Gershengorn, *supra* note 35, at 1085–87.

<sup>74</sup> See *id.*

<sup>75</sup> See *infra* notes 76–100 and accompanying text.

<sup>76</sup> *Flast v. Cohen*, 392 U.S. 83, 99–100 (1968).

<sup>77</sup> *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

<sup>78</sup> *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 663–64 (1993). The redressability prong revolves around the central inquiry, “Will the federal court decision make a difference?” CHEMERINSKY, *supra* note 8, at 75. A plaintiff need not demonstrate that a favorable decision will relieve every injury. See *id.* at 81.

<sup>79</sup> *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The Court has correspondingly developed both a prudential “third-party standing bar” that denies standing to third-party plaintiffs (individuals bringing suit to enforce another party’s rights), and a ban on generalized grievances.<sup>80</sup> In the 1975 case of *Warth v. Seldin*, the Court articulated the third-party standing bar when it expressed that, regardless of sufficient injury, plaintiffs may only bring claims when asserting their own legal rights.<sup>81</sup> Similarly, the taxpayer or “citizen standing” bar prevents a plaintiff from bringing suit based on a harm or generalized grievance that all taxpayers equally share in common.<sup>82</sup>

In 1923, the Supreme Court decided *Frothingham v. Mellon* and held that a plaintiff lacked standing when she sought to challenge the Maternity Act of 1921 as invading the local concerns of the state because it authorized appropriations to reduce the infant and maternal mortality rates.<sup>83</sup> The Court required that a party raising a claim against a statute must demonstrate not only the invalidity of the statute, but also some distinct, personal harm suffered by the plaintiff resulting from it.<sup>84</sup> *Frothingham* articulates the generalized grievance ban, which states that a party raising a suit must personally suffer some distinct, particularized injury in order to have standing to bring a claim.<sup>85</sup>

In 1968, the Court decided *Flast v. Cohen*, in which the plaintiffs challenged the Elementary and Secondary Education Act of 1965 as violating the Establishment and Free Exercise Clauses of the First Amendment because it provided federal funds for religious schools.<sup>86</sup> There, the plaintiffs were granted standing because the Court determined that their asserted injuries and rights were personal, not merely “third-party.”<sup>87</sup> The Court established a narrow allowance for taxpayer

---

<sup>80</sup> *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80 (1978); *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

<sup>81</sup> 422 U.S. at 498–99.

<sup>82</sup> See *Duke Power Co.*, 438 U.S. at 79–80; *Flast*, 392 U.S. at 105–06. The Supreme Court has suggested that the taxpayer standing bar may be constitutionally required and not simply prudential. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574–78 (1992); *Flast*, 392 U.S. at 101.

<sup>83</sup> See 262 U.S. 447, 479–80, 487 (1923). In denying the plaintiff standing, the Court repeatedly emphasized that nothing could be done under the Act without the state’s consent. See *id.* at 480, 483.

<sup>84</sup> See *id.* at 487–88 (deeming the plaintiff’s alleged harm—that the statute would effectively take her property under the guise of taxation—an insufficiently personal, distinct harm for standing purposes).

<sup>85</sup> See *id.* (considering the plaintiff’s interest—that her taxes not go up—to be an interest shared with millions of others, and one that is too minute, remote, and indeterminable to warrant standing).

<sup>86</sup> See 392 U.S. at 85, 105–06.

<sup>87</sup> *Id.* at 105–06.

standing in *Flast* when it determined that taxpayer suits may be brought only when two conditions are met: first, a logical link connects the plaintiff's status as taxpayer and the legislative act being attacked; and second, a nexus exists between that status and the exact nature of the constitutional infringement alleged.<sup>88</sup>

In the years since the Court decided *Flast*, its holding has seemingly been narrowed to permit taxpayer standing only in cases connected to a federal spending program under Article I, Section 8 of the Constitution and alleging a violation of the Establishment Clause of the First Amendment.<sup>89</sup> In 1978, however, the Supreme Court decided *Duke Power Co. v. Carolina Environmental Study Group, Inc.* and relaxed the standing requirements by holding that *Flast's* nexus analysis should be limited to cases presenting generalized grievances, and that constitutional claims involving concrete, particularized injury need not satisfy the nexus requirements.<sup>90</sup>

The Court has held that concrete, particularized injuries to constitutional rights may be adequate to grant standing whenever the suit is grounded in a constitutional provision that actually bestows rights.<sup>91</sup> A party bringing a suit regarding "a constitutional provision dealing with the structure of government is unlikely to be granted standing *unless* the person has suffered a particular harm distinctive from the rest of the population."<sup>92</sup> No matter how widely shared the grievance may be, the suffering of a concrete harm resulting from the alleged violation of a constitutional right conveys standing.<sup>93</sup> In deciding *FEC v. Akins* in 1978 (a case grounded in a right created by a federal statute, not the Constitution), the Court noted that the plaintiffs had standing because the statute sought to protect individuals, like the plaintiffs, from the precise kind of harm alleged.<sup>94</sup>

Furthermore, although the restriction against third-party standing presents an obstacle whenever the plaintiff is not the direct object of

---

<sup>88</sup> See *id.* at 102–03.

<sup>89</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974); *Richardson*, 418 U.S. at 176–78.

<sup>90</sup> See *Duke Power*, 438 U.S. at 78–79; *Flast*, 392 U.S. at 102.

<sup>91</sup> See *FEC v. Akins*, 524 U.S. 11, 25–26 (1998); *Duke Power*, 438 U.S. at 78–79; CHEMERINSKY, *supra* note 8, at 71.

<sup>92</sup> See CHEMERINSKY, *supra* note 8, at 71 (emphasis added).

<sup>93</sup> See *Akins*, 524 U.S. at 25–26.

<sup>94</sup> *Id.* Although the Tenth Amendment involves a constitutionally conferred right as opposed to a statutorily created one as in *Akins*, the key point is that the plaintiff was granted standing because he suffered particularized, concrete injury and was the holder of the right upon which his claim rested. See *id.*

the governmental action or inaction in question, that obstacle can be surmounted by a demonstration of significant personal injury to the plaintiff.<sup>95</sup> For example, in the 1992 case of *Lujan v. Defenders of Wildlife*, even though certain endangered animals, and not the plaintiffs, were the objects of the governmental action, the Court held that the plaintiffs could have been granted standing had they shown sufficient personal harm.<sup>96</sup> In its 2000 decision in *Friends of the Earth v. Laidlaw Environmental Services*, the Court held that the plaintiffs had significant injury to seek a court order compelling compliance with the Clean Water Act because their recreational use of the river was disturbed by the pollution resulting from Laidlaw's failure to comply.<sup>97</sup> There, the legislation was sufficiently linked with the plaintiffs' directly affected recreational, aesthetic, and economic interests.<sup>98</sup> Under the rubric established by these cases, it matters not that the federal governmental action in question has as the object of its regulation endangered animals or a park, so long as the plaintiffs are directly, uniquely, and personally affected by the action.<sup>99</sup> When a private party suffers distinct and personalized injury as a result of a violation of one of that party's rights, then the party, so long as the other standing requirements are satisfied, has standing to raise a claim before the courts.<sup>100</sup>

### C. *The Supreme Court on Private Party Tenth Amendment Standing*

The circuit courts holding the current majority view identify *Tennessee Electric Power Co. v. Tennessee Valley Authority* ("TVA"), decided in 1939, as the seminal and sole case in which the Supreme Court directly addressed—and went on to prohibit—private party Tenth Amendment standing.<sup>101</sup> The case arose when the federal Tennessee Valley Authority Act created a corporation that was required to create dams and sell the power produced by them throughout several states.<sup>102</sup> This federally mandated production of electricity created unwanted competition for the private electric companies, who enjoyed the state-conferred

---

<sup>95</sup> See *Lujan*, 504 U.S. at 563–64.

<sup>96</sup> See *id.*

<sup>97</sup> 528 U.S. 167, 183–84 (2000).

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*; *Lujan*, 504 U.S. at 563–64.

<sup>100</sup> See, e.g., *Lujan*, 504 U.S. at 563–64; *Duke Power*, 438 U.S. at 78–79.

<sup>101</sup> See 306 U.S. at 144; see also *Brooklyn Legal Servs. Corp B v. Legal Servs. Corp.*, 462 F.3d 219, 234 (2d Cir. 2006); *United States v. Parker*, 362 F.3d 1279, 1285 (10th Cir. 2004).

<sup>102</sup> *TVA*, 306 U.S. at 134–35.

benefits associated with being public utilities.<sup>103</sup> Resentful of the new competition that they deemed to constitute a taking of property, the private electric companies filed a complaint seeking to enjoin the production and sale of power that was mandated by the Act.<sup>104</sup> Though the appellants had no right to be the exclusive producers of power within the respective states, they pointed to state statutes giving the states—not the federal government—exclusive power to regulate and authorize any entity to operate and sell power within the state.<sup>105</sup>

In carefully outlining and responding to the appellants' multiple arguments, the Court determined that the federal action enacted mere competition, not actual regulation.<sup>106</sup> The Court rejected the appellants' claim that the Act constituted illegal competition, and thus "a taking," and denied that the private companies ever possessed the right to be free from competition.<sup>107</sup> The Court's discussion of standing revolved around the private parties' incorporated status and which property rights were and were not conferred by such status, a question the Court resolved by proclaiming that monopoly and freedom from competition were not among the conferred rights.<sup>108</sup>

Moving on to the appellants' Tenth Amendment argument, the Court characterized the argument as follows: that the federal government was unconstitutionally regulating the private company rates—a matter of state domain—by requiring new power production by the Authority that would be sold at lower rates.<sup>109</sup> The Court rejected the appellants' claims that the federal actions amounted to regulation and held the resultant effect on competition to be merely a collateral effect and not an infringement on state liberty.<sup>110</sup> The Court then pronounced that "appellants, absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment."<sup>111</sup> The Court only offered this pronouncement after first deciding that there was no federal regulation that infringed on state liberty, and thus no vio-

---

<sup>103</sup> *Id.* at 137.

<sup>104</sup> *Id.* at 135–36.

<sup>105</sup> *Id.* at 140. Several of the states, however, went on to adopt policies and laws facilitating the work of the Authority, seemingly indicating state consent to the federal actions. *Id.* at 141. Interestingly, the Court in *TVA* never considered state consent as an absolute defense to the appellants' Tenth Amendment claim. *See id.*

<sup>106</sup> *Id.* at 143–44.

<sup>107</sup> *Id.* at 136–41.

<sup>108</sup> *TVA*, 306 U.S. at 138–39.

<sup>109</sup> *See id.* at 143.

<sup>110</sup> *Id.* at 143–44.

<sup>111</sup> *Id.* at 144.

lation of the Tenth Amendment.<sup>112</sup> In the decades since, the Court's one-sentence commentary regarding the private companies' Tenth Amendment standing and state officers has been read in one of three ways: (1) as the authoritative word denying all private party Tenth Amendment standing; (2) as a limited holding applicable in cases when the plaintiff attempts to assert interests not in alignment with state interests; or (3) as mere dicta never intended to establish new, binding precedent.<sup>113</sup>

Writing in dissent, Justice Butler argued that the electric companies had in fact suffered a concrete, personal harm and that they should be granted standing.<sup>114</sup> The dissent asserted that the private electric companies suffered sufficient distinct harm when the Act infringed on their profits.<sup>115</sup>

Although the Court has not explicitly addressed private party standing under the Tenth Amendment except in *TVA*, during the New Deal era the Court permitted cases involving such claims to be decided on the merits.<sup>116</sup> In the 1937 Supreme Court case of *Helvering v. Davis*, a plaintiff complained that the Social Security Program invaded the Tenth Amendment rights of the state, a claim that the Court denied without reference to standing.<sup>117</sup> A private party Tenth Amendment claim in *Steward Machine Co. v. Davis* was similarly decided on the merits by the Supreme Court on the same day as *Helvering*.<sup>118</sup> In 2000 the Court heard and decided on the merits a Tenth Amendment claim

---

<sup>112</sup> See *id.* A court may not consider the merits of a case over which it lacks jurisdiction. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998) (holding that, if a party lacks standing to bring a claim, a court has no jurisdiction over that claim). For an analysis of the implications of this doctrine for the Court's statement about standing in *TVA*, see *supra* notes 234–236 and accompanying text.

<sup>113</sup> Compare, e.g., *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005) (holding that *TVA* constitutes binding precedent prohibiting all private party Tenth Amendment standing), and *Parker*, 362 F.3d at 1284–85 (same, but positing an exception for private parties whose interests align with the state's), with *Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999) (holding that the Court's Tenth Amendment standing discussion in *TVA* was cursory and not binding precedent given the expansion of standing since the Court decided *TVA*). Some subsequent circuit court cases allow an exception for private parties whose interests align with those of the state but *TVA*'s one-sentence standing commentary, relied upon by those courts, did not provide for such an exception. See *infra* notes 163–193 and accompanying text.

<sup>114</sup> *TVA*, 306 U.S. at 152 (Butler, J., dissenting).

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

<sup>116</sup> See *Helvering v. Davis*, 301 U.S. 619, 640 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937).

<sup>117</sup> See 301 U.S. at 640.

<sup>118</sup> See 301 U.S. at 585.

brought by local CLEOs.<sup>119</sup> In these cases standing was thus implicitly permitted because it is a long-established principle that a court may not proceed to decide the merits of a case unless it first establishes that it has jurisdiction, which includes a determination that the parties have standing.<sup>120</sup>

In 2003 the Supreme Court granted certiorari in order to definitively resolve the question of private party standing under the Tenth Amendment, yet produced no such resolution when the Court ultimately decided the case on other grounds.<sup>121</sup> The Supreme Court's recent grant of certiorari in *United States v. Bond*, where the Third Circuit denied private party Tenth Amendment standing, provides the Court with an opportunity to clarify *TVA's* holding and to explicitly affirm or reject the Court's practice of deciding private parties' Tenth Amendment claims on the merits.<sup>122</sup>

## II. CONFLICTING DECISIONS OF THE CIRCUIT COURTS ON PRIVATE PARTY TENTH AMENDMENT STANDING

Having considered the history and development of Tenth Amendment and standing jurisprudence, this Part analyzes the divergent federal appeals court precedent surrounding private party Tenth Amendment standing.<sup>123</sup> The U.S. courts of appeals have reacted to the Court's mixed signals and long silence regarding private party standing under the Tenth Amendment in rapidly evolving and contradicting ways.<sup>124</sup> As recently as the start of 2005, only three circuit courts had decided the issue, both the U.S. Courts of Appeals for the Seventh and Eleventh Circuits permitting private party standing, and the U.S. Court of Appeals for the Tenth Circuit alone denying it.<sup>125</sup> In the short span of time since then, five more circuit courts have definitively weighed in on the issue, all of them siding with the once-minority position of the

---

<sup>119</sup> *Printz*, 521 U.S. at 904, 933.

<sup>120</sup> *See Steel Co.*, 523 U.S. at 100–02; *Muskat v. United States*, 219 U.S. 346, 362 (1911) (prohibiting courts from issuing advisory opinions).

<sup>121</sup> *See Pierce County, Washington v. Guillen*, 537 U.S. 129, 147–48 (2003); *see also infra* notes 181–182 and accompanying text.

<sup>122</sup> *See United States v. Bond*, 581 F.3d 128, 137 (3rd Cir. 2009), *cert. granted*, 78 U.S.L.W. 3629 (U.S. Oct. 12, 2010) (No. 09-1227).

<sup>123</sup> *See infra* notes 131–223 and accompanying text.

<sup>124</sup> *See infra* notes 131–223 and accompanying text.

<sup>125</sup> *Compare Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999), and *Atlanta Gas Light Co. v. U.S. Dep't of Energy*, 666 F.2d 1359, 1368 n.16 (11th Cir. 1982), with *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761 (10th Cir. 1980).

Tenth Circuit.<sup>126</sup> The Seventh and Eleventh Circuits have determined that no binding Supreme Court precedent confines their analyses and have instead pointed to the Supreme Court's modern endorsement of wider standing and substantive enforcement of the Tenth Amendment in support of their rulings permitting private party Tenth Amendment standing.<sup>127</sup> In contrast, the other circuit courts deciding the issue have found the Supreme Court's 1939 case of *Tennessee Electric Power Co. v. Tennessee Valley Authority* ("TVA") to be a binding, definitive rejection by the Supreme Court of private party Tenth Amendment standing.<sup>128</sup> Despite their apparent uniformity, however, circuit courts denying such standing differ on a potential exception that would grant private party standing in limited Tenth Amendment cases when a party's interests align with the state's.<sup>129</sup> The U.S. Court of Appeals for the District of Columbia has also provided analysis relevant to the question, though it has avoided definitively deciding the validity of private party Tenth Amendment standing.<sup>130</sup>

#### A. Circuit Courts Granting Private Party Tenth Amendment Standing

Two circuit courts have granted private party Tenth Amendment standing, determining either explicitly or implicitly that *TVA* is not authoritative precedent.<sup>131</sup> The Seventh Circuit emphasized the Tenth Amendment's protection of individual rights, as elucidated in the Supreme Court's 1992 decision in *New York v. United States*, and the connection of those Tenth Amendment rights to the plaintiff's personal harm.<sup>132</sup> The Eleventh Circuit likewise held that standing should be granted because of the presence of particularized injury in the case and Supreme Court precedent implicitly granting such standing.<sup>133</sup>

The Seventh Circuit in 1999 made the most vigorous case for permitting private party Tenth Amendment standing in *Gillespie v. City of*

<sup>126</sup> See *United States v. Bond*, 581 F.3d 128, 137 (3rd Cir. 2009), cert. granted, 78 U.S.L.W. 3629 (U.S. Oct. 12, 2010) (No. 09-1227); *United States v. Hacker*, 565 F.3d 522, 526 (8th Cir. 2009), cert. denied, 130 S. Ct. 302 (2009); *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009); *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, 462 F.3d 219, 234 (2d Cir. 2006); *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005).

<sup>127</sup> See *infra* notes 131–151 and accompanying text.

<sup>128</sup> *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144 (1939); see *infra* notes 160–215 and accompanying text.

<sup>129</sup> See *infra* notes 160–215 and accompanying text.

<sup>130</sup> See *infra* notes 216–223 and accompanying text.

<sup>131</sup> *Gillespie*, 185 F.3d at 703; *Atlanta Gas Light Co.*, 666 F.2d at 1368 n.16.

<sup>132</sup> See *infra* notes 134–141 and accompanying text.

<sup>133</sup> See *infra* notes 142–147 and accompanying text.

*Indianapolis*.<sup>134</sup> There, the plaintiff was a police officer fired from his job after the Gun Control Act of 1968 outlawed his carrying a firearm because he had been convicted of domestic violence.<sup>135</sup> The plaintiff argued that the Act was an unconstitutional infringement on the state's right to select its own militia members and infringed on a traditional area of state sovereignty.<sup>136</sup> Though the court denied the plaintiff's claim on the merits, it granted him standing, citing the Supreme Court's pronouncement in *New York v. United States* that the Tenth Amendment protects the rights of individuals.<sup>137</sup> Under this analysis, the federal government's violation of the Tenth Amendment was potentially a violation of the plaintiff's personal rights guaranteed to him by the Tenth Amendment and did not implicate the third-party standing bar, which bans parties from bringing claims based on others' rights.<sup>138</sup> The court questioned whether the plaintiff was really injured by any Tenth Amendment violation and noted that his right to carry a gun had nothing to do with the state's sovereignty, and that any Tenth Amendment injury to him was thus incidental.<sup>139</sup> Relying, however, on the lowering of the standing barriers since *TVA* and its mere casual reference to private party Tenth Amendment standing, the court did not feel obligated to deny standing.<sup>140</sup> The court cited the Supreme Court's 1978 decision in *Duke Power Co. v. Carolina Environmental Study Group* for the proposition that an incidental connection is sufficient to bring a constitutional claim, reasoning that *Duke Power Co.* limited the nexus requirement from the Supreme Court's 1968 decision in *Flast v. Cohen* to taxpayer suits involving generalized grievances.<sup>141</sup>

The Eleventh Circuit's 1982 decision in *Atlanta Gas Light Co. v. U.S. Department of Energy* arose out of Tenth Amendment constitutional challenges to amendments and regulations made pursuant to the federal

---

<sup>134</sup> See *Gillespie*, 185 F.3d at 700–03.

<sup>135</sup> *Id.* at 697.

<sup>136</sup> *Id.* at 700. The court noted that, as a member of the local police, the plaintiff was subject to being called upon to serve in the state's National Guard, also known as its militia. See *id.* at 697.

<sup>137</sup> *Id.* at 703, 708; see also *New York v. United States*, 505 U.S. 144, 181–82 (1992); *supra* notes 54–60 and accompanying text.

<sup>138</sup> See *Gillespie*, 185 F.3d at 703; see also Douglas G. Bechtel, Survey, *U.S. v. Parker: Will Those with Standing Please Stand Up*, 82 DENV. U. L. REV. 479, 497 (2005) (suggesting that the Seventh Circuit's interpretation most aligns with the Constitution's text).

<sup>139</sup> See *Gillespie*, 185 F.3d at 701.

<sup>140</sup> *Id.* at 700–02.

<sup>141</sup> *Id.* at 702 (citing *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 79 (1978)); see also *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

Fuel Use Act of 1978.<sup>142</sup> The court noted modern trends in favor of granting standing when plaintiffs show personal injury and referred to the Tenth Amendment standing granted by implication in the Supreme Court New Deal Era cases.<sup>143</sup> It held that under *Duke Power Co.*, a plaintiff may make constitutional objections to a federal act so long as that party demonstrates injury and causal connection.<sup>144</sup> The *Atlanta Gas* court ruled that the petitioners had demonstrated injury and causal connection to the federal action in question, and thus were not bound by the *Flast* nexus scheme.<sup>145</sup> The Eleventh Circuit has since reiterated that a Tenth Amendment claim in and of itself does not raise a problem of a generalized grievance because a party bringing a Tenth Amendment claim has standing so long as the party can identify a concrete, personalized injury resulting from the alleged constitutional violation.<sup>146</sup> Only Tenth Amendment claims presenting an undifferentiated, generalized grievance shared by all citizens results in a lack of standing.<sup>147</sup>

The Seventh and Eleventh Circuits distinguished (implicitly in the case of the Eleventh Circuit) the *TVA* Court's intimations against private party Tenth Amendment standing, determining that the plaintiff may pursue a Tenth Amendment claim when asserting the plaintiff's own rights, and not when asserting a state's rights.<sup>148</sup> According to the decisions of these circuit courts, Tenth Amendment standing is in doubt only when parties raise a generalized grievance lacking requisite personal injury.<sup>149</sup> The two circuit courts expounded that it was the Supreme Court's practice simply to deny standing when parties do not object on the basis of any particularized harm to any recognized personal rights upon which the federal government has infringed.<sup>150</sup> Furthermore, both circuit courts highlighted prior Supreme Court decisions implicitly granting private party Tenth Amendment standing as

---

<sup>142</sup> *Atlanta Gas*, 666 F.2d at 1361.

<sup>143</sup> *Id.* at 1368 n.16 (citing *Helvering v. Davis*, 301 U.S. 619, 639–41 (1937)).

<sup>144</sup> *Id.* (citing *Duke Power Co.*, 438 U.S. at 79).

<sup>145</sup> *Id.*

<sup>146</sup> See *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1333, 1335 (11th Cir. 2007).

<sup>147</sup> *Id.* at 1334–35. In 2010, the Eleventh Circuit decided *United States v. Gorham* and reaffirmed its position that private parties can attain Tenth Amendment standing unless they lack personalized injury. See 377 F. App'x 899, 901 (11th Cir. 2010) (per curiam).

<sup>148</sup> See *Gillespie*, 185 F.3d at 700–02; *Atlanta Gas*, 666 F.2d at 1368 n.16; see also *Flast*, 392 U.S. at 101–02; *TVA*, 306 U.S. at 144.

<sup>149</sup> *Gillespie*, 185 F.3d at 700–01; *Atlanta Gas*, 666 F.2d at 1368 n.16.

<sup>150</sup> See *Gillespie*, 185 F.3d at 701–02; *Atlanta Gas*, 666 F.2d at 1368 n.16.

raising strong doubts about whether the Court's cursory mention of Tenth Amendment standing in *TVA* could be any more than dicta.<sup>151</sup>

In 1991, the Fourth Circuit issued a brief, unpublished per curiam decision in *Metrolina Family Practice Group v. Sullivan* affirming a grant of private party Tenth Amendment standing.<sup>152</sup> The court held that physicians alleging that they were injured by a federal regulation that would impinge on their profits asserted sufficient personal injury in fact, and thus asserted their own rights and were not third-party plaintiffs.<sup>153</sup> The court gave its imprimatur to the district court's description of Tenth Amendment jurisprudence, which stated that private parties, and not only states, have standing to raise Tenth Amendment claims.<sup>154</sup> The unpublished status of the Fourth Circuit's opinion limits its authoritative force but nonetheless indicates that an additional federal appeals court is inclined to recognize private party Tenth Amendment standing.<sup>155</sup>

In a 2010 decision, the Fourth Circuit avoided committing itself to a position on private party Tenth Amendment standing, but characterized the standing question as only a prudential one that could be waived in order to reach a decision on the merits.<sup>156</sup> In dicta the court stated that the plaintiff had satisfied the traditional standing prongs and that only a rule barring private parties from raising Tenth Amendment claims would result in him being denied standing.<sup>157</sup> Although the court acknowledged the weight of other circuits' precedents holding that private parties lack such standing, no resolution of the question was deemed necessary because the court ruled that the plaintiff's Tenth Amendment claim was implausible on the merits.<sup>158</sup> The Fourth Circuit's decision offers no independent analysis of the Constitution or of *TVA* but is significant for deviating from the majority of circuits, which have never suggested that these cases should be decided on the merits regardless of a potential bar on private party Tenth Amendment standing.<sup>159</sup>

---

<sup>151</sup> See *Gillespie*, 185 F.3d at 701–02; *Atlanta Gas*, 666 F.2d at 1368 n.16 (discussing Supreme Court precedent implicitly allowing private party Tenth Amendment standing, but not explicitly referencing *TVA*); see also *TVA*, 306 U.S. at 144.

<sup>152</sup> (*Sullivan II*), 929 F.2d 693, 693 (4th Cir. 1991) (per curiam), *aff'g* (*Sullivan I*), 767 F. Supp. 1314, 1320 (W.D.N.C. 1989).

<sup>153</sup> See *Sullivan II*, 929 F.2d at 693.

<sup>154</sup> *Id.*; *Sullivan I*, 767 F. Supp. at 1320.

<sup>155</sup> See *Sullivan II*, 929 F.2d at 693.

<sup>156</sup> *Kennedy v. Allera*, 612 F.3d 261, 269 (4th Cir. 2010).

<sup>157</sup> See *id.* at 269 n.3.

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

### B. Circuit Courts Denying Private Party Tenth Amendment Standing

By contrast, the U.S. Courts of Appeals for the First, Second, Third, Eighth, Ninth, and Tenth Circuits have all deemed *TVA* to be binding precedent rejecting private party Tenth Amendment standing and barring any independent analysis.<sup>160</sup> The result has been a rapid shift toward denying private party Tenth Amendment standing—a shift that has yet to be given scholarly consideration.<sup>161</sup> Yet underlying the recent trend toward denying standing is an undercurrent of uncertainty as the circuit courts fall into disagreement and probe the question of what exceptions should be granted to private parties whose interests align with the state's interests.<sup>162</sup>

Relying on the third-party standing bar, the U.S. Court of Appeals for the Tenth Circuit has ruled that the Tenth Amendment protects states' rights alone.<sup>163</sup> In 1980 the Tenth Circuit decided *Mountain States Legal Foundation v. Costle*.<sup>164</sup> There, the Tenth Circuit considered a plaintiff's challenge to a Clean Air Act provision granting the Environmental Protection Agency authority to approve or disapprove of Colorado's clean air policies.<sup>165</sup> The court held that under third-party standing principles, the Tenth Amendment claim belonged to the state and could not be raised by a private party.<sup>166</sup> The court determined that the plaintiff lacked standing because Colorado state law required that, unless a divergence is granted, only the attorney general may enforce the state's interests.<sup>167</sup> More than twenty years later, in 2004, the Tenth Circuit decided the case of *United States v. Parker*, where the petitioner had been found with a loaded firearm on a public street in violation of Utah state law, but the street was on federal land, where the Federal Assimilative Crimes Act required state law to be applied.<sup>168</sup> Citing *Costle* and *TVA*, the court ruled that because the petitioner was a private party

---

<sup>160</sup> See *infra* notes 163–215 and accompanying text.

<sup>161</sup> See *infra* notes 163–215 and accompanying text. Scholarly writing on private party Tenth Amendment standing predates several of the most recent circuit court decisions, and the last piece written to advocate private party Tenth Amendment standing was published when the permissibility of such standing was still the majority view. See Bechtel, *supra* note 138, at 497; Gershengorn, *supra* note 35, at 1095; David M. Palmer, Note, *Untangling Tenth Amendment Standing: Why Private Parties Cannot Enforce the Federal Structure*, 35 HASTINGS CONST. L.Q. 169, 170 (2008); see also *infra* notes 163–215 and accompanying text.

<sup>162</sup> See *infra* notes 163–215 and accompanying text.

<sup>163</sup> *Costle*, 630 F.2d at 761.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 759.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 762–63.

<sup>168</sup> 362 F.3d 1279, 1281 (10th Cir. 2004).

whose interests did not align with the state's, he could not pursue a Tenth Amendment claim.<sup>169</sup> The court noted that it would be conceptually difficult to assert that a Tenth Amendment violation resulted from the federal government's enforcement of a state law.<sup>170</sup>

Subsequent Tenth Circuit cases have nuanced the Tenth Circuit's position on private party Tenth Amendment standing by placing a crucial gloss on *Parker*.<sup>171</sup> In 2009, the court in *United States v. Kueker* explicitly pronounced what *Parker* and prior Tenth Circuit decisions post-*Parker* had intimated: that the Tenth Circuit's rejection of private party Tenth Amendment standing is not absolute.<sup>172</sup> *Kueker* interpreted *Parker* as denying individuals standing to assert Tenth Amendment claims "unless their interests are aligned with the state's interests."<sup>173</sup> This interpretation did not impact the result in *Kueker* because the court determined that a party's interests inherently do not align with those of the state when—as was the case there—the federal government action being challenged is its enforcement of a state law.<sup>174</sup> The decision left unresolved, however, how the court will gauge alignment with state interests and suggests, contrary to some other circuit court decisions denying private party Tenth Amendment standing, that state officials speaking for the state are not the sole parties who can raise Tenth Amendment claims.<sup>175</sup>

In recent years, two other U.S. courts of appeals joined the Tenth Circuit in ruling that private party Tenth Amendment standing violates the third-party standing bar because the Tenth Amendment does not grant rights to private parties.<sup>176</sup> These courts also allied with the Tenth Circuit in positing a potential exception for private parties whose interests align with those of the state.<sup>177</sup>

In 2009 the U.S. Court of Appeals for the Third Circuit rejected private party Tenth Amendment standing when it decided *United States v. Bond*.<sup>178</sup> A defendant convicted of possessing a chemical weapon and

---

<sup>169</sup> *Id.* at 1285.

<sup>170</sup> *Id.*

<sup>171</sup> See *United States v. Kueker*, 352 F. App'x 242, 246 (10th Cir. 2009); *United States v. Gibson*, 348 F. App'x 392, 395 (10th Cir. 2009); *Parker*, 362 F.3d at 1281.

<sup>172</sup> See *Kueker*, 352 F. App'x at 246; *Gibson*, 348 F. App'x at 395; *Parker*, 362 F.3d at 1284–85.

<sup>173</sup> See *Kueker*, 352 F. App'x at 246; *Parker*, 362 F.3d at 1284–85.

<sup>174</sup> *Kueker*, 352 F. App'x at 246.

<sup>175</sup> Compare *id.*, with *Brooklyn Legal Servs.*, 462 F.3d at 234 (recognizing no such exception for alignment with state interests), and *Medeiros*, 431 F.3d at 34 (same).

<sup>176</sup> See *Bond*, 581 F.3d at 137; *Hacker*, 565 F.3d at 526.

<sup>177</sup> See *Bond*, 581 F.3d at 137–38; *Hacker*, 565 F.3d at 527 n.6.

<sup>178</sup> 581 F.3d at 137.

two counts of mail theft appealed her conviction, arguing that the federal statute under which she was charged intruded on prosecution of localized offenses by states, invading federalism boundaries.<sup>179</sup> Relying on *TVA* as binding precedent and citing the likelihood of an increase in litigation should it hold otherwise, the court determined that the petitioner lacked standing.<sup>180</sup> The court held *TVA*'s position on Tenth Amendment standing to be undiminished, rejecting the argument that the Supreme Court's grant of certiorari in another Third Circuit decision, the 2003 case of *Pierce County, Washington v. Guillen*, disturbed *TVA*'s binding status.<sup>181</sup> The Court had originally granted certiorari in *Guillen* to decide the private party standing question, but eventually decided the case on other grounds; the *Bond* court saw this as only an indication that at least four justices questioned the binding status of *TVA*, not an indication that *TVA* was no longer valid.<sup>182</sup> The court added that denying the appellant standing best comported with the third-party standing bar that allows parties only to assert their own rights.<sup>183</sup> The court concluded its discussion of Tenth Amendment standing by rejecting the petitioner's argument for standing but indicating that it shared the Tenth Circuit's position that the prohibition on private party standing may not be absolute, and that such standing may potentially be permitted if a party's interests align with those of the state.<sup>184</sup> The Su-

---

<sup>179</sup> *Id.* at 134. The district court denied Bond's motions, including her federalism claims, on the merits and found that the federal act did not violate the principles of federalism because it was enacted under the Necessary and Proper Clause of the Constitution in compliance with a treaty. *See id.* at 133.

<sup>180</sup> *Id.* at 137.

<sup>181</sup> *See id.*; *Pierce County, Washington v. Guillen*, 537 U.S. 129, 148 n.10 (2003).

<sup>182</sup> *Bond*, 581 F.3d at 137; *Guillen*, 537 U.S. at 148 n.10.

<sup>183</sup> *Bond*, 581 F.3d at 137.

<sup>184</sup> *Id.* at 137–38. In a subsequent case the Third Circuit curiously did not invoke its recent holding in *Bond*. *See Berg v. Obama*, 586 F.3d 234, 239–42 (3rd Cir. 2009); *Bond*, 581 F.3d at 137. In the 2009 case of *Berg v. Obama*, the Third Circuit dismissed for lack of standing a claim questioning Barack Obama's eligibility for the presidency. *See Berg*, 586 F.3d at 239–42. Interestingly, the court spent several paragraphs dismantling the petitioner's claim for Tenth Amendment standing without ever invoking the holding in *Bond* or suggesting an inherent lack of standing for private parties raising Tenth Amendment claims. *See id.*; *Bond*, 581 F.3d at 137. Although the court held the Tenth Amendment irrelevant to the case and extensively outlined the petitioner's lack of concrete injury, it failed to reaffirm *Bond* and dismiss the petitioner's claim outright. *See Berg*, 586 F.3d at 239–42; *Bond*, 581 F.3d at 137. Whether *Berg* presents an anomalous case perhaps derived from its unique subject matter or a significant refusal to apply *Bond* is as yet unclear. *See Berg*, 586 F.3d at 239–42; *Bond*, 581 F.3d at 137. A later Third Circuit decision in 2010, *United States v. Shenandoah*, did not cite *Bond* but did cite other circuit courts in the majority and reaffirmed *Bond*'s holding that private parties lack standing to raise Tenth Amendment claims. *United States v. Shenandoah*, 595 F.3d 151, 161–62 (3rd Cir. 2010).

preme Court's recent grant of certiorari now makes this holding subject to Supreme Court scrutiny.<sup>185</sup>

In *United States v. Hacker*, also decided in 2009, the U.S. Court of Appeals for the Eighth Circuit similarly chose to rely on *TVA* and follow the sudden circuit court movement toward rejecting private party Tenth Amendment standing.<sup>186</sup> *Hacker* involved a rather unsympathetic appellant, a convicted child molester, who upon release from prison registered as a sex offender in Texas.<sup>187</sup> After moving several times to various states and failing to register as an offender in some states, the petitioner was indicted under the Sex Offender Registration and Notification Act for deliberately traveling in interstate commerce and failing to register as a sex offender.<sup>188</sup> Among other claims, the appellant charged that Congress violated the Tenth Amendment by forcing states to accept registrations from a federally mandated sex-offender program.<sup>189</sup> After pleading guilty and preserving his right to appeal, he brought his case before the Eighth Circuit, which affirmed the findings below.<sup>190</sup> The Eighth Circuit denied the appellant standing primarily on the strength of *TVA*, despite noting that *TVA*'s strength had arguably been weakened by subsequent Court decisions expanding standing and the substantive force of the Tenth Amendment.<sup>191</sup> The court added that the third-party standing bar prevents a private party from bringing a Tenth Amendment claim because such a party would be relying on the rights accorded to the state by the Tenth Amendment rather than any individual rights.<sup>192</sup> Although the court declined to decide whether alignment with state interests creates an exception whereby private parties may raise

---

<sup>185</sup> See *Bond*, 78 U.S.L.W. at 3629 (grant of certiorari).

<sup>186</sup> See *Hacker*, 565 F.3d at 526. As the First and Third Circuits noted, the Supreme Court's certiorari decisions convey ambiguous messages, and thus the denial of certiorari in *Hacker* should not be deemed to express the Supreme Court's agreement with the Eighth Circuit's analysis. See *Bond*, 581 F.3d at 137; *Medeiros*, 431 F.3d at 35. The Court's grant of certiorari in *Bond* confirms that its denial of certiorari in *Hacker* is no indication that the Supreme Court is uninterested in reviewing a circuit court holding that denies private party Tenth Amendment standing. See *Bond*, 78 U.S.L.W. at 3629 (grant of certiorari).

<sup>187</sup> See *Hacker*, 565 F.3d at 523.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 524.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 526–27 (quoting *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (noting that Supreme Court decisions remain binding precedent until the Supreme Court reviews them)).

<sup>192</sup> See *id.* at 527.

Tenth Amendment claims, it noted the Tenth Circuit's position and did not foreclose the possibility of permitting such standing.<sup>193</sup>

Two other federal appeals courts—the First and Second Circuits—followed the Tenth Circuit in rejecting private party Tenth Amendment standing; these courts primarily based their decisions on the binding authority of *TVA's* standing analysis, holding that the Supreme Court's discussion of case merits in no way detracted from the force of that analysis.<sup>194</sup> They also asserted that the *New York v. United States* Court's description of individual Tenth Amendment rights should not be deemed to undermine *TVA's* standing statements.<sup>195</sup> Neither court adopted the Tenth Circuit's exception for private parties whose interests align with those of the state.<sup>196</sup>

In 2005 the U.S. Court of Appeals for the First Circuit issued the decision, *Medeiros v. Vincent*, that ignited the recent trend toward reversing the once-majority position of the Seventh and Eleventh Circuits.<sup>197</sup> *Medeiros* involved a 1997 amendment to the compact signed by fifteen Atlantic states to jointly regulate coastal fishing, a compact made mandatory by Congress in 1993 in the Atlantic Coastal Fisheries Cooperative Management Act.<sup>198</sup> After the amendment placed a limit on the quantity of lobsters each vessel could catch daily, the plaintiff was criminally charged in 1999 for violating the limit.<sup>199</sup> The plaintiff sought relief and a ruling that the federal act was an illegal commanding of Rhode Island's legislative process in violation of the Tenth Amendment.<sup>200</sup> Citing *TVA*, the First Circuit held that even if the federal act violated the Tenth Amendment, as a private party, the plaintiff had no standing to bring the claim.<sup>201</sup> The *Medeiros* court considered *TVA's* Tenth Amendment standing reference to be an alternative holding to its decision on the case merits—rather than dicta—and one that has never been explicitly overruled.<sup>202</sup> The court acknowledged *New York v. United States* and its prohibition on states consenting to be com-

---

<sup>193</sup> See *Hacker*, 565 F.3d at 527 n.6. The court determined resolution of the question to be unnecessary because the petitioner had failed to even argue that his interests aligned with the state's interests. *Id.*

<sup>194</sup> See *Brooklyn Legal Servs.*, 462 F.3d at 234–35; *Medeiros*, 431 F.3d at 34.

<sup>195</sup> See *Brooklyn Legal Servs.*, 462 F.3d at 234–35; *Medeiros*, 431 F.3d at 34; see also *New York v. United States*, 505 U.S. at 181.

<sup>196</sup> See *Brooklyn Legal Servs.*, 462 F.3d at 235; *Medeiros*, 431 F.3d at 34.

<sup>197</sup> See *Medeiros*, 431 F.3d at 34.

<sup>198</sup> *Id.* at 27.

<sup>199</sup> *Id.* at 27–28.

<sup>200</sup> *Id.* at 28–29.

<sup>201</sup> *Id.* at 34.

<sup>202</sup> *Id.*

mandeered.<sup>203</sup> The *Medeiros* court responded by suggesting that aggrieved citizens could resort to the political process to prevent commandeering acquiesced to by the state, and that this, rather than private party Tenth Amendment standing, was the remedy *New York v. United States* envisioned.<sup>204</sup> Like the Third Circuit, the First Circuit cited fears of increased litigation as an additional policy reason to reject private party Tenth Amendment standing.<sup>205</sup> Also like the Third Circuit, the First Circuit dismissed the notion that the Supreme Court's grant of certiorari in *Guillen* indicated the Court's desire to permit private party Tenth Amendment standing.<sup>206</sup>

After the First Circuit decided *Medeiros*, the U.S. Court of Appeals for the Second Circuit heard *Brooklyn Legal Services Corp. B v. Legal Services Corp.* in 2006.<sup>207</sup> There, a non-profit legal foundation claimed that federal restrictions on local legal assistance programs that received federal funding were unconstitutional for violating the federalism principles of the Tenth Amendment.<sup>208</sup> The Second Circuit pronounced *TVA* binding because it found that *TVA*'s standing analysis was either an independent, authoritative rationale apart from its discussion of case merits, or else superseded its merits discussion because a court must establish jurisdiction and standing prior to considering case merits.<sup>209</sup> The Second Circuit also rejected the notion that *New York v. United States* could upset the precedent established by *TVA* because *New York v.*

<sup>203</sup> *Medeiros*, 431 F.3d at 35; see *New York v. United States*, 505 U.S. at 182.

<sup>204</sup> See *Medeiros* 431 F.3d at 35; see also *New York v. United States*, 505 U.S. at 182. One commentator has raised serious doubts about whether Rhode Island actually acquiesced to the federal actions at issue in *Medeiros*. See Keith Stover, Comment, *Restoring the Tenth Amendment: A Call to Overrule United States v. Darby and Reinstate National League of Citizens v. Usery*, 25 T.M. COOLEY L. REV. 555, 574 (2008). State officials, including the Governor, objected to some of the federal limits as discriminatory and inept, but were powerless to override the federally mandated standards. See *id.* By the time that the plaintiff violated the catch limits, Rhode Island no longer possessed the power to enact its own catch limits, but instead was forced into accepting federal regulations. See *Medeiros*, 431 F.3d at 27.

<sup>205</sup> See *Medeiros*, 431 F.3d at 36.

<sup>206</sup> See *id.* at 35 (positing that the Supreme Court may have granted certiorari merely to reaffirm the standing language in *TVA* in light of a circuit split on the issue).

<sup>207</sup> *Brooklyn Legal Servs.*, 462 F.3d at 234, *aff'g* *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 581–83 (E.D.N.Y. 2004).

<sup>208</sup> *Id.* The district court had granted the plaintiffs standing. *Velazquez*, 349 F. Supp. 2d at 581–83. It had determined that *TVA*'s standing discussion constituted only cursory dicta that was thoroughly undermined by the Supreme Court's holding in *New York v. United States* that the Tenth Amendment safeguards individuals. See *id.*; see also *New York v. United States*, 505 U.S. at 181; *TVA*, 306 U.S. at 144.

<sup>209</sup> *Brooklyn Legal Servs.*, 462 F.3d at 234–35 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (“Without jurisdiction the court cannot proceed at all in any cause.”) (internal quotations omitted)).

*United States* addressed the state's ability to waive Tenth Amendment violations and the Supreme Court never directly confronted the issue of private party Tenth Amendment standing.<sup>210</sup>

In 2009 the U.S. Court of Appeals for the Ninth Circuit also entered an opinion on private party Tenth Amendment standing in *Oregon v. Legal Services Corp.*<sup>211</sup> The case did not directly present the question of private party standing because the state was the party raising a Tenth Amendment claim.<sup>212</sup> The court, however, went on to comment that only states have standing to allege Tenth Amendment violations, endorsing the position that *TVA* is binding precedent.<sup>213</sup> The Ninth Circuit's position is seemingly dicta that had no direct bearing on the matter before the court; nonetheless, it indicates the Ninth Circuit's inclination to join the majority position of U.S. courts of appeals and to join the First and Second Circuits in the strictest interpretation of *TVA*, that only a state may raise a Tenth Amendment claim.<sup>214</sup> Furthermore, in 2010 the Ninth Circuit issued an unpublished memorandum decision that characterized *Legal Services Corp.* as establishing the "settled law of this circuit" that only states have Tenth Amendment standing.<sup>215</sup>

### C. Other Circuit Court Analysis of Tenth Amendment Standing

The U.S. Court of Appeals for the District of Columbia has also commented on private party Tenth Amendment standing; although the court has avoided definitively deciding the issue, it has contributed some important analysis of the question.<sup>216</sup> In the 2002 case *Lomont v. O'Neill*, the D.C. Circuit declined to decide the broad question of Tenth Amendment standing for all private parties, deeming the inquiry un-

<sup>210</sup> See *id.* at 236. The court also acknowledged that Supreme Court precedent subsequent to *TVA* has arguably weakened the Court's statement about standing in *TVA*. See *id.*

<sup>211</sup> 552 F.3d at 972.

<sup>212</sup> See *id.* Discussing quasi-sovereign jurisdiction, the court noted that "[i]nterests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's abiding in their achievement. In such situations, the state is no more than a nominal party." *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601–02 (1982)).

<sup>213</sup> See *id.* The practical result of the court's decision was that an alleged injury was left remediless. See *id.* at 972–73. Under the court's ruling, the private party claiming injury had no Tenth Amendment standing to bring the claim and the state of Oregon, the only party that could have Tenth Amendment standing, lacked any injury. See *id.*

<sup>214</sup> See *Legal Servs. Corp.*, 552 F.3d at 972 n.3; see also *Brooklyn Legal Servs.*, 462 F.3d at 234; *Medeiros*, 431 F.3d at 34.

<sup>215</sup> *Stop the Casino 101 Coal. v. Salazar*, Nos. 09–16294, 09–16297, 2010 WL 2530721, at \*2 (9th Cir. June 3, 2010).

<sup>216</sup> See *Lomont v. O'Neill*, 285 F.3d 9, 13 (D.C. Cir. 2002).

necessary because it upheld the grant of standing to two law enforcement officer plaintiffs.<sup>217</sup> The court interpreted *Printz v. United States* as implicitly granting Tenth Amendment standing to law enforcement officers, because the Supreme Court had decided the case on the merits without questioning the officers' standing to bring the claim.<sup>218</sup> The *Lomont* court further rejected the government's attempt to put a gloss on *Printz* that would read it as only permitting standing when the officers are authorized to act on behalf of the state, and instead held it to endorse law enforcement officer Tenth Amendment standing absolutely.<sup>219</sup>

In a footnote, the *Lomont* court discussed the broader question of standing for all private parties and observed that Supreme Court cases after *TVA* have severely undercut the decision's discussion of Tenth Amendment standing as interpreted by the current majority of circuit courts.<sup>220</sup> The court tempered that analysis, however, by quoting the Supreme Court's 1989 holding in *Rodriguez de Quijas v. Shearson/American Express, Inc.* that, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."<sup>221</sup> *Lomont* contributes to the notion—advanced even by some of the circuit courts declaring *TVA* to be binding—that subsequent Supreme Court decisions, such as *New York v. United States*, have undercut the position that Tenth Amendment standing should be denied to private parties.<sup>222</sup> It also stands for the important proposition that in *Printz* the Supreme Court has already expanded Tenth Amendment standing beyond the state and its authorized representatives.<sup>223</sup>

---

<sup>217</sup> See *id.* at 13–14.

<sup>218</sup> See *id.*; see also *Printz v. United States*, 521 U.S. 898, 904, 933 (1997); *supra* notes 61–66 and accompanying text.

<sup>219</sup> See *Lomont*, 285 F.3d at 13 (citing *Printz*, 521 U.S. at 898).

<sup>220</sup> *Id.* at 14 n.3.

<sup>221</sup> *Id.* (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

<sup>222</sup> See *id.*; see also *New York v. United States*, 505 U.S. at 181–82; *Hacker*, 565 F.3d at 527.

<sup>223</sup> See *Lomont*, 285 F.3d at 13–14; see also *Printz*, 521 U.S. at 904, 933.

### III. PERMITTING PRIVATE PARTY TENTH AMENDMENT STANDING IS CONSISTENT WITH *TVA* AND SUPREME COURT STANDING DOCTRINE

The evolution of the standing doctrine and the fluctuating development of Tenth Amendment jurisprudence make it difficult to decipher the Supreme Court's stance on the question of private party Tenth Amendment standing.<sup>224</sup> A collective look at how the Court has dealt with standing and the Tenth Amendment, however, shows that a careful reading of the Supreme Court's 1939 decision in *Tennessee Electric Power Co. v. Tennessee Valley Authority* ("*TVA*") and other Court precedent mandate a vindication of private party Tenth Amendment standing.<sup>225</sup> The Supreme Court's *TVA* decision is not binding precedent in regard to private party Tenth Amendment standing and was never intended to be such, as circuit court analysis of *TVA* reaffirms.<sup>226</sup> Freed from the yoke of *TVA*, the Court should permit private party Tenth Amendment standing when it decides *United States v. Bond*, because the Tenth Amendment protects individual rights, not merely those of the states.<sup>227</sup> The text of the Tenth Amendment and the Court's interpretation of the Amendment both recognize that private parties bring Tenth Amendment claims on the strength of their own rights—not those of the states.<sup>228</sup> With no Court precedent and no valid standing bar left obstructing private party reliance on the Tenth Amendment, the federal courts and the Supreme Court should recognize private party Tenth Amendment standing; at the very least, the Supreme Court should for the first time conduct a comprehensive exegesis of the Tenth Amendment in relation to private party standing.<sup>229</sup>

#### A. *The Supreme Court Did Not Intend TVA to Establish Binding Precedent on Tenth Amendment Standing*

Principles of judicial review and standing demonstrate that *TVA* did not establish a binding precedent prohibiting private party Tenth

---

<sup>224</sup> See *supra* notes 36–122 and accompanying text.

<sup>225</sup> See *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144 (1939); *Helvering v. Davis*, 301 U.S. 619, 640 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585 (1937); see also *infra* notes 228–278 and accompanying text.

<sup>226</sup> See *infra* notes 230–278 and accompanying text.

<sup>227</sup> See *infra* notes 279–310 and accompanying text; see also *United States v. Bond*, 581 F.3d 128, 137 (3rd Cir. 2009), *cert. granted*, 78 U.S.L.W. 3629 (U.S. Oct. 12, 2010) (No. 09-1227).

<sup>228</sup> See *infra* notes 279–310 and accompanying text.

<sup>229</sup> See *infra* notes 279–328 and accompanying text.

Amendment standing.<sup>230</sup> Likewise, prior Supreme Court precedent makes it unlikely that *TVA* was intended as a landmark case rejecting private party Tenth Amendment standing.<sup>231</sup> The language and specific facts of *TVA* similarly make such an intention unlikely.<sup>232</sup> On the contrary, other decisions of the Court provide an alternate implicit precedent embracing private party Tenth Amendment standing.<sup>233</sup>

The *TVA* Court's cursory statements regarding Tenth Amendment standing cannot be deemed authoritative because of the foundational principle of judicial review that a court may not hear a case over which it lacks jurisdiction.<sup>234</sup> If the *TVA* Court had in fact authoritatively ruled that the appellants lacked standing simply because they brought a Tenth Amendment claim as private parties, then the Court would have had no cause—and in fact, no jurisdiction—to decide that under the Tenth Amendment the federal action in question was not a regulation.<sup>235</sup> The *TVA* Court, however, preceded its brief one-sentence comment on Tenth Amendment standing with a determination of the case on the merits, an exercise in futility and abuse of jurisdiction if its subsequent comment regarding standing was meant to be binding.<sup>236</sup>

Those opposing private party Tenth Amendment standing argue that even in light of the Court's discussion of the merits, the Court's denial of standing absent state involvement is a second, equally authoritative holding.<sup>237</sup> The Supreme Court, however, is not subject to any higher court of review and would have no reason to discuss the merits as a second basis for its opinion should its so-called Tenth Amendment holding be rejected—no court has the power to reject a holding of the Supreme Court.<sup>238</sup> Additionally, even if this stance could conceivably explain the Court's discussion of the case merits, it does not account

---

<sup>230</sup> See *infra* notes 234–239 and accompanying text.

<sup>231</sup> See *TVA*, 306 U.S. at 144; *Helvering*, 301 U.S. at 640; *Steward Mach. Co.*, 301 U.S. at 585; see also *infra* notes 240–244 and accompanying text.

<sup>232</sup> See *TVA*, 306 U.S. at 144; see also *infra* notes 234–264 and accompanying text.

<sup>233</sup> See *infra* notes 260–264 and accompanying text.

<sup>234</sup> See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998); see also *TVA*, 306 U.S. at 144.

<sup>235</sup> See *Steel Co.*, 523 U.S. at 101–02; *TVA*, 306 U.S. at 144; see also Gershengorn, *supra* note 35, at 1073.

<sup>236</sup> See 306 U.S. at 143–44.

<sup>237</sup> See *Brooklyn Legal Servs. Corp B. v. Legal Servs. Corp.*, 462 F.3d 219, 235 (2d Cir. 2006); *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005); *Palmer*, *supra* note 161, at 183.

<sup>238</sup> See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Further, if the Court made an authoritative decision denying standing it would have no jurisdiction to continue further and offer an alternative holding. See *Steel Co.*, 523 U.S. at 101–02.

for the shift in precedent that a mere sentence without a word of explanation in *TVA* would enact if it actually prohibited all private party Tenth Amendment standing.<sup>239</sup>

Prior to deciding *TVA*, the Supreme Court had already implicitly upheld private party Tenth Amendment standing at least twice within the previous two years.<sup>240</sup> Thus, if *TVA* were intended to be authoritative it would not only have established binding precedent on a complex question of constitutional law and judicial review, but also would have directly overturned recent Court practice to the contrary.<sup>241</sup> It is improbable that the Supreme Court would take such major steps in a casual sentence embedded deep within an opinion rich with discussion of case facts, and do so without acknowledging the implicit precedent from the cases merely two years prior that it would be overturning.<sup>242</sup>

In fact, the Court makes no reference to its prior cases granting the type of standing *TVA* purportedly rejects.<sup>243</sup> On the contrary, one of those cases, the Court's 1937 decision in *Steward Machine Co. v. Davis*, was cited multiple times by the ultimately victorious appellees.<sup>244</sup>

Even if the standing statement in *TVA* was authoritative, it was applicable only to the parties in the case at hand; the language of *TVA* is narrow and case-specific, not sweeping and indicative of the dawning of a new, contrary precedent.<sup>245</sup> *TVA* neither mentions the past practice of granting the type of standing that it would be rejecting nor the new standing limits it would be enacting in all cases henceforth, but instead speaks only of the specific appellants in the case before it.<sup>246</sup>

The best reading of *TVA* is that the Court denied the appellants' right to bring the case absent state involvement because the private party appellants were only tangentially impacted by the federal action.<sup>247</sup> Further, the appellants suffered no personal, concrete harm to their rights because the incorporation granted to the private companies by the various states in which they operated promised no exclusiv-

<sup>239</sup> See *infra* notes 240–244 and accompanying text.

<sup>240</sup> See *Helvering*, 301 U.S. at 640; *Steward Machine Co.*, 301 U.S. at 585.

<sup>241</sup> See *TVA*, 306 U.S. at 144; *Helvering*, 301 U.S. at 640; *Steward Machine Co.*, 301 U.S. at 585.

<sup>242</sup> See *TVA*, 306 U.S. at 144; *Helvering*, 301 U.S. at 640; *Steward Mach. Co.*, 301 U.S. at 585.

<sup>243</sup> See *TVA*, 306 U.S. at 144; see also *Helvering*, 301 U.S. at 640; *Steward Mach.*, 301 U.S. at 585.

<sup>244</sup> *TVA*, 306 U.S. at 130, 131; *Steward Mach.*, 301 U.S. at 585. The appellees' arguments are reproduced in the *U.S. Reports* version of the *TVA* decision. 306 U.S. at 130.

<sup>245</sup> See *TVA*, 306 U.S. at 144.

<sup>246</sup> See *id.*

<sup>247</sup> See *id.* at 139, 144.

ity or monopoly of the market.<sup>248</sup> The states, by contrast, had statutes in place mandating that the state had the authority to establish and to regulate utilities within the state.<sup>249</sup> It was thus the states' rights as expressed in these statutes that were potentially infringed by the federal act establishing a power-producing entity within their borders. This is not because that is what the Tenth Amendment and standing doctrine require in all Tenth Amendment cases, but rather because that is what the facts dictated in that specific case.<sup>250</sup> The *TVA* Court's brief standing comment makes contextual sense read as a narrow observation on the case at hand—a case where the states could demonstrate concrete injury to a right they possessed but the private parties could not—rather than as a sweeping precedent intended to still bind the courts over six decades later.<sup>251</sup>

The narrow scope of *TVA*'s standing discussion is confirmed by Justice Butler's dissenting opinion, which argued not on Tenth Amendment interpretation grounds, but with case-specific facts.<sup>252</sup> His dissent argued not that the Tenth Amendment permits private parties to raise Tenth Amendment claims absent state participation, but that the private electric companies complained of a unique and concrete harm that under the circumstances of the case was not a generalized grievance and did constitute an infringement of rights.<sup>253</sup> The dissenting opinion provides further evidence that the issue of contention in *TVA* was whether the private parties had suffered sufficient harm to a cognizable right, not whether a private party could raise a claim under the Tenth Amendment.<sup>254</sup>

Notably, *TVA* was also decided in 1939, a time when the Supreme Court pendulum was in the midst of swinging back toward a non-substantive view of the Tenth Amendment, a view that did not survive the Court's 1992 decision in *New York v. United States* and similar cases.<sup>255</sup>

---

<sup>248</sup> See *id.* at 139.

<sup>249</sup> See *id.* at 140.

<sup>250</sup> See *id.* at 144. Without further elaboration drawn from *TVA* as to why, one commentator characterizes *TVA*'s holding as only prohibiting a private party from asserting a state's right, but allowing a private party to assert his own rights in bringing a Tenth Amendment claim. See Bechtel, *supra* note 138, at 491.

<sup>251</sup> See *supra* notes 124–223 and accompanying text.

<sup>252</sup> See *TVA*, 306 U.S. at 152 (Butler, J., dissenting).

<sup>253</sup> See *id.*

<sup>254</sup> See *id.*

<sup>255</sup> *New York v. United States*, 505 U.S. 144, 181 (1992); see *supra* notes 42–66 and accompanying text. Although *Darby* was not decided until 1941, Professor Chemerinsky identifies 1937 as the year when the Supreme Court reverted to viewing the Tenth Amendment as lacking substantive force. See CHEMERINSKY, *supra* note 8, at 313. Decided in 1939, *TVA*

Instead, the Supreme Court's implicit grant of standing to the CLEOs in the 2000 case of *Printz v. United States* demonstrates the Court's ongoing practice dating back to *Steward Machine Co.* of granting private parties standing in Tenth Amendment cases.<sup>256</sup>

Those rejecting private party Tenth Amendment standing point to the fact that *TVA* has not been overturned as evidence of its ongoing precedential force.<sup>257</sup> It is true that the erosion of time in and of itself does not erode the weight of precedent and that such precedent remains case law until the Supreme Court pronounces otherwise.<sup>258</sup> Such an argument, however, relies for all its force on the doubtful logical underpinning that *TVA* ever was binding on the question of Tenth Amendment standing.<sup>259</sup> Additionally, as much as *TVA* has never been explicitly overturned, neither have the 1937 cases of *Helvering v. Davis* and *Steward Machine Co.*<sup>260</sup> Given the weak case for considering *TVA* binding authority,<sup>261</sup> those two earlier cases, joined with the modern *Printz* decision, arguably present the strongest, albeit implicit, Supreme Court precedent on private party Tenth Amendment standing.<sup>262</sup> Which precedent definitively demands adherence has been undefined, as even at least four justices on the Supreme Court acknowledged when they granted certiorari in 2003 to *Pierce County, Washington v. Guillen* to try to answer that very question.<sup>263</sup> Although Supreme Court precedent does not unquestionably state the propriety of private party Tenth Amendment standing, it does imply it, and certainly does not serve as a strong reason for rejecting it.<sup>264</sup>

---

came down in the midst of a period marked by the Court's reticence to recognize rights flowing from the Tenth Amendment. *See id.*; *see also TVA*, 306 U.S. at 144.

<sup>256</sup> *See Printz v. United States*, 521 U.S. 898, 904, 933 (2000); *Steward Machine Co.*, 301 U.S. at 585. In *Printz* standing was implicitly granted to law enforcement officials. *See* 521 U.S. at 904, 933.

<sup>257</sup> *See, e.g.*, *United States v. Hacker*, 565 F.3d 522, 526–27 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 302 (2009); *Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002) (quoting *Rodriguez*, 490 U.S. at 484); *Palmer*, *supra* note 161, at 183.

<sup>258</sup> *See, e.g.*, *Lomont*, 285 F.3d at 14 n.3 (quoting *Rodriguez*, 490 U.S. at 484).

<sup>259</sup> *See id.*; *see also supra* notes 230–256 and accompanying text.

<sup>260</sup> *See Helvering*, 301 U.S. at 640; *Steward Machine Co.*, 301 U.S. at 585.

<sup>261</sup> *See supra* notes 230–256 and accompanying text.

<sup>262</sup> *See Printz*, 521 U.S. at 904, 933; *Helvering*, 301 U.S. at 640; *Steward Machine Co.*, 301 U.S. at 585.

<sup>263</sup> *See* 537 U.S. 129, 148 n.10 (2003); *see also Bond*, 581 F.3d at 137 (noting the significance of the grant of certiorari in *Washington*).

<sup>264</sup> *See supra* notes 230–263 and accompanying text.

### B. *Implicit Undermining of the Claim that TVA Is Binding Precedent*

Further reasons to doubt *TVA*'s binding force ironically come from some of the very circuit courts that deny Tenth Amendment standing chiefly on the strength of *TVA*.<sup>265</sup> The 2009 decision by the U.S. Court of Appeals for the Eighth Circuit in *United States v. Hacker* noted that "before reaching the merits of Hacker's Tenth Amendment argument, we must ensure that he has standing to raise the argument."<sup>266</sup> The court then went on to rest its ruling on *TVA*, a case where the Court reached the merits of the plaintiff's Tenth Amendment claim.<sup>267</sup> This is something that the Court would not have done—by the *Hacker* court's own reasoning—if *TVA* had in fact ruled definitively that the plaintiff, as a private party, did not have standing to bring a Tenth Amendment claim.<sup>268</sup> The circuit courts' interpretation of *TVA* as authoritatively rejecting private party Tenth Amendment standing is thus undermined by the reasoning of the courts themselves when they refuse to entertain the merits of a Tenth Amendment claim because they have determined the plaintiff to lack standing.<sup>269</sup>

Furthermore, the Third and Tenth Circuits' conceptualization of narrow private party Tenth Amendment standing in cases where the party's interests align with those of the state<sup>270</sup> abandons *TVA*'s language.<sup>271</sup> If actually binding precedent, *TVA* left no exception for private party standing when in alignment with state interests, but instead conditioned that the private corporations needed to bring the claim in conjunction with state officials.<sup>272</sup> The circuit courts envisioning this limited private party standing not only invite the nightmare of a vague and subjective inquiry into when a party's interests can be said to align with the state's, but also disregard *TVA* in a way sharply juxtaposed with those same circuit courts holding *TVA* as sacrosanct precedent when

---

<sup>265</sup> See *infra* notes 266–278 and accompanying text.

<sup>266</sup> 565 F.3d at 525. Some other circuit courts denying private party Tenth Amendment standing also acknowledged this principle. See, e.g., *Brooklyn Legal Servs.*, 462 F.3d at 234; *Medeiros*, 431 F.3d at 33.

<sup>267</sup> See *Hacker*, 565 F.3d at 526–27.

<sup>268</sup> See *id.* at 525–27.

<sup>269</sup> See *id.*; see also *Brooklyn Legal Servs.*, 462 F.3d at 234; *Medeiros*, 431 F.3d at 33.

<sup>270</sup> See *supra* notes 171–185 and accompanying text.

<sup>271</sup> See *TVA*, 306 U.S. at 144.

<sup>272</sup> See *id.* Alignment with state interests arguably existed in *TVA* since the private parties sought to enforce a state statute. See *id.* at 140. That position is weakened, however, by the states' policies and laws implemented to facilitate the federal action that the *TVA* plaintiffs were disputing. See *id.* at 141.

they use it as the chief basis to deny private party Tenth Amendment standing.<sup>273</sup>

The recent trend among U.S. courts of appeals toward denying or limiting private party Tenth Amendment standing resulted almost entirely from their perception of *TVA* as binding precedent.<sup>274</sup> Although some courts have identified policy reasons supporting a denial of such standing,<sup>275</sup> not one has made an independent argument apart from any reference to *TVA* as to why private party Tenth Amendment standing must be denied.<sup>276</sup> The trend toward denying such standing bespeaks not any independent analysis that could illuminate the Supreme Court's imminent review, but merely a parroting of the dicta in *TVA*.<sup>277</sup> No court now in the majority position has independently analyzed the constitutional and prudential considerations surrounding private party Tenth Amendment standing, and this is where the Supreme Court, unyoked from *TVA*, should begin.<sup>278</sup>

### C. *The Tenth Amendment Protects Individual Rights and Private Party Claims Do Not Violate General Standing Doctrine*

The Tenth Amendment was intended to protect private party rights, as evinced by the text of the Amendment and the decisions of the Supreme Court.<sup>279</sup> Thus, granting private party standing in Tenth Amendment claims does not violate the third-party and generalized grievance standing bars.<sup>280</sup> Without *TVA* as binding precedent, the federal courts are free to engage in their role of constitutional interpretation.<sup>281</sup> Principles of constitutional interpretation show that the Tenth Amendment should be read as safeguarding individual rights, not merely those of the states.<sup>282</sup> Proponents of private party Tenth Amendment standing identify the 1992 Supreme Court decision in *New York v. United States* as the seminal modern case delineating the con-

---

<sup>273</sup> See *supra* notes 171–193 and accompanying text.

<sup>274</sup> See *supra* notes 160–215 and accompanying text.

<sup>275</sup> See *Bond*, 581 F.3d at 137 (citing fear of increased litigation); *Medeiros* 431 F.3d at 36 (same).

<sup>276</sup> See *supra* notes 160–215 and accompanying text.

<sup>277</sup> See *supra* notes 160–215 and accompanying text.

<sup>278</sup> See *supra* notes 160–215 and accompanying text.

<sup>279</sup> See *infra* notes 287–310 and accompanying text.

<sup>280</sup> See *infra* notes 287–310 and accompanying text.

<sup>281</sup> See *supra* notes 160–215 and accompanying text; *infra* notes 287–310 and accompanying text.

<sup>282</sup> See *infra* notes 287–310 and accompanying text.

tours of the Tenth Amendment.<sup>283</sup> In *New York v. United States* the Supreme Court reaffirmed its 1991 decision in *Gregory v. Ashcroft* that the Tenth Amendment is a substantive limit on the power and actions of the federal government and highlighted individuals as the specific intended beneficiaries of the protections conferred by the Tenth Amendment.<sup>284</sup> Private parties with personal, particular harms should be able to bring a Tenth Amendment claim asserting their own personal rights.<sup>285</sup> Finally, private parties raising Tenth Amendment claims can receive redress for their injuries.<sup>286</sup>

### 1. The Text and Structure of the Tenth Amendment Demonstrate That Its Scope Protects Private Parties

The text of the Tenth Amendment supports the interpretation that the Amendment was designed to safeguard individual liberty and to secure rights to private parties, not merely to states.<sup>287</sup> The Amendment's reservation of rights "to the States respectively, or to the people" would have its closing clause "or to the people" rendered a nullity were the Court to rule that only states have rights and standing to raise claims under the Amendment.<sup>288</sup> Reading "to the people" as just another way of repeating "the States" gravely offends the principle that no clause in the Constitution "is intended to be without effect."<sup>289</sup>

---

<sup>283</sup> See *infra* notes 296–310 and accompanying text.

<sup>284</sup> See *New York v. United States*, 505 U.S. at 181; *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1992); see also *infra* notes 296–310 and accompanying text.

<sup>285</sup> See *infra* notes 296–310 and accompanying text.

<sup>286</sup> See *infra* notes 311–328 and accompanying text.

<sup>287</sup> See U.S. CONST. amend. X; *supra* notes 288–295 and accompanying text.

<sup>288</sup> Bechtel, *supra* note 138, at 496. Throughout the Constitution, the phrase "the people" is used to demark individual rights of the people. Kevin Jones, Comment, *Reframing the Tenth Amendment Debate: Drawing Cultural Theory from the Holster*, 77 UMKC L. REV. 487, 493 (2008). Additionally:

[T]he Tenth Amendment clearly implies a difference between the two terms ["states" and "the people"] by using the word "States" twice and "the people" once in a distinguishable fashion. The use of both terms in the same amendment illustrates that the drafters of the Constitution did not use the terms interchangeably, but rather had separate meanings for each.

*Id.* at 494.

<sup>289</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); Bechtel, *supra* note 138, at 496; see also *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 94–95 (1947) (determining that civil servants have political rights and freedoms under the Tenth Amendment). In contrast to other aspects of the Tenth Amendment, the phrase "to the people" was adopted without debate or disagreement. Gershengorn, *supra* note 35, at 1085–86. The most supported interpretation of this phrase is that it indicates that the people were the actual holders of the rights conveyed by the Amendment. *Id.* at 1086.

Based on historical data, there is strong reason to believe that “to the people” is most accurately read as granting individuals the right to enforce state sovereignty.<sup>290</sup> First, both those framers in favor and opposed to the Tenth Amendment held the belief that it was the people as individuals who retained the rights not granted to the federal government.<sup>291</sup> Additionally, the Tenth Amendment concludes the Bill of Rights portion of the Constitution that was inserted for the protection of individual liberties.<sup>292</sup> Because the dual-sovereignty notion of federalism embedded in the Tenth Amendment exists to prevent tyranny, it must protect the rights of individuals, the parties who would be the victims of such tyranny.<sup>293</sup>

The language of *New York v. United States* also strongly supports the interpretation that places the people as the primary intended beneficiaries of the Tenth Amendment’s protections.<sup>294</sup> Because individuals possess Tenth Amendment protections in their own right, those private parties raising Tenth Amendment claims sue to enforce their own rights.<sup>295</sup>

---

<sup>290</sup> See Gershengorn, *supra* note 35, at 1086–87; see also *supra* notes 67–74 and accompanying text.

<sup>291</sup> See Gershengorn, *supra* note 35, at 1085–86. References to the rights of “the people” were frequently used at the time of the Founding to connote individual rights. See Kates and Cramer, *supra* note 67, at 1350 n.68. The Founders, including James Madison, made early references to the right to assemble, the right to freedom of religion, and the right to freedom of speech in terms of rights belonging “to the people.” See *id.*

<sup>292</sup> See *Adamson v. California*, 332 U.S. 46, 70 (1947) (Black, J., dissenting).

<sup>293</sup> See *New York v. United States*, 505 U.S. at 181–82; Bechtel, *supra* note 138, at 497. It makes logical sense that the Tenth Amendment protects individual rights because when the federal government oversteps its bounds and encroaches on the states, it is not the state, but its citizens who suffer. Bechtel, *supra* note 138, at 497; Gershengorn, *supra* note 35, at 1095.

<sup>294</sup> See 505 U.S. at 181–82. Professor Erin Ryan criticizes the Court’s decision in *New York v. United States* for creating an “inalienability rule” regarding the Tenth Amendment. See Ryan, *supra* note 67, at 7–8. She argues that by assigning the Tenth Amendment’s protections to the individuals within a state—and not just the state itself—the Court created a bad policy whereby the state’s metaphorical hands would be tied in negotiating intergovernmental partnerships. See *id.* See generally Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. (forthcoming Jan. 2011). Notably, although Ryan expresses concern for the policy implications of *New York v. United States*, she never doubts the Court’s meaning that the Tenth Amendment exists to protect individual rights. Ryan, *supra* note 67, at 7–8, 41. Ryan describes the decision as analogizing private parties’ rights under the Tenth Amendment to other Bill of Rights protections enjoyed and enforced by private parties, like the right to a jury trial or the right to be free from unreasonable searches and seizures. See *id.* at 41.

<sup>295</sup> See Ryan *supra* note 67, at 7–8, 41. But see *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3084 n.20 (2010) (Thomas, J., concurring) (stating as an aside that the Ninth and Tenth Amendments, along with the Establishment Clause, do not guarantee individual rights); *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790 (2008) (stating in dicta that although the framers used the phrase “the people” to connote individual and not merely

## 2. Private Parties Can Raise Tenth Amendment Claims on the Strength of Their Own Rights and Personal Injuries

The permissibility of private party Tenth Amendment standing is the result that logically flows from the Court's pronouncement in *New York v. United States* that individuals are protected by the Tenth Amendment.<sup>296</sup> If the Tenth Amendment protects individual rights, then individual private parties with particularized harms may bring a Tenth Amendment claim on their own rights, thus rendering moot any alleged violation of the third-party standing bar.<sup>297</sup> Although the disputed federal government action may not directly regulate the private party, the private party may nonetheless be granted standing under the *Lujan v. Defenders of Wildlife* and *Friends of the Earth v. Laidlaw Environmental Services* model, cases decided by the Supreme Court respectively in 1992 and 2000.<sup>298</sup> Applying the reasoning of *Lujan* and *Laidlaw*, the Tenth Amendment violation needs only a sufficient nexus to the plaintiff's injury for standing to be granted.<sup>299</sup> Thus private parties should be able to bring Tenth Amendment claims—in which they invoke a constitutional right intended to protect individuals and not merely states—so long as they can demonstrate a personal, concrete harm.<sup>300</sup> Losing

---

collective rights, the Tenth Amendment is not a rights-granting amendment, but instead one that reserves powers).

<sup>296</sup> See *New York v. United States*, 505 U.S. at 181.

<sup>297</sup> See *supra* notes 75–100 and accompanying text. Accordingly, the taxpayer suit standing analysis the Court developed in 1968 in *Flast v. Cohen* does not apply to parties raising Tenth Amendment claims derived from personal, concrete injuries. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 78–79 (1978); *Flast v. Cohen*, 392 U.S. 83, 102, 105–06 (1968). Whereas the *Flast*-type plaintiff brings a generalized grievance claim grounded solely in his or her status as a taxpayer, under *New York v. United States* the private party Tenth Amendment plaintiff with distinct, personal injury brings a claim derived from his or her personal rights granted by the Tenth Amendment. See *New York v. United States*, 505 U.S. at 181; *Duke Power Co.*, 438 U.S. at 78–80; *Flast*, 392 U.S. at 105–06.

<sup>298</sup> See *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563–64 (1992).

<sup>299</sup> See *Laidlaw*, 528 U.S. at 183; *Lujan*, 504 U.S. at 563–64; Bechtel, *supra* note 138, at 495.

<sup>300</sup> See *Laidlaw*, 528 U.S. at 183; *Lujan*, 504 U.S. at 563–64. As in *FEC v. Akins*, standing should be recognized because there exists a constitutional protection (a federal statute in the case of *Akins*) designed to protect the plaintiff from just the sort of harm alleged—here the encroachment of the federal government on state sovereignty to the detriment of the individuals living in the states, a harm that the Court in *New York v. United States* pronounced that the Tenth Amendment protects against. See *FEC v. Akins*, 524 U.S. 11, 24 (1998); *New York v. United States*, 505 U.S. at 181. Even if the *Lujan* and *Laidlaw* precedents are viewed as confined to environmental cases, *New York v. United States*, *Printz*, and *Reno v. Condon* would still provide precedent for expanding Tenth Amendment protection by which the Court would likely recognize the private party's Tenth Amendment standing claim. See *Reno v. Condon*, 528 U.S. 141, 151 (2000); *Printz*, 521 U.S. at 904, 933; *New York*

one's job, being sent to prison, and being indicted for the size of a lobster catch seem to all present cases of personal, distinct, and concrete harm that, if sufficiently linked to a Tenth Amendment violation, should result in standing.<sup>301</sup>

Although some would-be plaintiffs attempting to raise Tenth Amendment claims may lack personal, particularized injury and may merely be asserting a generalized grievance, that standing obstacle is a product of the specific facts of the case, not of an overall principle that all Tenth Amendment claims are generalized grievances that do not particularly harm private parties or implicate individual rights.<sup>302</sup> Opponents of private party Tenth Amendment standing characterize the bar against generalized grievances established by the Supreme Court's 1923 decision in *Frothingham v. Mellon* as further evidence of the Court's rejection of private party Tenth Amendment standing.<sup>303</sup> In *Flast v. Cohen* in 1968, however, the Supreme Court noted that the *Frothingham* plaintiff's fatal flaw was that she sought to assert the states' interest in its legislative prerogatives, rather than her own interests as a taxpayer or any personalized injury distinct from all other taxpayers.<sup>304</sup> In light of the Constitution's text and *New York v. United States*, private parties may suffer distinct harms to their individual rights when the Tenth Amendment is violated—it remains for a trial court to determine if such distinct injury has occurred in a given case.<sup>305</sup>

In *New York v. United States*, the Court additionally ruled that a state may not surrender its sovereign power, even should it wish to do so.<sup>306</sup>

---

*v. United States*, 505 U.S. at 157, 181; Bechtel, *supra* note 138, at 495; *see also Laidlaw*, 528 U.S. at 183; *Lujan*, 504 U.S. at 563–64.

<sup>301</sup> *See Hacker*, 565 F.3d at 524; *Medeiros*, 431 F.3d at 28; *Gillespie v. City of Indianapolis*, 185 F.3d 693, 697 (7th Cir. 1999).

<sup>302</sup> *See New York v. United States*, 505 U.S. at 181; *Duke Power Co.*, 438 U.S. at 78–80; *TVA*, 306 U.S. at 144.

<sup>303</sup> *See Frothingham v. Mellon*, 262 U.S. 447, 479–80, 487 (1923); *Palmer*, *supra* note 161, at 182 (arguing that *Frothingham*, *Flast* and their progeny support the principle that “a state and a state alone must assert its own rights”).

<sup>304</sup> *See Flast*, 392 U.S. at 105. Though *Flast* did not explicitly link its ban on generalized grievances absent fulfillment of the nexus requirement with a prohibition of private party Tenth Amendment standing, the structure of the opinion suggests that the Court may have made such a link. *See Palmer*, *supra* note 161, at 182. Such a link is untenable, however, given the Court's pronouncement in *New York v. United States* that the Tenth Amendment safeguards individuals. *See New York v. United States*, 505 U.S. at 181. Under *New York v. United States*, the Tenth Amendment does not just protect states' rights—general and undifferentiated for all citizens, but personal rights subject to distinct, personal harm. *See id.*; *Duke Power Co.*, 438 U.S. at 78–79.

<sup>305</sup> *See New York v. United States*, 505 U.S. at 181.

<sup>306</sup> *See id.* at 181–82.

Thus, circuit courts that permit private party standing exclusively for states or parties raising claims in alignment with state interests erroneously weigh the opinion voiced by the state.<sup>307</sup> Under *New York v. United States*, the only question that matters is whether the federal government infringed on the state's sovereignty, with or without the state's consent.<sup>308</sup> It matters not that Utah would not have argued the same position as the plaintiff in *United States v. Parker*, only that the plaintiff bringing his claim had distinct personal injury and was objecting to a violation of the state's sovereign rights.<sup>309</sup> When private parties suffer a particularized injury that is distinct from the rest of the population—and thus not a generalized grievance—then under the Tenth Amendment as interpreted by *New York v. United States*, that party may raise a claim not as a third-party plaintiff invoking the rights of the state, but as an individual invoking his or her own rights.<sup>310</sup>

### 3. Private Party Tenth Amendment Standing Satisfies the Redressability Prong

A private party claim under the Tenth Amendment can be redressed.<sup>311</sup> If a federal action were struck down pursuant to a private party Tenth Amendment claim, the private party would be freed from the existence of the injurious federal action, and the states, no longer constrained by the federal action, would be free to enact their own policies suited to their own citizens' needs and demands.<sup>312</sup> Absent the permissibility of private party Tenth Amendment standing, injured private parties, including even some state officials, are denied a remedy from the courts.<sup>313</sup>

In analyzing the 2005 U.S. Court of Appeals for the First Circuit case *Medeiros v. Vincent*, one commentator has correctly asserted that, in

---

<sup>307</sup> See *id.*; see also *Bond*, 581 F.3d at 137; *United States v. Parker*, 362 F.3d 1279, 1285 (10th Cir. 2004). The *Medeiros* court suggests that the Supreme Court's ban on a state's consent to commandeering in *New York v. United States* is satisfied by the political process—citizens aggrieved by the consented-to commandeering will seek to change it. See *supra* notes 203–204 and accompanying text. Providing an additional remedy, however, by which state consent to commandeering can be remedied—the political process—does not justify considering such consent, which the Court in *New York v. United States* pronounced to be irrelevant. See 505 U.S. at 182; *supra* notes 168–193.

<sup>308</sup> See *New York v. United States*, 505 U.S. at 182.

<sup>309</sup> See 362 F.3d at 1284–85; see also Bechtel, *supra* note 138, at 493.

<sup>310</sup> See *New York v. United States*, 505 U.S. at 181; *Duke Power Co.*, 438 U.S. at 78–80.

<sup>311</sup> See *infra* notes 316–326 and accompanying text. But see Palmer, *supra* note 161, at 193.

<sup>312</sup> See *infra* notes 316–320 and accompanying text.

<sup>313</sup> See *infra* notes 321–328 and accompanying text.

order to bring a Tenth Amendment commandeering claim, a state government must suffer commandeering at the hands of the federal government.<sup>314</sup> The commentator goes on to argue, however, that because the relief for commandeering would be to strike down the federal law—allowing the state the freedom to do as it pleased—the plaintiff would only taste relief if the state were to repeal its own law that consented to the federal law, making effective redress unlikely.<sup>315</sup>

This view is faulty, however, because it assumes that Rhode Island had consented to and agreed with the lobster quantity limits imposed by the federal act at issue in *Medeiros*.<sup>316</sup> All that Rhode Island actually consented to, however, was a compact entered into decades earlier (and later made involuntary by federal law) whereby the Atlantic states would join together in overseeing the oceans by using interstate fishery management plans.<sup>317</sup> In many other potential Tenth Amendment claims, the state has not consented to the federal action at all.<sup>318</sup> If released from the federal plan mandates, Rhode Island officials may very well respond to the state's own needs and voter interests by creating a different catch limit or abandoning limits altogether.<sup>319</sup> It is unclear whether the plaintiff's every grievance would immediately be redressed, but it is certainly not sound to presume that he would receive no relief; at the least, the plaintiff would receive satisfaction by the removal of the federal mandate enforcing the catch limits and the opening of the way for him to lobby his local leaders for reform.<sup>320</sup>

It is also false to assume that when the claim involves the commandeering of a state executive apparatus, no harm is done by denying private party standing.<sup>321</sup> This view assumes that the ones most harmed by commandeering are state officials who would be able to bring a claim in conjunction with the state attorney general—who, speaking for the state, would have standing.<sup>322</sup> It is doubtful, however, that the state officials directly harmed would have standing to raise their claims in instances when the state and its attorney general disagreed with them,

<sup>314</sup> Palmer, *supra* note 161, at 193; *see also Medeiros*, 431 F.3d at 33.

<sup>315</sup> Palmer, *supra* note 161, at 193. Using *Medeiros* to illustrate, Palmer explains that even were the federal act to be struck down, the plaintiff would have no relief unless the state decided to change its lobster catch limits. *See id.*

<sup>316</sup> *See Medeiros*, 431 F.3d at 27.

<sup>317</sup> *See id.*

<sup>318</sup> *See Hacker*, 565 F.3d at 524–25; *Printz*, 521 U.S. at 904.

<sup>319</sup> *See Medeiros*, 431 F.3d at 27, 33; *Stover*, *supra* note 204, at 574.

<sup>320</sup> *See Medeiros*, 431 F.3d at 27, 33; *Stover*, *supra* note 204, at 574.

<sup>321</sup> *See infra* notes 323–325 and accompanying text. *But see* Palmer, *supra* note 161, at 194.

<sup>322</sup> *See infra* notes 323–325 and accompanying text. *But see* Palmer, *supra* note 161, at 194.

unless private parties have Tenth Amendment standing.<sup>323</sup> Had the position of the CLEOs in *Printz* been contradicted by the state, they would fail to meet the standing requirements outlined by the currently-prevailing view among circuit courts.<sup>324</sup> Private parties (both state officials and ordinary citizens) directly and personally harmed by the federal government's commandeering would be left without remedy, and the Court's command in *New York v. United States* that states may not consent to being commandeered would be thwarted.<sup>325</sup>

In order to effectuate the ruling in *New York v. United States*, *TVA* should not be construed as prohibiting private party Tenth Amendment standing because the Court's one-sentence standing commentary comes after the Court's discussion of case merits and makes the most contextual sense as referring only to the parties of that case.<sup>326</sup> The Supreme Court's decision in *New York v. United States*, coupled with the text and structure of the Tenth Amendment, demonstrate that the Tenth Amendment grants rights to individuals, and not only states.<sup>327</sup> Private parties suffering distinct, particularized injuries deserve standing because they raise Tenth Amendment claims on the strength of their own rights and are not third-party plaintiffs invoking the states' rights.<sup>328</sup>

#### CONCLUSION

The Tenth Amendment guards state sovereignty but can only be given its intended power, as defined by the most recent expressions of the Supreme Court, when individual citizens and private parties are allowed to enforce it. The Court's 1939 decision *Tennessee Electric Power Co. v. Tennessee Valley Authority* cannot be used as a precedential bar to private party Tenth Amendment standing because the Court's discussion of standing is cursory dicta, particular to the facts of that specific case, that has been outmoded by the Supreme Court's new emphasis on the Tenth Amendment and on its protection of individual rights.

---

<sup>323</sup> See *supra* notes 160–215 and accompanying text. Under *Printz* as interpreted by the D.C. Circuit, law enforcement officials would be granted standing regardless of whether or not they have been authorized to act on the state's behalf. See *Printz*, 521 U.S. at 904, 933; *Lomont*, 285 F.3d at 14 n.3.

<sup>324</sup> See 521 U.S. at 904, 933; *supra* notes 160–215 and accompanying text. The same would hold true in the hypothetical at the start of this Note. See *Printz*, 521 U.S. at 904; see also *supra* notes 1–7, 160–215 and accompanying text.

<sup>325</sup> See *New York v. United States*, 505 U.S. at 182; see also Gershengorn, *supra* note 35, at 1088.

<sup>326</sup> See *supra* notes 230–278 and accompanying text.

<sup>327</sup> See *supra* notes 287–310 and accompanying text.

<sup>328</sup> See *supra* notes 296–310 and accompanying text.

The third-party and generalized grievance bars are not automatically applicable to bar private party Tenth Amendment standing because history, text, and Supreme Court precedent indicate that the Tenth Amendment protects individual rights. The Supreme Court should resolve the growing circuit split in its forthcoming decision in *United States v. Bond*, to bring harmony to the courts over such a fundamental issue as standing, and should permit private parties to raise Tenth Amendment claims when they demonstrate distinct, personal harm.

KATHERINE A. CONNOLLY