Tenth Amendment Challenges After *Bond v. United States*

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Introduction

In its recent decision in *Bond v. United States*, the Supreme Court explained that because the Tenth Amendment "secures the freedom of the individual," private parties who otherwise satisfy Article III's standing requirements and other prudential requirements may challenge federal laws as violating the Tenth Amendment.[1] In so doing, the Court reversed the majority of circuit courts that have addressed the issue and removed a significant categorical bar to individual Tenth Amendment challenges. This Article explains *Bond*'s holding and explores its implications for future Tenth Amendment challenges by private parties.

Although *Bond* contains some expansive language regarding the role of Tenth Amendment in protecting individual liberties, it should not be read too broadly. *Bond* clarified that the Tenth Amendment protects individual liberties and thus prudential, third-party standing principles do not prevent individuals from bringing a Tenth Amendment challenge against federal statutes that impair their liberties.[2] But *Bond* also made clear that individual Tenth Amendment challenges must satisfy traditional Article III standing requirements and that not every violation of the Tenth Amendment automatically entails an impairment of individual liberty that supports standing.[3] As a result, Article III standing requirements will hinder many individual Tenth Amendment challenges, and many individual challenges will not succeed without the support of states. Thus, despite the breadth of the

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1. 131 S. Ct. 2355, 2358–59 (2011).
2. *Id.* at 2365.
3. *Id.* at 2366.

Court's language in *Bond*, states may significantly influence whether private parties can successfully assert the states' sovereign interests in a Tenth Amendment challenge.

Litigants must understand these limitations as they attempt to use *Bond* to challenge federal statutes that, until this point, have been protected from individual suits by the bar that most courts of appeals have imposed on private-party Tenth Amendment standing. Put succinctly, while *Bond* rightly removed the prudential bar to individual Tenth Amendment challenges, it did not confer Article III standing to each and every litigant alleging a Tenth Amendment injury. Litigants will still need to separately satisfy the Article III requirements, blunting the impact of *Bond* and likely insulating many federal statutes from individual Tenth Amendment challenges.

This Article explores these issues in five Parts. Part I provides a brief outline of standing doctrine. Part II examines the circuit court split on Tenth Amendment standing and outlines the *Bond* decision and its resolution of the circuit split. Part III analyzes *Bond*'s practical implications for Tenth Amendment litigation and explains how Article III standing requirements will continue to pose a significant problem for certain Tenth Amendment claims. Part IV applies this insight to current litigation, focusing in particular on the standing issues implicated in one of the most common targets of Tenth Amendment challenges, the Sex Offender Registration and Notification Act ("SORNA"). Part V concludes with some suggestions for courts and litigants considering individual Tenth Amendment challenges.

I. Overview of Standing Principles

Standing principles are rooted in Article III's limitation of the jurisdiction of the federal courts and in historical conceptions of the proper role of the courts.[4] Standing rules generally focus on whether the case before the court is the type of action that a court should

4. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1441 (2011). Scholars have disputed the standing doctrine's historical pedigree. *Compare* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) ("It is now apparently the law that Article III forbids Congress from granting standing to 'citizens' to bring suit. But this view . . . is surprisingly novel. It has no support in the text or history of Article III. It is essentially an invention of federal judges, and recent ones at that."), *with* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) ("[H]istory does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning.").

decide.[5] Most standing rules stem from two basic concerns. First, a concern that the circumstances of the dispute—i.e., the lack of "concrete adverseness" between the parties, or a party seeking to assert the rights of a third party not before the court—would hinder effective litigation of the case and may lead to mistaken decisions.[6] Second, a concern that adjudicating the type of dispute presented—i.e., a generalized grievance or citizen suit—would offend separation of powers principles by unnecessarily involving the judiciary in disputes about the wisdom or propriety of executive and legislative action.[7]

Based on these principles, the Supreme Court has recognized two different types of standing requirements, both of which must be satisfied before a federal court may reach the merits of a claim: those limiting federal court jurisdiction to "cases" and "controversies" pursuant to Article III, and those limiting federal jurisdiction based on prudential, judicially fashioned factors.[8]

A. Article III Standing

The Supreme Court has distilled Article III's case or controversy limitation into three requirements: a party must show that it (1) has suffered or will imminently suffer a concrete and particular injury, (2) that is fairly traceable to the defendant's conduct, and (3) would be redressed by a favorable decision.[9] The first standing requirement—concrete injury—focuses on whether the plaintiff is the proper person to bring suit and gives effect to the general principle that only those who are adversely affected by unlawful conduct may challenge it.[10] Injuries that are sufficiently concrete to support Article III standing include harm to "'aesthetic, conservational, and recreational' as well

5. Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decided the merits of the dispute or of particular issues.").

6. Baker v. Carr, 369 U.S. 186, 204 (1962) (explaining that the "gist" of standing is the concern that litigants possess "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . . .").

7. Erwin Chemerinsky, Federal Jurisdiction 57, 58 (5th ed. 2007).

8. *See id.* at 60 (indicating that the Supreme Court has announced constitutional requirements, which are those derived from the Court's interpretation of Article III, and prudential standing requirements, which are not based in the Constitution but on prudent judicial administration).

9. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (delineating the three constitutional standing requirements pursuant to Article III's case or controversy limitation).

10. Chemerinsky, *supra* note 7, at 62.

as economic values."[11] Invasion of interests traditionally protected at common law also generally constitutes a cognizable injury for standing purposes.[12] However, a citizen's general interest in seeing the laws upheld or having Congress or the executive branch act in conformity with the Constitution or federal statutes is usually too abstract to give rise to a cognizable injury.[13] Similarly, a taxpayer generally does not have a cognizable interest in seeing her tax dollars spent in a manner consistent with the federal Constitution and statutes.[14]

The second and third requirements—traceability and redressability—focus on whether the defendant is a proper person to be sued. Traceability requires a showing that the defendant caused the plaintiff's injury.[15] Redressability requires that relief against the defen-

11. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970) (quoting Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965)). Although *Camp* concerned standing under the Administrative Procedure Act rather than under Article III of the Constitution, the Court has adopted the same standards for Article III standing. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974) ("[In *Camp*] the Court . . . in the context of judicial review of regulatory agency action held that whatever else the 'case or controversy' requirement embodied, its essence is [the Article III] requirement of 'injury in fact.'").

12. *See* CHEMERINSKY, *supra* note 7, at 69.

13. *Schlesinger*, 418 U.S. at 221–22 (holding that reservists lacked standing as citizens to challenge congressmen serving in army reserves in violation of Incompatibility Clause, U.S. CONST. art I, § 6); *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam) (rejecting challenge to appointment of Justice Black under the Ineligibility Clause, U.S. CONST. art I, § 6, because petitioner failed to "show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public").

14. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343 (2006) ("On several occasions, this Court has denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers."); *Schlesinger*, 418 U.S. at 221 ("[T]he District Court . . . denied respondents' standing as taxpayers for failure to satisfy the nexus test. We agree with that conclusion since respondents did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status."); Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) ("Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'" (quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923))).

15. *See* Allen v. Wright, 468 U.S. 737, 752 (1984) (explaining that the standing inquiry seeks to answer three questions, including whether "the line of causation between the illegal conduct and injury [is] too attenuated").

dant remedy the plaintiff's asserted injury.[16] Where the defendant played no role in the plaintiff's injury or relief against the defendant would not remedy the plaintiff's injury, resolution of the dispute between the plaintiff and the defendant will often have no immediate practical consequences and thus the dispute is in a sense abstract and hypothetical. Traceability and redressability problems arise where the connection between the plaintiff's harm and the defendant's conduct is indirect or attenuated, often because a third party who is not a defendant in the action interrupts the connection between the challenged conduct and the concrete injury.[17] The concern is that even if relief is granted against the defendant, the nondefendant third party may continue to harm the plaintiff, thus rendering relief against the defendant pointless. For example, in *Allen v. Wright*, parents of African American school children brought suit against the Internal Revenue Service ("IRS"), arguing that its failure to enforce a prohibition on tax exemptions for racially segregated charter schools harmed their children's educational prospects.[18] The Court found that the plaintiffs lacked standing because the connection between their injury and the IRS's lack of enforcement of tax exemption limits was too indirect and attenuated.[19] In particular, the Court was concerned that the racially segregated charter schools, whose conduct most directly caused the plaintiffs' injury, might persist in their racially restrictive policies, even if they were to lose their tax exemption.[20]

In sum, to satisfy the Article III standing requirements, plaintiffs must demonstrate that they have suffered a concrete injury that can be directly remedied by a decision in their favor.

B. Prudential Standing

In addition to Article III standing requirements, the Supreme Court has also recognized a limited number of prudential standing principles. Prudential standing refers to a cluster of doctrines that are not mandated by Article III, but rest on principles of judicial self-governance "closely related to Art[icle] III concerns."[21] Because pruden-

16. *See id.* (explaining that the standing inquiry seeks to answer three questions, including whether "the prospect of obtaining relief from the injury as a result of a favorable ruling [is] too speculative . . . .").

17. *See infra* text accompanying notes 18–20.

18. *Id.* at 739–40.

19. *Id.* at 757.

20. *Id.* at 758.

21. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (quoting Warth v. Seldin, 422 U. S. 490, 500 (1975)).

tial standing rules are not required by the Constitution, Congress can override them and empower the federal courts to hear cases that, as a prudential matter, they would ordinarily decline to adjudicate.[22] These principles include two related rules: "'[T]he general prohibition on a litigant's raising another person's legal rights, [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches.'"[23]

Bond implicated the first prudential standing rule, "that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'"[24] Assertion of another party's rights is also referred to as "third-party standing" or "*jus tertii*,"[25] and the Supreme Court has given two reasons for refusing to adjudicate such claims:

> First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*.[26]

But these principles do not apply in all cases with the same force. Indeed, the courts have recognized exceptions to the rule against third-party standing where (1) a litigant will be an effective proponent of the third party's rights and has interests aligned with the third party, and (2) the third party is unlikely or unable to assert her rights.[27]

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22. FEC v. Akins, 524 U.S. 11, 20 (1998).

23. *Allen*, 468 U.S. at 751.

24. Bond v. United States, 131 S. Ct. 2355, 2363 (2011) (quoting *Warth*, 422 U.S. at 499).

25. CHEMERINSKY, *supra* note 7, at 84.

26. Singleton v. Wulff, 428 U.S. 106, 113–14 (1976) (citations omitted).

27. *See* Powers v. Ohio, 499 U.S. 400, 413–15 (1991) (holding that a criminal defendant can object to race-based exclusions of jurors regardless of whether the defendant and the excluded juror are the same race); *see also* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623–24 n.3 (1989) (stating that an exception to the rule against third-party standing applies based on "three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests.").

The Court has invoked these exceptions in a wide variety of cases. *See Powers*, 499 U.S. at 410 ("[A] criminal defendant has standing to raise the equal protection rights of a juror excluded from service . . . ."); U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720–21 (1990) (finding that an attorney has standing to raise due process rights of potential clients af-

The second prudential principle bars adjudication of generalized grievances. The Supreme Court has explained that a party has no standing "when the asserted harm is a 'generalized grievance' shared in a substantially equal measure by all or a large class of citizens."[28] Courts have used this limitation to prevent suits by parties seeking to challenge laws as contravening the structural requirements of the Constitution where the "only injury is as a citizen or a taxpayer concerned with having the government follow the law."[29]

C. Results-Oriented Application of Standing Principles

Notwithstanding the well-established Article III and prudential standing requirements outlined above, the Supreme Court's application of these principles to individual cases has often been criticized as uneven or results-oriented.[30] According to these criticisms, instead of adhering to previously proclaimed standing precepts, the Court has altered these principles or crafted narrow exceptions to achieve desired results.[31] Whatever the merits of these criticisms, the Court has, at times, been sensitive to the ways in which standing doctrine interacts with the substantive rights guaranteed by the Constitution. The Court has refined the standing requirements applicable to certain types of constitutional claims to facilitate individuals' assertions of constitutional rights that the Court considers important. *Flast v. Cohen*

fected by a provision of the Black Lung Benefits Act of 1972 that limited voluntary fee arrangements between attorneys and black lung claimants); *Caplin & Drysdale, Chartered*, 491 U.S. at 623 n.3 (recognizing that an attorney may assert a client's Sixth Amendment right to a counsel of his choice); Carey v. Population Servs. Int'l, 431 U.S. 678, 682–84 (1977) (holding that sellers of mail-order contraceptives have standing to assert the rights of potential customers); Craig v. Boren, 429 U.S. 190, 192–97 (1976) (holding that sellers of beer have standing to assert equal protection rights of young male customers); Eisenstadt v. Baird, 405 U.S. 438, 443–46 (1972) (finding that distributors of contraceptives have standing to assert the rights of potential unmarried customers); Barrows v. Jackson, 346 U.S. 249, 254–57 (1953) (holding that white sellers of land have standing to assert the equal protection rights of potential black purchasers). *But cf.* Kowalski v. Tesmer, 543 U.S. 125, 134–35 (2004) (Thomas, J., concurring) (noting the breadth of third-party standing exceptions and suggesting that cases recognizing such exceptions "have gone far astray").

28. *Warth*, 422 U.S. at 490.

29. CHEMERINSKY, *supra* note 7, at 91.

30. *See* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1422–25 (1995) (surveying criticisms of the Supreme Court's application of Article III and prudential standing requirements to individual cases).

31. *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1786 (1999) ("Modern standing law is closer to a part of the political system than to a part of the legal system. It is characterized by numerous malleable doctrines and numerous inconsistent precedents. Judges regularly manipulate the doctrines and rely on selective citation of precedents to further their own political preferences.").

provides a well-known example.[32] As a general rule, a federal taxpayer lacks standing to challenge the constitutionality of Congress' expenditure of his tax dollars.[33] But despite this general rule, the Court held in *Flast* that the Establishment Clause creates or recognizes a concrete interest in refusing to contribute even "three pence" to the establishment of religion.[34] Thus, where Congress exercises its Spending Clause power to improperly establish religion, federal taxpayers who object to such expenditures suffer a concrete injury and have standing to challenge the expenditure.[35] By expanding the concept of Article III injury to include a harm that is not obviously concrete, the Court ensured that federal expenditures would remain subject to Establishment Clause scrutiny.[36]

The Supreme Court has similarly refined the concept of Article III injury applicable to claims of discrimination in violation of the Equal Protection Clause. In equal protection challenges to discriminatory policies governing school admissions or the award of contracts, the plaintiff may have problems showing that, absent the challenged policy, the school would have admitted the applicant or awarded the contract to the plaintiff. For example, in *Regents of the University of California v. Bakke*, the plaintiff challenged the University of California at Davis' use of affirmative action in determining whether to admit students to its medical school.[37] Given the large number of applicants,

32. 392 U.S. 83 (1968).

33. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344–45 (2006).

34. *Flast*, 392 U.S. at 103 (quoting James Madison, Memorial and Remonstrance Against Religious Assessments, *in* 2 WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901)). Standing to enforce the Establishment Clause's limit on Congress' taxing and spending power conferred by Article I, Section 8, is necessary to address the concern that "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Id.* at 103–04; *see also* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1447 (2011) (characterizing the injury recognized in *Flast* as one where "[a] dissenter whose tax dollars are 'extracted and spent'" is "in some small measure . . . made to contribute to an establishment in violation of conscience." (quoting *Flast*, 392 U.S. at 106)); *Cuno*, 547 U.S. at 347 (characterizing *Flast* as recognizing "the right not to 'contribute three pence . . . for the support of any one [religious] establishment.'" (alteration in original) (quoting *Flast*, 392 U.S. at 103)).

35. *Flast*, 392 U.S. at 105–06.

36. *See id.* ("[T]he Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8 . . . . Consequently, we hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.").

37. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269–70 (1978).

the small number of students accepted (only 100), and the complexity of admissions decisions,[38] Bakke would probably have failed to show that the school would have admitted him to the medical school, absent the University's affirmative action policy. The Court nevertheless agreed with the trial court that Bakke had standing because he had suffered "an injury, apart from failure to be admitted, in the University's decision not to permit [him] to compete for all 100 places in the class, simply because of his race."[39] By broadly characterizing the equal protection injury as a denial of equal opportunity, rather than denial of the specific benefit sought, the Court has facilitated equal protection challenges to discriminatory policies whose effects on any particular plaintiff are uncertain.[40]

A final example of modified standing requirements to facilitate individuals' assertions of constitutional rights is the overbreadth doctrine applied by the Supreme Court to facial First Amendment challenges to restrictions on speech.[41] As noted above, prudential standing principles ordinarily preclude a party from asserting the rights of a third party not before the Court.[42] However, the Supreme Court has consistently permitted an individual to bring a facial First Amendment challenge to a law or regulation limiting speech, even if that law or regulation could constitutionally apply to him.[43] In such a

38. *Id.* at 273–74, 273 n.2.

39. *Id.* at 281.

40. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007) ("[O]ne form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff . . . ."); Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, . . . [t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier[,] . . . not the ultimate inability to obtain the benefit."). For analysis and criticism of this doctrine see generally Spann, *supra* note 30 (discussing the Supreme Court's standing doctrine in affirmative action cases).

41. *See* Bd. of Trustees v. Fox, 492 U.S. 469, 484 (1989) ("The First Amendment doctrine of overbreadth was designed as a 'departure from traditional rules of standing' . . . ." (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973))).

42. *See supra* Part I.B.

43. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 119 (2003) (explaining that the "expansive" overbreadth remedy is provided "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech . . . ."); Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 955–58 (1984) (holding that a professional fundraising organization had standing to challenge a statute that prohibited charitable organizations form paying expenses in excess of 25% of the funds collected in fundraising activities because "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society to prevent the statute from chilling the First Amendment rights of other parties not before the court."); *cf.* Regan v. Time, Inc., 468

case, a plaintiff is essentially asserting the First Amendment rights of others to whom the challenged law cannot constitutionally be applied. Thus, this exception to the traditional third-party standing rule exists to facilitate First Amendment challenges to restriction on speech.

II. The Circuit Split and its Resolution in *Bond*

Prior to *Bond*, the vast majority of circuits had concluded that private parties lacked standing to challenge federal laws as violating the Tenth Amendment.[44] Almost uniformly, they did so without considering whether this conclusion was consistent with the logic and purpose of the amendment, relying instead on language from a seven-decade old Supreme Court case, *Tennessee Electric Power Co. v. Tennessee Valley Authority*.[45] Even more troubling for standing jurisprudence, several circuits appeared confused as to whether the bar to private-party Tenth Amendment standing stems from either Article III or from prudential standing principles. Here, we outline these circuit cases, their inconsistencies, and the corrective measures of *Bond*.

A. The Circuit Split

United States v. Parker[46] was one of the first cases to consider an individual's standing to assert a Tenth Amendment violation. In *Parker*, the defendant was convicted of possessing a loaded firearm in a vehicle or on a public street under the Assimilative Crimes Act, a statute that enabled the federal government to prosecute crimes committed in violation of state criminal law if the crime occurred on federal lands.[47] In considering the defendant's standing to raise this defense, the Tenth Circuit made two analytical choices that the majority of circuits followed thereafter. First, without analyzing whether the Tenth Amendment actually protected individual rights, the court simply cited to *Tennessee Electric* as holding that individuals lack standing to bring Tenth Amendment challenges.[48] In *Tennessee Electric*, the Supreme Court addressed whether Congress contravened the Tenth Amendment by creating a corporation, the Tennessee Valley Author-

U.S. 641, 650–52 (1984) (finding no evidence that a statute challenged by Time was overbroad, but asserting that "an overbreadth challenge can be raised on behalf of others . . . when the statute is substantially overbroad, *i.e.*, when the statute is unconstitutional in a substantial portion of the cases to which it applies.").

44. *See infra* Part II.A.
45. 306 U.S. 118 (1939).
46. 362 F.3d 1279 (10th Cir. 2004).
47. *Id.* at 1281.
48. *Id.* at 1285.

ity ("TVA"), which had the authority to develop a series of dams along the Tennessee River.[49] A group of state-chartered power companies that were injured by TVA's competition initiated the lawsuit.[50] The Court first held, on the merits, that federal competition in the market was not regulation, and therefore Congress had not violated the Tenth Amendment by granting TVA authority to build dams.[51] The Court then observed: "As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment."[52] This seventy year-old sentence from *Tennessee Electric* was the fraying tightrope upon which the circuits denying private-party standing would come to rely.

Second, the Tenth Circuit characterized the purported limitation on private-party Tenth Amendment standing as deriving from Article III, rather than prudential grounds.[53] The court *sua sponte* raised this issue, explaining that it was required "to ensure that there is an Article III case or controversy before [it]" and ultimately concluding that "the case presented no justiciable case or controversy."[54] This characterization is perplexing because the court went on to evaluate the merits of Parker's Second Amendment challenge to the Assimilative Crimes Act, presumably because he possessed a constitutionally sufficient injury to challenge his conviction.[55] In other words, absent Article III standing, there would be no need to evaluate the merits of the Second Amendment challenge. Several other circuits repeated these two analytical missteps, demonstrating the confusion among lower courts regarding the difference between prudential and constitutional standing requirements.

In *Medeiros v. Vincent*, the First Circuit analyzed a challenge to a Rhode Island state environmental regulation that restricted the number of lobsters that could be harvested via methods other than a trap.[56] The state regulation was implemented pursuant to a federal statute that arguably compelled state compliance.[57] Medeiros, who had violated the state regulation, challenged it as an unlawful com-

49. *Tenn. Elec. Power*, 306 U.S. at 134.
50. *Id.* at 134–35.
51. *Id.* at 143–44.
52. *Id.* at 144.
53. *Parker*, 362 F.3d at 1284–85.
54. *Id.* (quoting Rector v. City & Cnty. of Denver, 348 F.3d 935, 942 (10th Cir. 2003)).
55. *Id.* at 1282.
56. 431 F.3d 25, 27 (1st Cir. 2005).
57. *Id.* at 33.

mandeering of Rhode Island's legislative prerogatives under the Tenth Amendment.[58] Following the Tenth Circuit's lead in *Parker*, the First Circuit relied on *Tennessee Electric* to hold that Medeiros lacked standing to challenge the law.[59] Although not entirely clear, the First Circuit appears to have viewed the private-party Tenth Amendment standing bar as a prudential limitation for two reasons. First, it considered Medeiros' equal protection and substantive due process challenges, thereby suggesting that Medeiros possessed a cognizable injury sufficient to satisfy Article III standing requirements.[60] Moreover, the court justified the limitation on Medeiros' standing with reference to the prudential concern that allowing private parties to challenge laws for violating rights they lack would result in a "substantial increase in such litigation before the federal courts."[61] *Medeiros* thus improved the analysis of *Parker* by accurately depicting the Tenth Amendment standing bar as based on prudential, third-party standing concerns, rather than Article III requirements.

The Second Circuit also addressed the issue of individual Tenth Amendment standing in *Brooklyn Legal Services Corp. v. Legal Services Corp.*[62] In *Brooklyn Legal Services Corp.*, local legal assistance providers who receive federal funding through the Legal Services Corporation ("LSC") challenged the constitutionality of federal restrictions on such providers.[63] The court first addressed whether the plaintiffs had constitutionally sufficient Article III injuries and concluded that they did.[64] However, the court refused to reach the merits of the Tenth Amendment challenge and, based on *Tennessee Electric*, held that the plaintiffs lacked standing.[65] In tension with its initial ruling that Article III was satisfied, the Court concluded that *Tennessee Electric*'s treatment of the Tenth Amendment was *dicta*, stating that "[w]here the standing question concerns the *constitutional* jurisdiction of a federal court, however, the judgment on the jurisdictional issue predominates and is antecedent to any discussion of the merits."[66] Thus, it is somewhat unclear whether *Brooklyn Legal Services* viewed the standing bar as

58. *Id.*
59. *Id.* at 35–36.
60. As discussed, consideration of the merits of other constitutional challenges did not prevent the Tenth Circuit in *Parker* from characterizing the Tenth Amendment limitation as constitutional.
61. *Medeiros*, 431 F.3d at 36.
62. 462 F.3d 219 (2d Cir. 2006).
63. *Id.* at 221.
64. *Id.* at 225–28.
65. *Id.* at 236.
66. *Id.* at 235 (emphasis added).

prudential or constitutional, but, in any event, it followed both *Parker* and *Medeiros* in concluding that *Tennessee Electric* did provide such a bar.

Finally, in *United States v. Bond*, which would eventually work its way to the Supreme Court, the Third Circuit *sua sponte* raised the issue of whether the defendant Carol Ann Bond had standing to raise a Tenth Amendment challenge to the Chemical Weapons Convention Implementation Act of 1998,[67] which criminalizes owning or using certain toxic chemicals.[68] Bond argued that section 229(a)(1) of the Act criminalized purely local behavior, infringing on police powers traditionally and routinely reserved for the states under the Tenth Amendment.[69] Bond, a trained microbiologist, had been convicted and incarcerated under section 229(a)(1) after she spread chemicals on her best friend's property.[70] Bond sought revenge upon discovering that her best friend was pregnant and that Bond's husband was the father of the child.[71] The Third Circuit held, primarily based on *Tennessee Electric*, that Bond lacked "standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties."[72] Apparently, the court treated the Tenth Amendment bar on private-party standing as a prudential limitation.[73] The court also addressed the merits of Bond's additional constitutional challenge, her vagueness claim,[74] suggesting that it did not believe she lacked Article III standing.

In contrast to the above cases, a limited number of circuit courts looked past *Tennessee Electric* and held that individuals could bring actions asserting Tenth Amendment injuries. However, even these cases create some confusion regarding the nature of the supposed Tenth Amendment standing limitation—that is, whether it is prudential or constitutional—and the nature of the Tenth Amendment right itself.

For example, in *Gillespie v. City of Indianapolis*, the Seventh Circuit held that a former Indianapolis police officer possessed standing to

67. 18 U.S.C. § 229(a)(1) (2006).
68. 581 F.3d 128, 135–38 (3d Cir. 2009).
69. *Id.* at 134.
70. *Id.* at 131–33.
71. *Id.* at 131.
72. *Id.* at 137.
73. *See id.* (noting that other circuit courts "point to varying prudential considerations to support their determinations," and citing *United States v. Hacker*, 565 F.3d 522, 527 (8th Cir. 2009), for the proposition that "the holding of *Tennessee Electric* comports with prudential standing principles that generally limit a plaintiff to asserting his own rights.").
74. *Id.* at 138–39.

challenge the Gun Control Act of 1968.[75] The plaintiff lost his job pursuant to this law, which prohibits persons convicted of domestic violence offenses from carrying firearms.[76] Gillespie alleged that the federal law "strips the States of their right to establish the qualifications for [law enforcement] officers . . . [and compelled] state officers to implement a federal statute . . . in violation of the Tenth Amendment."[77] The court held that Gillespie possessed standing because he suffered an injury traceable to an alleged violation of the Tenth Amendment, which protects individual rights.[78] In fact, the Seventh Circuit even entertained Gillespie's commandeering challenge—one of the few courts to reach the merits of such a challenge—but ultimately rejected it on the merits.[79]

Similarly, in *Atlanta Gas Light Co. v U.S. Department of Energy*, the Eleventh Circuit found that a private party had standing to challenge section 402 of the Power Plant and Industrial Fuel Use Act of 1978.[80] The law purported to conserve natural gas for industrial uses for which alternative fuels were not available.[81] The Act achieved that goal by prohibiting local gas distribution companies from providing natural gas for certain non-industrial purposes.[82] Atlanta Gas Light Company brought suit challenging this restriction.[83] The court held that the company satisfied the Article III injury requirement and that the Tenth Amendment posed no bar.[84] Rather than considering whether the Tenth Amendment claim was subject to the prudential third-party standing bar, the court considered whether the claim satisfied the nexus requirement for taxpayer standing.[85] This approach further complicated the jurisprudence on the purported Tenth Amendment limitation, because no other circuit viewed the limitation through this lens. The court reasoned that the nexus requirement was not implicated because this was not a taxpayer suit, and therefore "the petitioners may make constitutional objections based on any of its provisions so long as they show the requisite injury in fact and its causal

75. 185 F.3d 693, 697, 703 (7th Cir. 1999).
76. *Id.* at 697.
77. *Id.* at 700.
78. *Id.* at 703.
79. *Id.* at 708.
80. 666 F.2d 1359, 1368 & n.16 (11th Cir. 1982).
81. *Id.* at 1362.
82. *Id.*
83. *Id.* at 1363–64.
84. *Id.* at 1363 n.7, 1368 n.16.
85. *Id.* at 1368 n.16. For a discussion of the limitations on taxpayer standing, see *supra* Parts I.A–B.

relation to the action in question."[86] The court ultimately rejected the Tenth Amendment challenge on the merits reasoning that the states had the ability to refuse to implement the Act, and therefore the statute did not violate the Tenth Amendment.[87]

With this jurisprudential backdrop, the Supreme Court entered the fray and addressed whether the Tenth Amendment posed a barrier to private-party standing.

B. The Supreme Court's Decision in *Bond*

In *Bond*, the Supreme Court resolved the troubled areas in the circuit split. In Justice Kennedy's decision, the Court unanimously held that (1) the Article III injury requirement was satisfied by Bond's incarceration; and that (2) because the Tenth Amendment protects individual liberties as well as states' rights, it posed no prudential barrier to individual parties challenging federal laws as violating the Amendment.[88]

In addressing the circuit split, the Court clarified that Article III was not a barrier to Bond's suit.[89] The Court reasoned that because Bond was a criminal defendant challenging her conviction and sentence, the case or controversy requirement of Article III was readily satisfied: Bond's injury was the incarceration following her conviction, and the injury was redressable by invalidation of the federal statute authorizing the conviction.[90] Thus, before engaging whether the Tenth Amendment conferred individual rights, the Court held that Article III was satisfied.

Bond is important because it reiterates that criminal defendants possess Article III standing to challenge the validity of the laws they are convicted of violating. But beyond that, the Court clarified the application of third-party standing rules to Tenth Amendment claims. As outlined above, most circuits that had considered the matter had held that the Tenth Amendment protected the sovereign rights of

86. *Atlanta Gas Light Co.*, 666 F.2d at 1368 n.16.

87. *Id.* at 1369.

88. Bond v. United States, 131 S. Ct. 2355, 2366–67 (2011).

89. *Id.* at 2361–62.

90. *Id.* at 2362 ("Bond's challenge to her conviction and sentence 'satisfies the case-or-controversy requirement, because the incarceration . . . constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction.'" (quoting Spencer v. Kemna, 523 U.S. 1, 7 (1998))); *see also id.* at 2367 (Ginsburg, J., concurring) ("Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law.").

states, not individual rights.[91] In *Bond*, the Court-appointed amicus to defend the judgment argued that Bond was essentially seeking to assert the sovereign rights of the states protected by the Tenth Amendment and that the rule against third-party standing precluded her from doing so.[92] The United States took a similar position, arguing that Bond had standing to challenge the Chemical Weapons Convention Implementation Act on the ground that it exceeded Congress' enumerated powers, but not on the ground that it impinged on the rights of the states under the Tenth Amendment.[93]

The Court rejected these arguments, stating that they rested on the flawed premise that the Tenth Amendment protected only states' rights.[94] The Court explained that "[s]tate sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"[95] The Court added: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."[96] Accordingly, "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable."[97] The Court also relied on an analogy to its separation of powers cases, pointing out that in *INS v. Chadha* and numerous other cases, individuals were permitted to challenge the constitutionality of laws violating separation-of-power principles.[98] The Court reasoned: "Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism."[99]

91. *See supra* Part II.A.

92. Brief for the Amicus Curiae Appointed to Defend Judgment Below at 21–26, Bond v. United States, 131 S. Ct. 2355 (2011) (No. 09-1227). After certiorari was granted in *Bond*, the United States abandoned its position that Bond lacked standing, and the Supreme Court appointed Stephen R. McAllister as amicus curiae to defend the judgment below. *Bond*, 131 S. Ct. at 2361. However, the United States continued to argue that Bond or any other private litigant would lack standing to make an interference with sovereignty argument. *Id.* at 2365–66.

93. Brief for United States at 12–21, Bond v. United States, 131 S. Ct. 2355 (2011) (No. 09-1227).

94. *Bond*, 131 S. Ct. at 2366.

95. *Id.* at 2364 (quoting New York v. United States, 505 U.S. 144, 181 (1992)).

96. *Id.*

97. *Id.*

98. *Id.* at 2365 (citing INS v. Chadha, 462 U.S. 919 (1983)).

99. *Id.*

Significantly, the Court did not find that Bond's case was an exception to the rule against third-party standing, but rather that the rule does not apply to Tenth Amendment challenges at all because this Amendment protects both state sovereignty and individual liberty.[100] In other words, *Bond* removed the rule against third-party standing as an obstacle to individual Tenth Amendment challenges.[101]

III. Implications of *Bond*

It is tempting to think that *Bond*'s broad language confers on individuals a personal right to challenge all violations of the Tenth Amendment.[102] If the bar on third-party standing was inapplicable to Bond's individual Tenth Amendment challenge, one might naturally assume that Bond was asserting a personal individual right to request the federal government to comply with the Tenth Amendment. However, the Court avoided such a broad holding throughout its opinion and repeatedly emphasized that an individual bringing a Tenth Amendment challenge must satisfy traditional Article III standing requirements.[103] In practice, this emphasis will limit the effect of *Bond*'s holding as many individual Tenth Amendment claimants will continue to have difficulty meeting Article III standing requirements.

A. Standing Requirements in Tenth Amendment Challenges

The importance of Article III standing in *Bond* is easy to overlook because the issue was not disputed, and the Court quickly dismissed

100. *Id.* at 2366–67.

101. *Compare* David M. Palmer, Note, *Untangling Tenth Amendment Standing: Why Private Parties Cannot Enforce the Federal Structure*, 35 HASTINGS CONST. L.Q. 169 (2008) (arguing that only states may use the Tenth Amendment to enforce a constitutional check on federal government's power and private parties lack standing to bring this type of constitutional claims), *with* Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065 (2000) (arguing that private parties should have Tenth Amendment standing to challenge the constitutionality of commandeering federal legislation, even if the state fails to raise the claim).

102. A commentator has espoused his belief that *Bond* broadly alters the landscape of Tenth Amendment litigation and represents "game on!" for Tenth Amendment challenges, including challenges to the Patient Protection and Affordable Care Act. John C. Eastman, *Will Mrs. Bond Topple* Missouri v. Holland*?*, 2010–2011 CATO SUP. CT. REV. 185, 185–86.

103. *E.g.*, *Bond*, 131 S. Ct. at 2366 ("An individual who challenges federal action on these grounds is, of course, subject to the Article III requirements, as well as prudential rules, applicable to all litigants and claims.").

any suggestion that the plaintiff lacked Article III standing.[104] The Court reasoned that a federal criminal prosecution is obviously a "case" or "controversy" within the meaning of Article III because Bond faced a concrete injury—imprisonment—this injury flowed directly from the allegedly unconstitutional statute that criminalized her conduct; and the invalidation of the challenged statute remedied the injury.[105] Because the standing question in *Bond* was straightforward, the Court did not need to consider what types of injuries would be sufficiently concrete and adequately connected to federal action to confer standing on a plaintiff bringing a Tenth Amendment challenge. However, the reasoning of *Bond* suggests some insights that will be relevant in future Tenth Amendment litigation.

Bond makes clear that these traditional Article III standing requirements and prudential standing rules will be applied to Tenth Amendment challenges:

> An individual who challenges federal action on [Tenth Amendment] grounds is, of course, subject to the Article III requirements, as well as prudential rules, applicable to all litigants and claims. Individuals have "no standing to complain simply that their Government is violating the law." *Allen v. Wright*, 468 U.S. 737, 755 (1984). It is not enough that a litigant "suffers in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (decided with *Massachusetts v. Mellon*). If, in connection with the claim being asserted, a litigant who commences suit fails to show actual or imminent harm that is concrete and particular, fairly traceable to the conduct complained of, and likely to be redressed by a favorable decision, the Federal Judiciary cannot hear the claim. *Lujan*, 504 U.S., at 560–561, 112 S.Ct. 2130. These requirements must be satisfied before an individual may assert a constitutional claim; and in some instances, the result may be

104. *Id.* at 2361 ("In the instant case, moreover, it is apparent—and in fact conceded not only by the Government but also by *amicus*—that Article III poses no barrier.").

105. *Id.* at 2361–62; *see also* ASARCO Inc. v. Kadish, 490 U.S. 605, 616–17 (1989) (applying appellate standing principles); Diamond v. Charles, 476 U.S. 54, 64–65 (1986) (same); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999) (discussing standing of United States to bring criminal prosecutions).

Arguably, Bond also had standing to bring her appeal because she remained in prison as a result of the challenged statute—a concrete injury that would be remedied by a favorable exercise of the Court's certiorari jurisdiction. *See Bond*, 131 S. Ct. at 2361 ("One who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, and, in addition, an 'ongoing interest in the dispute' on the part of the opposing party that is sufficient to establish 'concrete adverseness.'" (citations omitted) (quoting Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011)).

> that a State is the only entity capable of demonstrating the requisite injury.[106]

As noted above in Part I.C, the Court has refined Article III and prudential standing requirements to facilitate certain types of constitutional challenges that might otherwise fail for lack of standing. But it is unlikely that the Court will similarly modify Article III standing requirements to facilitate Tenth Amendment claims for two reasons. First, the Court specifically reaffirmed the application of traditional standing principles to Tenth Amendment claims. The Court's citation to *Allen*, *Frothingham*, and *Lujan* is significant, as in each case the Court rejected efforts to broaden standing requirements and reaffirmed standing limitations.[107] Second, the Court's characterization of the individual interest protected by the Tenth Amendment fits neatly within the traditional standing framework. As the Court explained, federalism, like other separation of powers principles, protects individual liberty by limiting government power.[108] Thus, where a federal regulation transgresses the federalism principles enshrined in the Tenth Amendment and, by doing so, also imposes concrete limits on individual liberty, those individuals whose liberty is impaired have standing to challenge that transgression.[109]

In sum, *Bond* did not hold that every Tenth Amendment violation *ipso facto* infringes individual liberty. Rather, an individual seeking to challenge such a violation must show that the challenged government

106. *Bond*, 131 S. Ct. at 2366 (parallel citations omitted).

107. The Court's citation of *Frothingham* is particularly significant because there the Court relied on the rule against taxpayer standing to reject a Tenth Amendment claim. Massachusetts v. Mellon, 262 U.S. 447, 486–488 (1923) (decided with *Frothingham v. Mellon*); *see also* Hein v. Freedom from Religion Found., 551 U.S. 587, 600 (2007) ("In *Frothingham*, a federal taxpayer sought to challenge federal appropriations for mothers' and children's health, arguing that federal involvement in this area intruded on the rights reserved to the States under the Tenth Amendment and would 'increase the burden of future taxation and thereby take [the plaintiff's] property without due process of law.'" (alteration in original) (quoting *Mellon*, 262 U.S. at 486)). The Court has also emphasized that the *Flast* exception to the rule against taxpayer standing articulated in *Frothingham* is a narrow one and has steadfastly refused to expand it. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1447 (2011) (declining to extend *Flast* to permit Establishment Clause challenge to state tax credits); *Hein*, 551 U.S. at 603–05 (declining to extend *Flast* to permit Establishment Clause challenge to spending decision by Executive not mandated by congressional appropriation); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347–49 (2006) (declining to extend *Flast* to permit Commerce Clause challenges by taxpayers); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 478–80 (1982) (declining to declining to extend *Flast* to permit Establishment Clause challenge to statute enacted under Property Clause).

108. *Bond*, 131 S. Ct. at 2364–65.

109. *See id.* at 2364.

action has actually impinged on his liberty by causing some concrete injury. As the Court put it: "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable."[110] As the Court recognized, this means that in some cases, no individual will have standing to assert a violation of the Tenth Amendment.[111] Thus, even after *Bond*, an individual may not go about challenging federal statutes or regulations simply because they violate Tenth Amendment or federalism principles—she must show that challenged statutes cause her a concrete injury that would be redressed by the relief she seeks.[112]

B. Individual Commandeering Claims After *Bond*

One important source of potential Tenth Amendment challenges is the anti-commandeering doctrine. This doctrine prohibits the federal government from using the states' sovereign authority to implement federal law.[113] The Supreme Court has elaborated this doctrine in a trio of cases. First, in *New York v. United States*, the Court invalidated a federal statute controlling states' disposal of radioactive waste that "offer[ed] state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress."[114] The choice was unacceptable because either option violated the principle that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[115]

110. *Id.*

111. *Id.* at 2366.

112. The limited number of cases decided since *Bond* have buttressed this conclusion. *See* LaRoque v. Holder, 650 F.3d 777, 792 (D.C. Cir. 2011) ("[A] litigant is in no way freed from familiar constitutional and prudential standing requirements merely because he challenges a law that he claims [violates the Tenth Amendment]."); Purpura v. Sebelius, 446 Fed. App'x 496, 498 (3d Cir. 2011) (denying uninjured plaintiffs' challenge to the Patient Protection and Affordable Care Act because "*Bond* did nothing to upend the well-established standing rules.").

113. New York v. United States, 505 U.S. 144, 161 (1992).

114. *Id.* at 175. The Court upheld two other portions of the statute that encourage states to participate in interstate compacts for the regulation of radioactive waste by authorizing States where radioactive waste is disposed (1) to impose a surcharge on waste received from other States, and (2) to gradually increase the cost of access to disposal sites and even deny access altogether. *Id.* at 171–74.

115. *Id.* at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

The Court further elaborated on this principle in *Printz v. United States*, in which it invalidated a transitional provision in the Brady Act requiring state law enforcement officers to perform background checks on individuals seeking to purchase a handgun under certain circumstances.[116] Just as Congress could not commandeer state legislatures to enact legislation implementing a federal regulatory program, neither could it commandeer state executive officials to execute and enforce federal regulations.[117] Finally, in *Reno v. Condon*, the Court limited the scope of the anti-commandeering doctrine, upholding a federal statute limiting states' disclosure of a driver's personal information without his consent.[118] The Court explained that the statute did not commandeer state officials because it "'regulate[d] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'"[119] The anti-commandeering rule does not prevent the federal government from regulating individuals directly or from regulating certain activities of the states, but it does prohibit the federal government from compelling state executive and legislative officials to regulate individuals.

1. Third-Party Standing in Commandeering Challenges

Because commandeering implicates a sovereign interest specific to the state, one might think that, at least in this context, third-party standing principles would preclude private plaintiffs from asserting a commandeering claim. But *Bond* explicitly rejected this theory. The United States argued before the Court that Bond had standing to "assert[ ] only that Congress could not enact the challenged statute under its enumerated powers," but she lacked standing to argue "that the statute 'interferes with a specific aspect of state sovereignty.'"[120] The Court rejected this argument, explaining that the government's proposed distinction between interference with sovereignty and limitations on federal power was inapt:

> The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Gov-

116. Printz v. United States, 521 U.S. 898, 933–35 (1997).

117. *Id.* at 932–33.

118. Reno v. Condon, 528 U.S. 141, 150–51 (2000).

119. *Id.* at 150 (alternation in original) (quoting South Carolina v. Baker, 485 U.S. 505, 514–15 (1988)).

120. Bond v. United States, 131 S. Ct. 2355, 2366 (2011) (quoting Brief for United States, *supra* note 93, at 18).

> ernment, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States. The unconstitutional action can cause concomitant injury to persons in individual cases.[121]

Arguably, this conclusion is dicta because the Court suggested that Bond's Tenth Amendment claim was not asserting a theory of interference with sovereignty.[122] Additionally, in a concurring opinion joined by Justice Breyer, Justice Ginsburg suggested a narrower ground for rejecting the government's argument in this case, arguing that an individual has "a personal right not to be convicted under a constitutionally invalid law," regardless of the reason for its unconstitutionality.[123] But both Justices joined the Court's unanimous opinion, which rejected the United States' argument that individuals could not bring Tenth Amendment claims based on an interference with state sovereignty and specifically cited *New York v. United States*—a commandeering case—to make this point.[124] Therefore, even if this reasoning is dicta, given the unanimous endorsement of all the members of the Supreme Court, it is extremely persuasive dicta.

2. Article III Standing in Tenth Amendment Commandeering Challenges

Although *Bond* makes clear that third-party standing doctrine should pose no obstacle to individual commandeering challengers, the case is equally clear that individual plaintiffs must satisfy the traditional Article III standing requirements of injury in fact, traceability,

121. *Id.* (citations omitted).

122. *See id.* The Court stated that "[t]he premise that petitioner does or should avoid making an 'interference-with-sovereignty' argument is flawed," explaining that Bond's principal argument against the statute was that "the conduct with which she is charged is 'local in nature' and 'should be left to local authorities to prosecute' and that congressional regulation of that conduct 'signals a massive and unjustifiable expansion of federal law enforcement into state-regulated domain.'" *Id.* But it is debatable whether this observation furnishes an alternative basis for the Court's rejection of the government's argument, which might suggest that the language quoted above is *dicta.* The Court suggested that even this argument was in some sense an interference with the sovereignty claim because "[t]he public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, has been displaced by that of the National Government." *Id.* This observation anticipates the Court's argument, quoted above, that "[t]he principles of limited national powers and state sovereignty are intertwined." *Id.* In other words, when the federal government exceeds its limited power, it trenches on powers reserved to the states, thereby interfering with states' sovereignty.

123. *Id.* at 2367 (Ginsburg, J., concurring).

124. *See id.* at 2367–68 (citing New York v. United States, 505 U.S. 144 (1992)); *id.* at 2359 (syllabus) (noting that Justice Kennedy delivered an unanimous decision of the Court).

and redressability.[125] As a result, the redressability prong will often pose a significant standing problem in many commandeering cases, unless a state joins an individual commandeering challenge. The essence of a commandeering claim is that the federal government has improperly compelled state legislative or executive officers to regulate private conduct.[126] Where a private individual claims to have suffered a concrete and particular injury from federal action that violates the anti-commandeering principle, the injury will usually be indirect: the federal government has compelled the state to regulate in a manner that has harmed the plaintiff.[127] But federal courts are reluctant to find standing where an individual's injury is indirect and "results from the independent action of some third party not before the court"[128]—in an individual anti-commandeering challenge the missing third party is the State—because the "'indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art[icle] III.'"[129]

As one commentator has pointed out, in most commandeering cases the difficulty of meeting Article III requirements usually arises at the redressability stage of the standing inquiry.[130] Where state legislation or regulation that was commandeered by a federal statute harmed a private party, she may have problems showing that, if the federal statute is invalidated, the improperly compelled state regulatory action would cease.[131] This is particularly clear in legislative commandeering cases, where a federal statute compels state legislative action.[132] If states do not challenge the federal statute and instead enact legislation, it may be difficult for an individual seeking invalida-

125. *See supra* Part III.A.

126. *New York v. United States*, 505 U.S. at 161.

127. *See, e.g.*, Medeiros v. Vincent, 431 F.3d 25, 33 (1st Cir. 2005) (considering challenge to Rhode Island statute enacted to comply with the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101–5108 (1993)); *see also infra* note 147 and supporting text (describing requirements on states under the Sex Offender Registration and Notification Act ("SORNA"), Pub. L. No. 109-248, §§ 101–155, 120 Stat. 590, 590–611 (2006) (codified as amended in scattered sections of 10, 18, 21, 28, and 42 U.S.C. (2006)).

128. Allen v. Wright, 468 U.S. 737, 757 (1984) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976)).

129. *Id.* at 758 (omission in original) (quoting Warth v. Seldin, 422 U.S. 490, 505 (1975)) (internal quotation marks omitted).

130. *See* Palmer, *supra* note 101, at 192–94 (explaining the "redressability problem").

131. *See, e.g.*, UTAH CODE ANN. § 77-27-21.5 (LexisNexis 2008) (implementing sex offender registration and notification requirements without reference to SORNA or its continuing validity); *Medeiros*, 431 F.3d at 33 (noting defendants' argument that state regulations would remain in place even if the challenged federal statute were invalidated).

132. *See supra* text accompanying notes 127–29.

tion of the federal statute to show that, if her claim is successful, the state legislation that it produced will be repealed. Similarly, where an individual challenges a federal statute compelling action by state executive officials, proving that the state executive officials would act differently in the absence of the federal statute would be troublesome. Because the state's executive officials did not challenge the federal statute and instead agreed to implement its requirements, whether they would act differently if the court invalidates the statute is highly uncertain.[133] At a minimum, a state could easily create a nearly insurmountable redressability problem for a private-party's commandeering challenge simply by intervening in the suit and (credibly) asserting that it would continue enforcing the challenged state statute or regulation, even if the challenged federal statute is invalidated.

One student commentator challenged this reasoning, arguing that the invalidation of a federal statute would redress a plaintiff's injury because "the plaintiff would receive satisfaction by the removal of the federal mandate . . . and the opening of the way for him to lobby his local leaders for reform."[134] But removing one obstacle to a lobbying effort does not mean that it is therefore likely to succeed. Moreover, for a plaintiff to have standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[135] The Court's taxpayer standing cases clarify that the mere possibility of favorable changes in legislation does not suffice to show redressability.[136] The Court has repeatedly rejected taxpayer

133. This point is particularly salient in light of *Printz v. United States*, which permitted individual state officials to bring commandeering challenges in their official capacity. 521 U.S. 898, 904 (1997). If an individual plaintiff cannot find a single state official to join his commandeering challenge, it seems unlikely that state officials will change their policies even if the commandeering challenge succeeds.

134. Katherine A. Connolly, Note, *Who's Left Standing for State Sovereignty?: Private Party Standing to Raise Tenth Amendment Claims*, 51 B.C. L. REV. 1539, 1580 (2010).

135. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976)).

136. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1444 (2011) ("Respondents have not established that an injunction against application of the STO tax credit would prompt Arizona legislators to 'pass along the supposed increased revenue in the form of tax reductions.'" (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006))); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006) ("[E]stablishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions."); ASARCO Inc. v. Kadish, 490 U.S. 605, 614 (1989) ("The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is 'remote, fluctuating and uncertain,' . . . and consequently the claimed injury is not 'likely to be redressed by a favorable decision.'" (quoting Massachusetts v. Mellon, 262 U.S. 447, 487 (1923) and Valley Forge Christian Coll. v. Ams. United for Separation of Church and

challenges to state and federal expenditures or tax credits, in part because "establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer [and] legislators will pass along the supposed increased revenue in the form of tax reductions."[137] Similarly, establishing redressability in an individual commandeering challenge requires speculating that, absent the challenged federal law, state legislators or executive officials will repeal the state legislation or regulation that was (voluntarily) enacted pursuant to the challenged federal law.

In some cases, state participation in a lawsuit will not be necessary to overcome the redressability problem. For example, if an individual challenges a federal statute before the state has implemented it, she has a much stronger argument that invalidating the statute will result in no state implementing legislation or regulations, thereby averting any prospective injury to the plaintiff.[138] But in many cases, a pre-implementation challenge will be unripe because, until the state chooses to implement the federal statute, it will not be clear whether the state will choose to do so or whether the way it implements the statute will harm the plaintiff.[139] Only after the state has implemented the statute will the challenge be ripe, but by then, the individual plaintiff will face the redressability problem described above. A rarer, more promising situation is where a plaintiff's injury results from a state law that would be unconstitutional under the state constitution, but for the preemptive force of a commandeering federal law. In that case, invalidation of the federal law under the Tenth Amendment would permit invalidation of the commandeered state legislation or regulation on state constitutional grounds.

State, Inc., 454 U.S. 464, 472 (1982))); Massachusetts v. Mellon, 262 U.S. 447, 487 (1923) ("[T]he effect upon future taxation, of any payment out of the [Treasury] funds [is] so remote, fluctuating and uncertain, that no basis is afforded for [a taxpayer] appeal to the preventive powers of a court of equity.").

137. *Cuno*, 547 U.S. at 344.

138. It should also be noted that a private party raising a commandeering challenge could not enjoin a state from implementing the challenged federal legislation or regulation. The anti-commandeering principle forbids only federal *compulsion* of state legislative and executive branches—it does not prohibit state officials from voluntarily participating in a federal regulatory scheme. *See* New York v. United States, 505 U.S. 144, 185–186 (1992).

139. *Cf.* Branch v. Smith, 538 U.S. 254, 265–66 (2003) (vacating lower court's alternative holding on constitutionality of state redistricting plan pursuant to Voting Rights Act in light of Court's conclusion that the plan was not properly pre-cleared under the Act); *id.* at 283 (Kennedy, J., concurring) (explaining that ruling on the plan was "premature" (citing Connor v. Waller, 421 U.S. 656 (1975) (per curiam))).

States could also facilitate individual commandeering challenges without actually intervening in each suit. For example, where a state does not wish to bring a commandeering challenge against a federal statute but has doubts about its constitutionality, it can enact legislation or promulgate regulations providing that legislation or regulations enacted pursuant to the federal statute will become ineffective or void if that statute is found unconstitutional.[140] Such a provision would remedy the redressability problem, at least in the case where an individual suffers ongoing injury from a state regulation that was improperly commandeering by federal law, because if the individual succeeds, the commandeered state action will immediately cease. An even broader approach, suggested by one commentator, is for a state to enact a *qui tam* or citizen suit statute that would authorize individuals to bring commandeering or other constitutional challenges on the state's behalf.[141]

Thus, as a practical matter, states will continue to have considerable control over commandeering challenges by private parties, even after *Bond*. States can facilitate such challenges by joining individual suits or making regulatory or legislative action contingent on a federal statute's continuing validity. States can also preclude individual commandeering challenges by making clear that they will continue to implement the commandeered state regulations regardless of the federal statute's validity. Only where an individual has some independent grounds for challenging the commandeered state regulatory activity will the federal court reach the merits of their commandeering challenge. This result makes good policy sense and is consistent with federalism and standing principles. From a federalist perspective, states have strong institutional incentives to protect their sovereign prerogatives from federal encroachment and there is little danger that all fifty states will acquiesce in an unconstitutional federal statute that improperly commandeers state officials. States may choose in some cases to enlist the help of their citizens in policing and enforcing their sovereign rights, but they need not do so. Concerning standing, federal courts have little reason to clarify the uncertain and controversial line

140. To further facilitate individual challenges, the state might even provide that the law or regulation should be considered void ab initio if the federal statute is invalidated. But such a provision could be problematic as it could create considerable undesirable uncertainty about the future validity of official acts pursuant to the state law or regulation.

141. *See* Gershengorn, *supra* note 101, at 1088–95. Although Gershengorn presents compelling arguments for the constitutionality of such a statute, the matter is unsettled, and the simpler expedients proposed above may be a safer way for states to facilitate individual Tenth Amendment challenges.

between federal power and states' rights if it is not necessary to redress a concrete injury to private parties, and no state believes that the challenged federal statute has impugned its sovereignty.

IV. The Future of Individual Tenth Amendment Challenges

Individual Tenth Amendment challenges are likely to increase now that *Bond* has removed one important standing obstacle for such challenges. Even before *Bond*, one of the most common Tenth Amendment challenges was by individuals convicted under SORNA.[142] Prior to the Supreme Court's decision in *Bond*, several circuit courts had dismissed criminal defendants' Tenth Amendment challenges to SORNA.[143] *Bond* makes clear that these defendants satisfy Article III's injury requirements due to their incarceration and that the Tenth Amendment imposes no prudential bar to such claims.[144] Accordingly, we anticipate renewed challenges to SORNA based on the requirements it imposes on states.[145]

Beginning in 1994, federal law has required states, as a condition for receipt of certain law enforcement funds, to create systems for sex-offender registration and community notification.[146] In 2006, Congress enhanced these provisions by passing SORNA, part of the Adam Walsh Child Protection and Safety Act.[147] Although by 1996 every state had adopted their version of mandatory sex offender registration laws, SORNA implemented a national sex offender registry with the

142. A Westlaw search reveals over 100 federal cases considering Tenth Amendment challenges to SORNA.

143. *E.g.*, United States v. Hacker, 565 F.3d 522, 525–27 (8th Cir. 2009); United States v. Shenandoah, 595 F.3d 151, 161–62 (3d Cir. 2010).

144. Bond v. United States, 131 S. Ct. 2355, 2362–64 (2011).

145. Significantly, in a case before the Sixth Circuit, the Department of Justice withdrew its argument that a defendant lacked standing to challenge SORNA as violating the Tenth Amendment. Letter pursuant to FED. R. APP. P. 28(j), United States v. Trent, 654 F.3d 574 (6th Cir. 2011) (No. 08–4482). The Sixth Circuit ultimately held that the defendant had not been required to register under SORNA and thus did not reach the merits of his Tenth Amendment challenge to SORNA. United States v. Trent, 654 F.3d 574, 576 & n.1 (6th Cir. 2011). Moreover, since *Bond*, at least two courts of appeals have held in precedential opinions that the Tenth Amendment poses no barrier to individual challenges against SORNA. United States v. Felts, 674 F.3d 599, 607 (6th Cir. 2012); United States v. Smith, 655 F.3d 839, 848 (8th Cir. 2011).

146. *See* Carr v. United States, 130 S. Ct. 2229, 2238–39 (2010) (discussing the history of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2006), and SORNA).

147. SORNA, Pub. L. No. 109-248, §§ 101–155, 120 Stat. 590, 590–611 (2006) (codified as amended in scattered sections of 10, 18, 21, 28, and 42 U.S.C. (2006)).

purpose of removing inconsistencies among state registries.[148] Specifically, SORNA requires states to create and maintain a state-wide sex offender registry conforming to the requirements of SORNA, provide a criminal penalty for a sex offender's failure to register, input information into the registry, and share this information to other law enforcement agencies.[149]

In addition to the requirements it imposes on the states, SORNA imposes two distinct demands on sex offenders. First, it requires sex offenders "to register, and keep the registration current, in each jurisdiction where the offender [resides, works, or studies.]"[150] While SORNA requires states to provide criminal penalties for the sex offender's failure to comply with this registration requirement, this statute does not include an enforcement provision criminalizing the failure to register under federal law.[151] However, SORNA separately requires any person who has committed a sex offense—and therefore is required to register under SORNA—and travels in interstate or foreign commerce to register at their new location.[152] This provision, 18 U.S.C. § 2250, makes it a federal criminal offense for anyone to fail to register after traveling.[153] As explained by the Supreme Court: "Once a person becomes subject to SORNA's registration requirements, . . . that person can be convicted under § 2250 if he thereafter travels and then fails to register."[154]

Although the Supreme Court has yet to consider SORNA's constitutionality, the courts of appeals have uniformly upheld the Act against a variety of constitutional challenges.[155] However, prior to *Bond*, many Tenth Amendment challenges to SORNA had been dismissed for lack of standing, relying on the reasoning of the majority of circuits, as described above. Both the Eighth and the Third Circuits specifically held that criminal defendants indicted for failing to regis-

148. United States v. Pendleton, 636 F.3d 78 (3d Cir. 2011); *see* 152 CONG. REC. S8013 (daily ed. July 20, 2006) (statement of Sen. Hatch) ("Laws regarding registration for sex offenders have not been consistent from State to State[, but] now all States will lock arms and present a unified front in the battle to protect children.").

149. 42 U.S.C. §§ 16912(a), 16913(e), 16921(b) (2006); *see also* United States v. Shenandoah, 595 F.3d 151, 155–56 (3d Cir. 2010) (citing SORNA).

150. 42 U.S.C. § 16913(a).

151. *Id.* § 16913(a), (e); *see Pendleton*, 636 F.3d at 83 (noting that § 16913 does not have an enforcement provision).

152. 18 U.S.C. § 2250(a) (2006).

153. *Id.*

154. Carr v. United States, 130 S. Ct. 2229, 2236 (2010).

155. *See* United States v. Kebodeaux, 647 F.3d 137, 140–41 (5th Cir. 2011) (listing circuit court cases that have upheld SORNA or reversed decisions that have rejected parts of SORNA as unconstitutional).

ter as a sex offender under Section 2250 of SORNA lack standing to challenge the law under the Tenth Amendment. The Eighth Circuit, in *United States v. Hacker*, was the first court of appeals to address standing in the SORNA context.[156] The court held that a "private party does not have standing to assert that the federal government is encroaching on state sovereignty in violation of the Tenth Amendment absent the involvement of a state or instrumentalities."[157] The court explained that the limitation was related to the prudential bar to third-party standing.[158] The fact that the court entertained the defendant's challenge to SORNA as exceeding Congress' authority under the Commerce Clause further indicates that it viewed the Tenth Amendment standing bar as prudential. Substantively, the court's analysis of the Tenth Amendment bar to individual standing was based almost entirely on *Tennessee Electric*.[159]

In *United States v. Shenandoah*, the Third Circuit addressed a similar challenge, though Shenandoah's challenge was framed more explicitly as a commandeering challenge.[160] Shenandoah alleged that "SORNA is unconstitutional because it compels [state] law enforcement to accept registrations from federally-mandated sex offender programs in violation of the Tenth Amendment . . . ."[161] The court perfunctorily dismissed the claim, concluding that because Shenandoah was challenging SORNA in his individual capacity without arguing that his interests were aligned with the states, he "lack[ed] standing to raise a Tenth Amendment challenge to SORNA."[162] The court did not analyze whether the Tenth Amendment protected individual rights, nor did it explain whether this was a prudential or constitutional limitation. Instead, the court merely cited to several similar circuit courts' holdings, including *Hacker*.[163]

However, prior to *Bond*, two courts of appeals reached the merits of SORNA challenges. In *Kennedy v. Allera*, the Fourth Circuit rejected a defendant's Tenth Amendment challenge to his SORNA conviction.[164] The court noted that the challenge would "face a serious standing question" in light of the cases holding that an individual

156. 565 F.3d 522, 525 (8th Cir. 2009).
157. *Id.* at 526.
158. *Id.* at 527.
159. *Id.* at 526–27.
160. 595 F.3d 151, 161–62 (3d Cir. 2010).
161. *Id.* at 161.
162. *Id.* at 162.
163. *Id.* at 161–62.
164. 612 F.3d 261, 269–70 (4th Cir. 2010).

lacks standing to assert Tenth Amendment claims, but noted that the defendant had Article III standing to challenge his conviction because the standing problem was based "only [on] prudential concerns."[165] The court assumed *arguendo* that it had jurisdiction and rejected the Tenth Amendment challenge on the merits.[166] The court held that SORNA did not commandeer the State of Maryland in violation of the Tenth Amendment because it only requires sex offenders to register with states, but does not "*require* that the States comply with its directives."[167]

Similarly, in *United States v. Johnson*, the Fifth Circuit reached the merits of a defendant's Tenth Amendment challenge to SORNA.[168] The court held that defendant's claim satisfied Article III's requirements because he had been injured by his incarceration and that relief would be granted if SORNA were declared unconstitutional under the Tenth Amendment.[169] The court recognized that prudential standing principles might bar the defendant from asserting a defense based on the Tenth Amendment, but decided to resolve the Tenth Amendment question in light of the "simplicity of the merits."[170] Following *Allera*, the court reasoned that because SORNA's state registration provisions were merely conditions on federal funding, they did not improperly coerce the states and thus did not violate the Tenth Amendment.[171]

However, even though some courts of appeals have reached the merits of commandeering challenges to SORNA, those courts of appeals that have yet to consider such challenges may be reluctant to do so, as SORNA's unique structure poses two important obstacles to commandeering challenges. First, SORNA's criminal prohibition is not clearly tied to those provisions requiring states to implement a sex offender registry. Several courts of appeals have noted this disconnect

165. *Id.* at 269–70, 270 n.3.

166. *Id.* at 270 & n.3.

167. *Id.* at 269.

168. 632 F.3d 912, 919–20 (5th Cir. 2011).

169. *Id.* at 919 & nn.29–30 (noting a circuit split on the issue and that *Bond* was pending before the Supreme Court).

170. *Id.* at 919–20, 920 n.33 (citing Nisselson v. Lernout, 469 F.3d 143, 151 (1st Cir. 2006)) (noting that bar on hypothetical exercise of jurisdiction only applies where Article III standing was implicated).

171. *Id.* at 920 (citing South Dakota v. Dole, 483 U.S. 203, 210–11 (1987)). As noted, since *Bond*, at least two other courts of appeals have held that a criminal defendant does have standing to challenge SORNA on Tenth Amendment grounds, but both have rejected the claims on the merits. *See* United States v. Felts, 674 F.3d 599, 607 (6th Cir. 2012) (rejecting plaintiff's commandeering challenge, reasoning that states are free to forego federal funding); United States v. Smith, 655 F.3d 839, 848 (8th Cir. 2011) (same).

and have held that a sex offender's obligation to register does not depend on the implementation of SORNA's uniform registry requirements in the state where the defendant resides.[172] In other words, although SORNA imposes uniform requirements on states' registries, the offenders' requirements to register exist whether or not the state has complied with its obligations. Therefore, even if the state's requirements were declared unconstitutional under the Tenth Amendment, the offender would ostensibly still be required under SORNA to register in that state. This is not necessarily a standing problem. One might say that a defendant convicted of violating SORNA's criminal prohibitions has standing to challenge the constitutionality of the prohibition, but not unrelated SORNA provisions, as invalidation of those provisions would not affect his conviction and thus would not redress his injury.[173] Or one might just as plausibly say that, on the merits, SORNA's criminal prohibition does not violate the anti-commandeering rule because the provision does not compel the states to regulate anyone and does not depend for its validity on improperly compelled state regulation.[174] However one characterizes this prob-

172. United States v. Shenandoah, 595 F.3d 151, 157 (3d Cir. 2010) ("New York and Pennsylvania may never implement SORNA, choosing, for whatever reason, to forego a portion of their federal funding. This failure to implement a federal law, however, does not give sex offenders a reason to disregard their federal obligation to update their state registrations. When a sex offender travels in interstate commerce and disobeys the federal command to keep his or her registration current, as required by SORNA, he or she is subject to prosecution."); *see also Felts*, 674 F.3d at 604 ("The duty of an offender to register is independent of whether or not the state has implemented SORNA."); United States v. Hester, 589 F.3d 86, 92–93 (2d Cir. 2009) ("That SORNA also requires jurisdictions to update and improve their registration programs, and that New York and Florida had not yet met those administrative requirements, does not excuse Hester's failure to meet the registration requirements that SORNA imposes on individual sex offenders and to register with the programs that did exist."); United States v. Brown, 586 F.3d 1342, 1349 (11th Cir. 2009) ("We agree with our sister circuits that a sex offender is not exempt from SORNA's registration requirements merely because the jurisdiction in which he is required to register has not yet implemented SORNA."); United States v. Gould, 568 F.3d 459, 463–64 (4th Cir. 2009) ("SORNA § 113(a)'s requirements to register and maintain registration are not expressly conditioned on a State's implementation of the Act . . . ."); United States v. Hinckley, 550 F.3d 926, 939 (10th Cir. 2008) ("[SORNA's Proposed] Guidelines state that, while SORNA does set 'minimum standards for jurisdictions' registration and notification programs,' it does not require statutory implementation." (quoting 72 Fed. Reg. 30,213–14 (May 30, 2007))).

173. The Supreme Court has recognized in other cases that whether a challenged statutory provision is severable from other provisions can affect a challenger's standing. *See* INS v. Chadha, 462 U.S. 919, 931–32 (1983) (discussing severability of a federal statute for standing purposes).

174. However, it should be noted that Section 16913(e) of SORNA does require states, as a condition of funding, to enact their own criminal penalties for sex-offenders who fail to register. 42 U.S.C. § 16912(e) (2006). Thus, a criminal defendant convicted under a

lem, it may preclude commandeering challenges by those convicted of violating SORNA's criminal registration provision. This also illustrates an important difficulty for most private parties bringing commandeering challenges. Like SORNA, a number of federal laws susceptible to a commandeering challenge belong to a complex regulatory scheme, only a part of which may involve improperly compelling state regulation.[175] Unless the provisions that commandeer state executive or legislative functions are not severable from the larger scheme, a private plaintiff bringing a commandeering challenge may be required to trace her injury to those specific provisions.

Second, even if a court were to conclude that SORNA's criminal prohibition on failing to register applies only in those states that had complied with SORNA's registration requirements, a criminal defendant challenging his SORNA conviction could still face the redressability problem discussed in the preceding section. Invalidation of the registration requirements that SORNA imposes on the states would not render state legislation implementing those requirements automatically invalid. States are free to comply with federal directives even if they cannot be compelled to do so.[176] To establish redressability, a defendant would have to show that if SORNA's commandeering requirement were invalidated, the state where he was required to register would not only repeal its sex offender registration requirements, but would also retroactively absolve him of his failure to comply with those requirements.[177] Given the prevalence of sex offender registration requirements in most states long before the 2006

federally-induced state registration law may have a stronger argument that the injury is connected to the federal statutory scheme. Of course, as discussed *infra*, the sex-offender would still face redressability problems as the state is free to implement the criminal sanctions of its own volition.

175. For example, the federal statutes challenged in *Medeiros v. Vincent*, essentially grafted a federal regulatory role onto a more comprehensive regulatory scheme established by an interstate compact. 431 F.3d 25, 27–28 (1st Cir. 2005).

176. *See* New York v. United States, 505 U.S. 144, 166 (1992) (noting that Congress may incentivize states to do that which it cannot compel them to do under the commandeering doctrine); Kennedy v. Allera, 612 F.3d 261, 269 (4th Cir. 2010) ("[C]onditioning federal funding on a State's implementation of a federal program does not, without more, violate the Tenth Amendment.").

177. Even this might not suffice, as SORNA's criminal provision could still quite plausibly be read as requiring that the defendant register in states that had a sex offender registration system in place at the time he moved to the state, regardless of whether the state subsequently alters or abolishes the registration requirement. *Cf. Gould*, 568 F.3d at 468–69 (finding that the defendant had failed to register in several states under state registration statutes in violation of SORNA); *Hinckley*, 550 F.3d at 938–39 (finding that the defendant had violated SORNA registration requirement because even though the state that had not yet implemented SORNA, he failed to register pursuant to state registration statutes).

SORNA amendments relating to state sex offender registries, defendants will often have difficulty making such a showing.[178]

This difficulty illustrates another facet of the redressability problem mentioned above. An individual bringing a commandeering challenge need not only show that the commandeered state legislation or regulation would be eliminated upon invalidation of the compulsory federal law, but she must also show that elimination of the state legislation or regulation would actually redress a cognizable injury. This requirement is easily satisfied where the injury is imminent or ongoing—such as a regulatory prohibition that will limit or continues to limit the plaintiff's liberty because invalidation of the law removes the limitation and thus redresses the injury. But where improperly compelled state laws or regulations have worked an injury that is now complete and is unlikely to recur—for example, imposition of a penalty—it is far from obvious that this injury will be redressed by eliminating the state law or regulation. This is especially true because, as mentioned above, states may freely choose to comply with unduly coercive federal laws, and a successful commandeering challenge—even if it resulted in the repeal of the commandeered state law—would not ordinarily render that law void ab initio. Rather, commandeered state legislation and regulation should ordinarily be presumed valid and effective unless and until it is repealed or becomes ineffective by operation of law.

Conclusion

Bond has removed one important prudential standing obstacle to individual Tenth Amendment claims but does not give federal courts carte blanche to resolve the merits of all such challenges. Rather, Article III standing principles will require careful consideration of the precise connection between the allegedly unconstitutional federal action and the plaintiff's injury. Specifically, in anti-commandeering challenges, courts and litigants should consider: (1) the nature of the plaintiff's injury: Does it result directly from the federal statute, or is it the result of compelled state action? Is it a past, completed harm, or an ongoing or prospective injury?; (2) the nature of the challenged federal statute: Does it stand alone, or is it inseparable from a broader federal regulatory scheme that operates directly on individuals?; and

178. For example, many states enacted sex offender registration statutes between 1994 and 1996. *See, e.g.*, Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L. J. 315, 315–16 (2001) (mentioning state statutes pre-dating federal Megan's law).

(3) the relationship between the federal law and state regulation: Has the state already voluntarily complied with the challenged federal statute? Will state law change if the federal law is invalidated? In many cases, private parties asserting an anti-commandeering complaint against federal law will only be indirectly injured by the law. Their injury will be more immediately caused by state legislation or regulations implementing federal law, and thus the private party will have to show how invalidating federal law will change state law in a way that redresses her injury. The outcome of this fact-specific inquiry will vary from case to case, but without the support of a state, the private plaintiff will often lack standing. *Bond* thus not only rejects a categorical bar to prudential standing for private Tenth Amendment challenges, but also mandates a more nuanced Article III standing examination. This inquiry properly recognizes that while some of these challenges may reach the merits on their own strength, many will continue to require the support of the states whose sovereignty the Tenth Amendment protects.