The Perils of State Standing, Revisited

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Alexander M. Bickel, The Voting Rights Cases, **1966 Sup. Ct. Rev. 79** (1966).

For those who teach and write about the federal courts and/or constitutional law, Alexander Bickel's 24-page review of how the Voting Rights Act fared in the Supreme Court – a lucid dissection of *South Carolina v. Katzenbach*, *Harper v. Virginia State Board of Elections*, and *Katzenbach v. Morgan* — would almost certainly be worth a read as a pure matter of historical (and academic) curiosity.

What's particularly salient about Bickel's analysis, though, is its contemporary relevance along at least two axes. First, it provides the outlines of a rejoinder to the Supreme Court's 2013 conclusion that key provisions of the VRA are unconstitutional (for economy of space, I'll leave this issue to the interested reader). Second, and, even more significantly, it makes perhaps the most emphatic argument against broad state standing in lawsuits challenging the scope of federal government policies — including Virginia's rejected challenge to the Affordable Care Act's individual mandate and Texas's pending challenge to President Obama's "deferred action" immigration policy. Thus, although no one needs convincing that Bickel was the first among equals, contemporary readers might benefit from this relatively short and less well-known piece of his.

I. Bickel and *South Carolina* v. *Katzenbach*

The irony of how quickly the VRA ended up before the Supreme Court was not lost on Bickel, whose essay opens with the observation that "[v]ery few statutes can ever have been drafted with a warier eye to the prospect of litigation, or a keener intention to ward it off as long as possible." In that regard, at least, Congress failed miserably. South Carolina moved for leave to file an original bill of complaint in the Supreme Court fewer than six weeks after the VRA was signed into law, and, nervous at the prospect of defending the statute's constitutionality in potentially hostile southern district courts, Attorney General Katzenbach responded by moving to file an original bill of his own against Alabama, Mississippi, and Louisiana (and refusing to oppose South Carolina's).

Although the merits issues were practically identical, the Court denied the government's motion for leave to file, and on the same day granted leave to South Carolina, even though, as Bickel notes, it was only *that* bill that raised a potentially fatal jurisdictional obstacle — South Carolina's standing.

Since *Massachusetts* v. *Mellon* in 1923, if not before, the Supreme Court had steadfastly held to the rule that a state may not sue the federal government as *parens patriae* of its citizens, since "it is no part of its duty or power to enforce their rights in respect of their relations with the federal government."

As well-established as the rule was, no prior commentator had done anything to explain *why* such a rule was necessary beyond pure fidelity to precedent. Bickel's discussion of *South Carolina* remedied that gap. As he opened his discussion, "[a] state is said to have no standing in such circumstances, not because the interests asserted are unreal or inadequately particular to the state, but because by hypothesis they should not, in such circumstances, suffice to invoke judicial action." What state standing threatened to undermine, Bickel explained, was the "simple proposition" that,

> the nature of the federal union, the power and function of Congress and the President, and the power and function of the judiciary all would be radically altered if states could come into the original jurisdiction at will to

> litigate the constitutional validity of national law applicable within their territories. To allow the states to litigate in this fashion . . . would be a fundamental denial of perhaps the most innovating principle of the Constitution: the principle that the federal government is a sovereign coexisting in the same territory with the states and acting, not through them, like some international organization, but directly upon the citizenry, which is its own as well as theirs.

In addition to the potentially serious sovereignty implications of allowing liberal state standing, Bickel also suggested that "[i]t would make a mockery . . . of the constitutional requirement of case or controversy . . . to countenance automatic litigation — and automatic it would surely become — by states situated no differently than was South Carolina in this instance."

Finally, as if those first two critiques weren't enough, Bickel also suggested that allowing such standing would precipitate preemptive and premature litigation that would force constitutional judgments based on underdeveloped (if not undeveloped) records. "Time and again, precisely like a council of revision, the Court would be pronouncing the abstraction that some law generally like the one before it would or would not generally be constitutional in the generality of its applications." As Bickel concluded, "[s]uch an abstraction was what the Court was reduced to pronouncing on the merits of [*South Carolina*]." Indeed, although the Court dismissed South Carolina's due process and bill of attainder claims for lack of standing, it rejected on the merits South Carolina's argument that Congress had exceeded its power to enforce the Fifteenth Amendment, albeit in a manner that, Bickel concludes, only reinforces the added benefit that might have accrued had "the Court allowed real cases to arise."

To be fair, Bickel's analysis of the standing issue in *South Carolina* had one flaw: As Justice Black would explain five years later in *Oregon v. Mitchell*, states may well have a unique sovereign interest in the allocation of power vis-à-vis *elections* as between the state and federal governments, since Article I, Section 4 specifically leaves the "Times, Places, and Manner" of federal elections to state control. Thus, a stronger argument could be made that the Court in *South Carolina* was recognizing South Carolina's unique interest *as a state* in the relationship between Article I and Congress's power to enforce the Fifteenth Amendment. Such unique interests help to explain why, in cases like *New York v. United States* and *Massachusetts v. EPA*, the Court didn't balk at the identity of the plaintiff, or why states were held to have standing to challenge the ACA's Medicaid expansion, but not its individual mandate. Whether or not *South Carolina* thereby falls on the right side of the line, Bickel's jeremiad against undifferentiated state standing is not undermined by his failure to anticipate an argument that wasn't made at the time. At most, *South Carolina* is the exception that proves the rule, and one which helps to illuminate the very serious stakes of the standing issue in the pending challenge to the individual mandate.

II. State Standing and Contemporary Litigation

As readers surely recall, the core of the challenge to the ACA's individual mandate was the claim that Congress has exceeded its Article I regulatory powers — the same kind of claim on which Massachusetts rested its standing in *Mellon* and on which dozens of states unsuccessfully rested their claim to standing in dozens of cases since. The critical factual distinction of those cases on which Virginia rested its standing in the ACA litigation was the Virginia Health Care Freedom Act, which provides that

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

Thus, Virginia argued, its sovereign interest in enforcing its own laws is injured by the individual mandate (which, to the extent that it's valid, preempts the Virginia Health Care Freedom Act).

Whereas a formalistic reading of *Mellon* and its progeny might provide support for the notion that the Virginia Health Care Freedom Act *is* enough to distinguish the earlier cases, Bickel's explication of *Mellon*'s analytical underpinnings helps to show why the existence of a putatively conflicting state law is a distinction without a difference. After all, if preemption, standing alone, were sufficient to confer standing, then the category of federal laws that could be challenged by states *qua* states is virtually limitless. Indeed, states wouldn't even be limited to constitutional claims on this reading; the existence of a putative conflict between federal and state law would be enough for a state to sue challenging whether the conflict even exists — a claim sounding at most in statutory interpretation.

Nor was the Virginia Health Care Freedom Act a unique state law. One needn't have looked far to find laws similarly exempting citizens from compliance with certain federal laws in Idaho, Arizona, and a steadily growing number of other states. To be sure, these laws are political theater, since the constitutionality of the federal laws at which they are directed does not — and cannot — turn in any meaningful way on the existence of a conflict with state law. But if these same laws are sufficient to create standing, then the fears Bickel expressed in his analysis of *South Carolina* may well come true, 45 years later.

Moreover, any suggestion that the ACA litigation was unique vis-à-vis state plaintiffs is belied by the litigation challenging President Obama's deferred action immigration policy, which both the district court and a divided panel of the Fifth Circuit invalidated under the Administrative Procedure Act only after concluding that Texas (and the 25 other states who joined it as plaintiffs) had standing. Whereas Texas claimed that its standing derived from the incidental added costs of providing drivers' licenses to those undocumented immigrants who received temporary lawful status under the policy, the injury it suffered was neither (1) unique to Texas (or some discrete subset of the states); nor (2) in violation of a specific right federal law conferred upon the states, as such.

To be sure, I'm not one who generally counts himself a fan of restrictive standing rules. Nor do I think arguments against standing can (or should) be used simply to avoid reaching the merits of high-profile constitutional litigation. But absent some far more specific harm to states like Virginia under the ACA or Texas under the deferred action policy, reaching the merits of these suits, risks opening the very floodgates against which Bickel inveighed by allowing states to use litigation in lieu of the political process to challenge virtually any federal policy with which they disagree.

If nothing else, appreciating what those floodgates are, and why they matter, makes his essay worth a (modern) read.

In the interest of full disclosure, I should note that I served as co-counsel to a group of federal courts professors as amici curiae in support of the government's appeal to the Fourth Circuit in Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011). Needless to say, the views expressed herein are mine alone.*

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