



## ARTICLE

**The New Public Standing**

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**Abstract.** Today's public litigants are not citizens or individual taxpayers who, suffering no injury of their own, seek instead to stand for the public. Instead, they are states that have suffered financial injuries. In recent years, states have brought many high-profile public law cases against the federal government based upon financial injuries. State standing to sue the federal government for financial injuries is the new public standing.

This Article's goal is to offer a comprehensive account of the new public standing. It argues that we should not hope—or expect—that the federal courts will treat the new public standing with the disfavor they have shown to citizen and taxpayer standing. Nor, however, should we hope or expect that the federal courts will treat the new public standing as indistinguishable from private standing based upon financial injuries.

One aspect of this thesis is doctrinal and normative. Under the U.S. Supreme Court's Article III jurisprudence, financial injuries are the paradigmatic example of an injury in fact that supports standing to sue, as contrasted with an ideological injury that does not suffice for standing. What makes the new public standing doctrinally difficult is that while some financial injuries to states mirror those to private parties, others do not. And what makes these cases normatively difficult is that the state attorneys general who sue based upon financial injuries to their states are ideological litigants. The new public standing thus requires us to rethink the terms of the debate about state standing to sue the federal government.

Another aspect of this thesis is descriptive and positive. To ground its normative analysis, this Article attempts to identify the ideological, institutional, and political factors that have contributed to the new public standing and that will shape its future prospects. Analysis of these factors leads to the conclusion that the Court will preserve the new public standing while tinkering with its remedial scope. The new public standing will prove more durable than citizen and taxpayer standing for the public, but will not substitute for the promise of an individual standing upon her conscience in federal court.

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### Introduction

In 1968, Louis Jaffe celebrated that the federal courts had begun to grant citizens and taxpayers Article III standing to challenge government action on behalf of the public.<sup>1</sup> Later that year, the U.S. Supreme Court proved Jaffe prophetic, opening the door to taxpayer standing in *Flast v. Cohen*.<sup>2</sup> Individual litigants thus emerged as representatives of the public interest in federal court.<sup>3</sup>

How times have changed. The moment of the individual standing upon her “conscience”<sup>4</sup> in federal court proved fleeting. By the mid-1970s, an increasingly conservative Supreme Court began to cut back on the standing of private litigants to vindicate public interests, or what this Article calls “private standing for the public.”<sup>5</sup> And in 2007, the Court in *Hein v. Freedom from Religion Foundation, Inc.* all but buried *Flast* by treating it as a narrow exception to a general rule against individual taxpayer standing.<sup>6</sup>

Today’s new public litigants are not private citizens or individual taxpayers seeking to stand for the public. In 2007, the Court also decided *Massachusetts v. EPA*,<sup>7</sup> which, in retrospect, all but announced state governments as the new public interest litigants. In affording the Commonwealth of Massachusetts “special solicitude in [the] standing analysis,” it was not clear whether the Court

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1. See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).
  2. See 392 U.S. 83, 85-86, 88 (1968).
  3. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 674-76, 688-90 (1973) (granting standing to a group of concerned law students who challenged the Interstate Commerce Commission’s approval of rates for shipping freight by train); see also Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1133-34 (2009) (explaining that while the Supreme Court initially “unquestionably sanctioned this ‘standing for the public’ regime as constitutional,” the federal courts ultimately “retreated” from this regime).
  4. See Jaffe, *supra* note 1, at 1047 (arguing that society had “recogniz[ed] the importance of the individual’s conscience” and that courts should do the same by granting standing to citizens and taxpayers).
  5. See Magill, *supra* note 3, at 1195-98 (describing cases between 1970 and 1976 in which the Supreme Court adopted the modern injury-in-fact requirement out of concern that “ideological advocates . . . [were] attempting to enlist the courts in their policy-reform campaign”).
  6. See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 602, 608-09 (2007) (opinion of Alito, J.). Jaffe famously distinguished the “Hohfeldian” plaintiff, who “seek[s] a determination that he has a right, a privilege, an immunity or a power,” from the “ideological” plaintiff, who seeks to vindicate a public interest without a personal right at stake. See Jaffe, *supra* note 1, at 1033-35.
  7. 549 U.S. 497 (2007).

was focused upon the State's financial injury as an owner of real property, its status as a sovereign government, or its capacity to represent its citizens.<sup>8</sup> But it has quickly become clear that states are significant public interest litigants in federal court.

In recent years, states have brought a spate of public interest suits against the federal government based upon financial injuries.<sup>9</sup> State standing to sue the federal government for financial injuries is "the new public standing." Fifteen states (plus the District of Columbia) relied upon financial harms to establish standing to defend provisions of the Affordable Care Act on appeal after President Trump threatened to allow the Act's health care exchanges to "explode."<sup>10</sup> Several states claimed economic injuries to their public universities to establish standing to challenge the Trump Administration's Muslim travel ban.<sup>11</sup> Maryland and the District of Columbia, both of which own hotels that compete with Trump properties, sued the President under the Emoluments Clauses based in part upon "proprietary" and other financial harms.<sup>12</sup> Texas, along with a host of other states, successfully sued the Obama Administration over its immigration enforcement policies, claiming they

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8. *See id.* at 520 & n.17, 522-23.

9. *See infra* Part I.

10. *See* U.S. House of Representatives v. Price, No. 16-5202, 2017 WL 3271445, at \*1 (D.C. Cir. Aug. 1, 2017) (per curiam); Seth Davis, *Standing In for the Executive: The Latest in House v. Price, TAKE CARE* (May 26, 2017), <https://perma.cc/J2MB-3M5R>; Amy Goldstein & Juliet Eilperin, *Affordable Care Act Remains "Law of the Land," but Trump Vows to Explode It*, WASH. POST (Mar. 24, 2017), <https://perma.cc/USJ2-F4UE>; *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code). While state litigation during the Trump Administration furnishes many examples of the new public standing, so too does state litigation during the Obama and George W. Bush Administrations. This Article will draw upon examples from all three Administrations, among others.

11. *See* Hawaii v. Trump, 859 F.3d 741, 757-59, 765 (9th Cir.) (per curiam), *vacated as moot per curiam*, 138 S. Ct. 377 (2017); Washington v. Trump, 847 F.3d 1151, 1156-57, 1159-61 (9th Cir. 2017) (per curiam). I participated as an amicus in support of the plaintiffs in a subsequent challenge to the Trump Administration's later iteration of the travel ban.

12. *See* District of Columbia v. Trump, 291 F. Supp. 3d 725, 742-46 (D. Md. 2018), *argued*, No. 18-2488 (4th Cir. Mar. 19, 2019); *see also* U.S. CONST. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); *id.* art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, . . . and he shall not receive . . . any other Emolument from the United States, or any of them."). I participated as an amicus in support of the plaintiffs' standing to sue. *See* Brief of Amici Curiae Administrative Law, Constitutional Law & Federal Courts Scholars in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss, *District of Columbia*, 291 F. Supp. 3d 725 (No. PJM 17-1596), 2017 WL 5624872.

would cause the State financial harm.<sup>13</sup> Texas relied upon financial harm when it challenged the Department of Labor’s overtime rule<sup>14</sup> and the Obama Administration’s guidance on the rights of transgender students.<sup>15</sup> These are just a few examples of the new public standing.<sup>16</sup>

The state attorneys general who bring these public actions are ideological litigants. They do not claim a personal right of their own, but instead premise their standing to bring politically controversial and ideologically charged public actions upon financial injuries to the states they represent. The new public standing is a valuable resource for state attorneys general and ideological interest groups interested in collaborating on impact litigation.<sup>17</sup> A financial injury is the “paradigmatic” injury in fact, one that supports Article III standing for private parties as a matter of course.<sup>18</sup> States often point to this paradigmatic injury in fact while enjoying flexibility, particularly when multiple states sue together, to search for a favorable forum in which to file suit. In some cases, the state plaintiff suffering a financial injury may be the only party with Article III standing.<sup>19</sup> Thus, the new public standing channels

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13. See *Texas v. United States*, 809 F.3d 134, 146, 155-56, 162 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016).

14. See *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 525-26 (E.D. Tex. 2016).

15. See *Texas v. United States*, 201 F. Supp. 3d 810, 815-16, 819-23 (N.D. Tex. 2016).

16. Texas alone brought at least forty-eight suits against the Obama Administration. See Neena Satija et al., *Texas vs. the Feds—A Look at the Lawsuits*, TEX. TRIB. (Jan. 17, 2017), <https://perma.cc/W9MF-CHUX>. Local governments have also emerged as public law litigators. See, e.g., *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017) (holding that the City of Miami had “prudential standing” to sue banks based upon financial injuries in the form of “lost tax revenue and extra municipal expenses”); see also David J. Barron, Essay, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2241-42 (2006) (arguing that state standing doctrine may provide helpful instruction concerning local government standing in some cases). This Article discusses examples of local government standing where it is isomorphic to the new public standing for states.

17. See Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS: J. FEDERALISM 451, 465-66 (2014) (discussing the “increasing willingness” of state attorneys general “to collaborate on lawsuits with ideological interest groups”).

18. See, e.g., *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (Alito, J.).

19. Under the “one-plaintiff” rule, courts have jurisdiction over a case as long as at least one plaintiff has standing. See, e.g., *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). For two particularly consequential examples relying on this rule in allowing a suit to proceed, see *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (“Only one of the petitioners needs to have standing to permit us to consider the petition for review.”); and *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (citing the one-plaintiff rule and holding that “[a]t least one state—Texas—has satisfied the [injury-in-fact] requirement by demonstrating that it would incur significant costs in issuing driver’s licenses” to beneficiaries of the challenged program), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016). The one-plaintiff rule has come in for recent

*footnote continued on next page*

legal mobilization and cause lawyering toward the offices of the fifty state attorneys general. At the same time, these state lawsuits disperse authority over agenda control down the federal judicial hierarchy. By hearing these suits on the merits and issuing preliminary relief—sometimes with nationwide scope—federal district judges can powerfully shape the national discourse surrounding public law disputes.

Whether the new public standing’s empowerment of state officials and lower court judges is normatively desirable is a matter that is difficult to assess in the abstract. It is a question on which we can expect changes of position and corresponding charges of hypocrisy and motivated reasoning.<sup>20</sup>

This Article’s goal is to offer a comprehensive account of the new public standing. It argues that we should not hope—or expect—that the federal courts will treat the new public standing as they have treated private standing for the public: by denying standing on the ground that states are ideological plaintiffs.<sup>21</sup> Nor, however, should we hope or expect that the federal courts will treat the new public standing as they have treated private standing based upon financial injuries.

One aspect of this thesis is doctrinal and normative. The new public standing presents constitutional, prudential, and remedial issues that are distinct from those raised by private standing for the public and by private standing based upon financial injuries. Under Article III standing rules for private parties, financial injuries “always” satisfy the injury-in-fact requirement, but an ideological interest in vindicating the public interest does not.<sup>22</sup> Doctrinally, some financial injuries to states mirror those to private parties, but others do not. Normatively, state attorneys general who sue based upon financial injuries to their states may raise the same concerns that the

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criticism. *See, e.g.*, Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 485-86 (2017) (“[C]ourts and commentators should recognize that all plaintiffs in a case need standing . . .”).

20. *See* Greg Goelzhauser & Shanna Rose, *The State of American Federalism 2016-2017: Policy Reversals and Partisan Perspectives on Intergovernmental Relations*, 47 PUBLIUS: J. FEDERALISM 285, 285-86 (2017) (noting that “change in party control of government” as a result of the 2016 election “contributed to a realignment of partisan positions on matters of federalism”); *see also* Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 490 (2016) (“[F]lip-flopping seems like a species of hypocrisy, and hypocrisy in politics is as old as politics itself.”).

21. *See, e.g.*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (opinion of Alito, J.).

22. *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 178-79 (2012) (“[T]he Court has said that ‘pocketbook’ or ‘wallet’ injury always qualifies, but that mere ‘ideological’ or ‘psychic’ harm never does.”); *see also* *Franchise Tax Bd. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990) (holding that allegations of “actual financial injury,” causation, and redressability are “all that is required for Article III standing”).

Supreme Court has cited in cutting back on private standing for the public. The new public standing therefore requires us to rethink the terms of doctrinal and normative debates about standing to sue the federal government.

Another aspect of this thesis is descriptive and positive. This Article describes the ideological, institutional, and political factors that help explain the emergence of the new public standing.<sup>23</sup> In light of these factors, this Article concludes that the new public standing will prove more durable than citizen and taxpayer standing. Something valuable was lost, however, when standing doctrine swerved from the path prophesied by Jaffe, and the new public standing will not replace it.

The argument unfolds in five Parts. Part I clarifies the doctrinal problem that the new public standing presents. The commentary on state standing has focused upon cases in which states sue based upon harms that do not fit within the paradigmatic injuries of private standing doctrine. In these cases, the question is whether federal courts should afford states “special solicitude in [the] standing analysis.”<sup>24</sup> The new public standing requires us to rethink the terms of the debate because it seems to present a paradigmatic “private” harm: a financial injury. Scholars have only begun to map the complexities of the new public standing,<sup>25</sup> and this Article builds upon and challenges the existing maps. The question is whether special disfavor (or special solicitude, or neither) is warranted when states sue the federal government based upon financial injuries. And that question is more doctrinally and normatively complex than it seems at first glance because states may suffer financial injuries in both typically private and uniquely public capacities.

Part II describes the ideological, institutional, and political context of the new public standing. What makes the new public standing “new” is not simply state governments’ reliance upon financial injuries to bring public actions.

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23. See generally Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1112-14 (2015) (calling for “more doctrinal Realist work” that assumes that “context matters crucially to determinations of whether and how abstract legal concepts apply”).

24. See *Massachusetts*, 549 U.S. at 520.

25. The doctrinal complexity arises from a feature of government standing that is easy to miss: Some financial injuries to governments mirror those that private parties might suffer, while others do not. In an important recent article, Raymond Brescia considers examples of the new public standing and argues that states are “pursuing major public law litigation while claiming very private law harms.” See Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 415 (2018). While this Article builds upon Brescia’s account, it departs from it in several respects. Most fundamentally, this Article argues that it is not the case that the new public standing necessarily involves the sorts of “common law harms” that a private party might assert. See *id.* at 366; *infra* Part I.B. This Article argues, therefore, that the normative dimensions of the new public standing are different and much more complex than the normative dimensions of private standing based upon financial injuries.



Instead, this Article argues, the story of the new public standing forces us to look anew at several socio-legal factors that bear upon access to federal court—including legal mobilization, federalism and federal executive power, and intellectual and ideological trends within the federal judiciary.

The new public standing empowers two types of “local” actors to act together as national lawmakers: state executive officials and federal district court judges. State government litigants may aim to satisfy the injury-in-fact requirement by pointing to financial injuries while selecting favorable paths within the federal court system for the development of substantive public law. And by allowing the litigation to proceed, federal district court judges may decide nationally controversial public law disputes.

As a positive matter, Part III explains, the prospects of the new public standing depend upon the Supreme Court’s concern for agenda control. The same ideological forces that support the logic of the nationwide injunction also support the Court’s “drive” to control the agenda of law declaration within the Article III courts.<sup>26</sup> It seems obvious that the Roberts Court will respond to the new public standing much as the Burger Court responded to citizen standing in the 1970s: by tightening the injury-in-fact requirement to limit federal jurisdiction.<sup>27</sup> After all, expansive federal jurisdiction is the *bête noire* of conservative jurists, or so it may seem today,<sup>28</sup> and the new public standing has proven a powerful tool in progressive cause lawyering. But under plausible assumptions about future patterns of political elections and judicial appointments, the Court will be motivated to retain the flexibility that current doctrine provides while shaping the remedial scope of the new public standing.

Against the descriptive and positive backdrops of Parts II and III, Part IV takes up the normative question whether the Court should treat the new public standing with special solicitude or with special disfavor. There are strong arguments that states should be treated with special disfavor in the standing analysis when they sue the federal government based upon financial

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26. See Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669 (2012) (explaining that “[c]urrent doctrinal developments reflect a powerful drive” toward hierarchical supervision and agenda control by the Supreme Court); cf. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1318 (1995) (arguing that standing “substantially reduces . . . the ability of litigants to manipulate the substantive evolution of legal doctrine by controlling the order, or ‘path,’ of case decisions”).

27. See generally Magill, *supra* note 3 (explaining that the Supreme Court opened the door to public standing in the 1940s but began to close it in the 1970s when progressive cause lawyers brought environmental and civil rights suits).

28. See, e.g., Heather Elliott, *Standing Lessons: What We Can Learn when Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 559 (2012) (“Standing has particularly been criticized by those who see it as a tool used by conservative judges to keep left-wing litigants out of court.”).

injuries. And even though these arguments are not decisive, they go a long way toward showing that federal courts should be circumspect in invoking special solicitude when assessing whether a state may sue the federal government based upon a financial injury. Constitutional—as well as prudential, procedural, and remedial—doctrines have important roles to play in addressing the concerns that the new public standing raises.

Part V illustrates these normative claims by applying them to examples of high-profile cases premised upon the new public standing. In so doing, it distinguishes among constitutional, prudential, procedural, and remedial aspects of the new public standing, parsing Article III and non-Article III solutions to the problems that these suits may present.

## I. The Problem of the New Public Standing

To have Article III standing to sue, a plaintiff must point to an injury in fact.<sup>29</sup> This injury must be concrete, imminent, and particularized; caused by the defendant; and redressable through judicial relief.<sup>30</sup> Thus, standing doctrine “requires [courts] to separate injured from ideological plaintiffs.”<sup>31</sup> Ideological plaintiffs, who allege nothing more than a “special interest” in the subject of their suit, lack standing.<sup>32</sup> The individual who seeks only to stand upon her conscience in federal court has no Article III injury.

By contrast, individuals and private entities may sue to vindicate financial injuries, which have been called the “paradigmatic” type of injury in fact.<sup>33</sup> This premise is well established.<sup>34</sup> Because the loss of even a “few pennies” is

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29. *See, e.g.*, *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013).

30. *See, e.g., id.*

31. *See Books v. Elkhart County*, 401 F.3d 857, 871 (7th Cir. 2005) (Easterbrook, J., dissenting) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)).

32. *See Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972) (identifying potential adverse consequences from granting standing to “special interest” plaintiffs, and holding that “a mere ‘interest in a problem’” is not sufficient for standing to challenge administrative action).

33. *See, e.g., Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (Alito, J.).

34. *See, e.g., Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (Breyer, J.) (“For standing purposes, a loss of even a small amount of money is ordinarily an ‘injury.’”); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-86 (2000) (Ginsburg, J.) (holding that “economic interests” can support standing); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) (Kavanaugh, J.) (“A dollar of economic harm is still an injury-in-fact for standing purposes.”); *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1029 (8th Cir. 2014) (Riley, C.J.) (“The consumers’ alleged economic harm—even if only a few pennies each—is a concrete, non-speculative injury.”).

enough to give a litigant standing in an Article III court,<sup>35</sup> even public interest litigants face substantial pressure to frame their injuries in terms of financial harms rather than in terms of their public interest concerns.<sup>36</sup>

Though the U.S. Supreme Court has closed the federal courthouse doors to an individual standing simply upon her concern for the public interest, it has left those doors open to state attorneys general who can allege their states have suffered financial injuries.<sup>37</sup> States have pointed to this paradigmatic Article III injury to establish standing when bringing public actions against the federal government. In many of these cases, to deny standing would be to treat the states with special *disfavor*. In others, special *solicitude* may be required. The doctrinal question, therefore, is this: Should states that sue the federal government to vindicate financial injuries be treated with special disfavor or special solicitude?

This Part summarizes the existing debate about state standing and then explains the doctrinal problems that the new public standing raises.

#### A. The Existing Debate

In the main, the scholarly debate about state standing to sue the federal government has centered on state suits to protect state law or to vindicate the rights of state citizens through *parens patriae* actions. Should a state have standing to challenge the validity of a federal law that purportedly preempts state law? May a state sue the federal government in a *parens patriae* capacity? Under current law, a state may have sovereign standing to protect state law,<sup>38</sup> but it lacks *parens patriae* standing to challenge the constitutionality of federal law in a suit against the federal government.<sup>39</sup>

Much of the normative debate about state standing to sue the federal government focuses on *Massachusetts v. EPA*, in which Massachusetts sued the

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35. See *Wallace*, 747 F.3d at 1029.

36. See, e.g., *Friends of the Earth*, 528 U.S. at 182-83 (holding that a private landowner who alleged “that her home . . . had a lower value than similar homes located farther from [the alleged polluter’s] facility” had established injury in fact).

37. This Article critically discusses the Court’s line-drawing between ideological and financial injuries, canvassing the possible rationales and arguing that the Court’s standing doctrine has become less about whether we will have politically controversial public interest litigation and more about the allocation of public versus private power to bring such litigation. See *infra* Part IV; *infra* Conclusion. I thank my colleagues Kathy Abrams, Claudia Polsky, and Steve Sugarman for pressing me to address these points in more detail.

38. See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); *Missouri v. Holland*, 252 U.S. 416, 431 (1920); see also Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 19 (2014).

39. See *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007); *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923).

Environmental Protection Agency for failing to regulate greenhouse gas emissions.<sup>40</sup> The Commonwealth pointed to its interests as an owner of property along the Atlantic coast, its sovereign interest in addressing climate change through state law, and its quasi-sovereign interest in protecting its citizens' health and well-being.<sup>41</sup> Relying on "special solicitude [for states] in [the] standing analysis," the Court held that Massachusetts had Article III standing.<sup>42</sup>

By affording the Commonwealth "special solicitude" in *Massachusetts v. EPA*, the Court signaled that states could—and perhaps should—point to financial injuries to establish standing to sue the federal government. But the reach of this principle remains unclear. In affording Massachusetts special solicitude, it was not clear whether the Court was focused upon the Commonwealth's financial injury, its sovereign status, its representative capacity, or some combination of the three. On the one hand, the Court based its standing holding on the Commonwealth's allegation that it would face hundreds of millions of dollars in remediation costs as rising sea levels swallowed its coastal property due to climate change.<sup>43</sup> That might suggest states are due special solicitude whenever they sue to vindicate financial injuries. It is not clear, however, that Massachusetts needed special solicitude to sue on that basis; after all, a financial injury is the "paradigmatic" injury in fact.<sup>44</sup> A state that stands upon a financial injury would seem no different than a private party bringing an action to redress a concrete harm. Instead, the most obvious reason to give a state special solicitude in standing analysis is its status as a sovereign government. The Court's discussion of the Commonwealth's sovereign interest in the "exercise of its police powers"<sup>45</sup> and its quasi-sovereign interest in the "health and welfare of its citizens"<sup>46</sup> might ground special solicitude to sue the federal government in the structure of federalism and the unique political accountability of state officials.

Federal courts should not, some scholars argue, afford states special treatment when they call upon the federal courts to superintend the federal

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40. See *Massachusetts*, 549 U.S. at 505.

41. See *id.* at 519-23.

42. See *id.* at 520, 526. On the merits, the Court held that the EPA had acted arbitrarily and capriciously by failing "to decide whether greenhouse gases cause or contribute to climate change" in relation to the agency's decision not to regulate greenhouse gases. See *id.* at 505, 534-35.

43. See *id.* at 522-23.

44. See, e.g., *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (Alito, J.).

45. See *Massachusetts*, 549 U.S. at 519.

46. See *id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)).

government.<sup>47</sup> First, as Ann Woolhandler has argued, “disallowing intergovernmental suits to vindicate sovereignty interests reinforce[s] the federalism principle that state and federal governments should act primarily on the people rather than on each other.”<sup>48</sup> Second, such suits may undermine individual rights claims by crowding out private enforcement of public law.<sup>49</sup> Third, state suits against the federal government may call for “abstract judicial determinations of the validity of governmental action.”<sup>50</sup>

States should have standing, other scholars contend, even when their injuries do not fit within the paradigmatic injuries of private standing doctrine. Aziz Huq, Bradford Mank, Calvin Massey, and Jonathan Remy Nash have each argued that states should receive special solicitude when they sue to vindicate at least some sovereign or quasi-sovereign interests.<sup>51</sup>

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47. See, e.g., Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 88-89 (“[T]he nature of the federal union, the power and function of Congress and the President, and the power and function of the judiciary all would be radically altered if states could come into the original jurisdiction at will to litigate the constitutional validity of national law applicable within their territories.”); Stephen I. Vladeck, Essay, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845, 848 (2012) (arguing that states may sue to enforce “constitutional provisions under which the federal government operates on the states *qua* states,” but that federal courts should deny standing to states that “challenge the constitutionality of federal regulation on behalf of their citizens”); Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 236 (2014) (arguing that there are “ample reasons the courts should decline to use their discretion to recognize” government plaintiffs’ standing to sue based upon sovereignty interests); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 396 (1995) (questioning the “public law model [of standing] in which the litigation of sovereignty interests and of the constitutionality of statutes is seen as [the Supreme Court’s] most appropriate role”).

48. Woolhandler, *Governmental Sovereignty Actions*, *supra* note 47, at 209-10.

49. See *id.* at 210 (“[P]reference for suits between individuals and government enhance[s] the status of individuals as rights-holders against government . . .”).

50. *Id.*

51. See Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013) (arguing that governments should be preferred litigants in disputes relating to constitutional structure); Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1704-05 (2008) (proposing that “courts relax the immediacy and redressability prongs of the standing test when states bring *parens patriae* suits to protect their quasi-sovereign interest in the health, welfare, and natural resources of their citizens”); Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 252 (2009) (arguing that *Massachusetts v. EPA* permits states to assert injuries to their quasi-sovereign interests that “would not be judicially cognizable if asserted by any individual citizen”); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1073 (2010) (arguing that “[s]tates ought to have greater solicitude” in standing analysis when the federal government has preempted their sovereign authority to regulate); see also Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201, 206 (2017) (arguing that states have standing to sue the federal executive  
*footnote continued on next page*

Some scholars have parsed among states' sovereign, quasi-sovereign, and proprietary interests. Tara Leigh Grove, for instance, has urged federal courts to give states "broad standing" when they sue to protect state law, but not when they challenge federal agencies' compliance with federal law.<sup>52</sup> In prior work I have argued that courts should afford states special solicitude when they sue "in a uniquely public capacity," but not when they sue in "what amounts to a private capacity."<sup>53</sup>

#### B. The New Problem: States' Financial Injuries as the Basis for Public Actions

The common thread throughout this commentary is a focus upon cases in which states claim standing based upon harms that do not fit within the paradigmatic injuries of private standing doctrine.<sup>54</sup> The new public standing requires us to rethink the terms of this debate because it involves financial injuries, not simply states' sovereign interest in protecting state law or their *parens patriae* interest in vindicating their citizens' rights. Financial harms are the sort of concrete harms that might look like those alleged in private rights cases especially suited for judicial resolution.<sup>55</sup> The Supreme Court has held that a state's financial injuries satisfy the injury-in-fact requirement,<sup>56</sup> and

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branch when it has underenforced federal law "in a way that is inconsistent with a governing statute" and the state "point[s] to preemption of state law").

52. See Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 855 (2016); *id.* at 898-99 ("[S]tate attorneys general should have no special role in overseeing the federal executive's implementation of federal law.").

53. See Davis, *supra* note 38, at 84.

54. *Virginia ex rel. Cuccinelli v. Sebelius*, in which Virginia sued based upon its declared "opposition to federal law," is a ready example of this type of case. See 656 F.3d 253, 269-71 (4th Cir. 2011). The Fourth Circuit held that just as a private individual cannot stand in federal court upon her conscience alone, neither could the Commonwealth of Virginia stand based upon its simple objection to the Affordable Care Act's individual mandate. See *id.* at 266-67, 269-71; see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(b), 124 Stat. 119, 244-49 (2010) (codified as amended at 26 U.S.C. § 5000A (2017)).

55. See, e.g., *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (Alito, J.) ("Monetary harm is a classic form of injury-in-fact."); see also *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970) (holding that companies selling data processing services "no doubt" had shown injury in fact sufficient to challenge a regulation that, among other things, "might entail some future loss of profits"); *NRA of Am. v. Magaw*, 132 F.3d 272, 281 (6th Cir. 1997) (holding that gun manufacturers had standing to challenge a law banning some firearms because of the "immediate economic harm" to manufacturers).

56. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 736-37 (1981).

there is no shortage of lower court authority that treats state standing to sue the federal government as obvious when the state alleges a financial harm.<sup>57</sup>

State standing to sue the federal government for financial injuries is not straightforward, however. Supreme Court authority from the 1920s suggests that a state's financial injury—at least where the injury is “at most, only remote and indirect”—does not suffice for federal jurisdiction.<sup>58</sup> When states that have suffered financial injuries bring public actions against the federal government, it is not clear that they should be afforded the same treatment as private parties suing based upon financial injuries.

The doctrinal complexity arises from a feature of government standing that is easily missed: A government may suffer financial injury in more than one capacity. Some such injuries mirror those to private parties. Others do not.

The new public standing does not, therefore, necessarily involve private law injuries. In an important contribution to our understanding of state standing, Raymond Brescia argues that states have “claim[ed] very private law harms” in recent litigation against the federal government.<sup>59</sup> Brescia rightly points out that a state may suffer a financial injury in a way that mirrors “economic injury suffered by [private] actors in a market economy,” and therefore rightly argues that states may bring public actions while availing themselves of standing doctrine that favors financial injuries.<sup>60</sup> But the new public standing is more doctrinally complex than Brescia's account suggests. This form of state standing does not necessarily involve “traditional, common law harms.”<sup>61</sup> Because states can suffer financial injuries in uniquely public capacities, not all examples of the new public standing involve private law injuries; many instead present distinct constitutional, prudential, and remedial issues. To begin to understand these issues, we need to specify precisely the different ways in which a state may claim standing based upon a financial injury.

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57. See, e.g., *Air All. Hous. v. EPA*, 906 F.3d 1049, 1059-60 (D.C. Cir. 2018) (per curiam) (holding that the plaintiff States had “pocketbook” standing to sue based upon expenses they had “previously made and may incur again”); *Kansas v. United States*, 16 F.3d 436, 437-39 (D.C. Cir. 1994) (holding that Kansas had standing based upon the challenged statute's impact on the costs of airline tickets for state employees); cf. *Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253, 261 (6th Cir. 2009) (en banc) (holding that school districts had standing to challenge a federal statute where they alleged that they “must spend state and local funds” to comply).

58. See *Florida v. Mellon*, 273 U.S. 12, 17-18 (1927); see also Kevin C. Walsh, *The Ghost That Slayed the Mandate*, 64 STAN. L. REV. 55, 73-74 (2012) (discussing *Mellon*).

59. Brescia, *supra* note 25, at 415; see also *supra* note 25.

60. See *id.* at 367-68.

61. See *id.* at 366.

There are four ways in which states can claim financial injuries when suing the federal government. For one, a state may claim a financial injury in a proprietary capacity, much as a private entity might. In addition, there are three different ways in which a state may claim a financial injury in its sovereign capacity. First, a state may claim that it lost revenue as a direct consequence of a wrongful action by the federal government. Second, a state may sue when the federal government takes an action that would increase the state's costs of providing governmental services. Third, and finally, a state may sue based upon an allegation of general harm to its economy.

1. Financial injuries to a state's proprietary interests

When a state suffers a financial injury in a proprietary capacity, it may point simply to the same Article III requirements that apply to private plaintiffs. A private party that suffers an economic harm has little trouble establishing an injury in fact under Article III. The recent Emoluments Clauses litigation and travel ban cases provide examples of states suing the federal government or federal officials based upon financial injuries to their proprietary interests.

a. The Emoluments Clauses litigation

Both private parties and states have brought suit against President Trump under the Foreign<sup>62</sup> and Domestic<sup>63</sup> Emoluments Clauses, alleging that he has accepted prohibited emoluments in violation of both Clauses. While the private litigants have been denied standing, Maryland and the District of Columbia have succeeded in establishing standing and surviving a motion to dismiss on the merits.<sup>64</sup> Private entities have Article III standing to sue for

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62. U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”).

63. *Id.* art. II, § 1, cl. 7 (“The President shall, at stated Times, receive for his Services, a Compensation, . . . and he shall not receive . . . any other Emolument from the United States, or any of them.”).

64. *Compare* Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 179, 188-89 (S.D.N.Y. 2017) (concluding that the private plaintiffs lacked standing to sue under the Emoluments Clauses), *argued*, No. 18-474 (2d Cir. Oct. 30, 2018), *with* District of Columbia v. Trump, 315 F. Supp. 3d 875, 878 (D. Md. 2018) (concluding that Maryland and the District of Columbia had stated claims under the Emoluments Clauses), *argued*, No. 18-2488 (4th Cir. Mar. 19, 2019), *and* District of Columbia v. Trump, 291 F. Supp. 3d 725, 748, 752-53 (D. Md. 2018) (concluding that both Maryland and the District of Columbia had standing to raise claims under the Emoluments Clauses), *argued*, No. 18-2488 (4th Cir. Mar. 19, 2019). The District of Columbia, of course, is not a state, but the district court treated it as such in the standing analysis, *footnote continued on next page*



competitive harm arising from actions of the federal government.<sup>65</sup> Maryland and the District of Columbia invoked this well-settled rule as one basis for their standing to sue the President. The State and the District alleged that they have ownership stakes in properties that compete with President Trump's properties.<sup>66</sup> They claimed that the President's acceptance of prohibited emoluments imposed a competitive harm on their businesses.<sup>67</sup> In establishing standing on this basis, the State and the District could point to cases in which a private competitor had standing based upon competitive harm.<sup>68</sup>

To deny Maryland and the District of Columbia competitor standing would be to treat them with special disfavor in the standing analysis. If, as the State and the District allege, they have suffered competitive harm from the President's acceptance of unlawful emoluments, then no special solicitude would be necessary to conclude that they have Article III standing on the same terms as a private competitor would.<sup>69</sup>

b. The travel ban cases

Like private parties that have suffered financial injuries, a state may seek third-party standing to litigate based upon another's rights.

For example, in *Washington v. Trump*, the State of Washington and the State of Minnesota challenged President Trump's ban on travel from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—all majority-Muslim countries.<sup>70</sup> The Ninth Circuit held that the States had Article III standing to sue the Administration to redress the injury to their public universities arising from the travel ban.<sup>71</sup> Because of the ban, nationals of the seven affected countries could not travel to the United States to teach, research, or study at the States'

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except to the extent that the District premised standing upon a "sovereign interest."  
*See District of Columbia*, 291 F. Supp. 3d at 735 n.6, 738 n.10.

65. *See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152, 158 (1970).

66. *See District of Columbia*, 291 F. Supp. 3d at 742-43.

67. *See id.* at 743.

68. *See id.* at 743-44.

69. *See id.* at 745 (concluding that Maryland and the District of Columbia had suffered competitive harm, and thus had standing, "based on fairly straightforward economic logic").

70. *See* 847 F.3d 1151, 1156-57 (9th Cir. 2017) (per curiam); *see also* Exec. Order No. 13,769, 3 C.F.R. 272 (2017), *reprinted as amended in* 8 U.S.C. § 1182 app. at 187 (2017), *revoked by* Exec. Order No. 13,780, 3 C.F.R. 301 (2017), *reprinted in* 8 U.S.C. § 1182 app. at 187; Anthony S. Winer, *Action and Reaction: The Trump Executive Orders and Their Reception by the Federal Courts*, 44 MITCHELL HAMLINE L. REV. 907, 911 (2018) (noting that the seven countries covered by the first travel ban order have Muslim majorities).

71. *See Washington*, 847 F.3d at 1159-60 (per curiam).

public universities.<sup>72</sup> As a result, the States suffered financial injuries to their “proprietary interests as operators of their public universities.”<sup>73</sup> Though the States raised other interests, including their quasi-sovereign interest in protecting their residents, the Ninth Circuit held that their proprietary interests sufficed for standing.<sup>74</sup> In allowing the States third-party standing to assert the rights of their students and scholars, the court pointed to the same third-party standing rules that apply to proprietors of private schools.<sup>75</sup>

Similarly, in *Hawaii v. Trump*, the State of Hawai‘i challenged President Trump’s second ban on travel from several Muslim-majority countries.<sup>76</sup> Hawai‘i first argued that it had standing based on its proprietary interest in its public universities,<sup>77</sup> the same type of interest that sufficed for standing in *Washington v. Trump*. The Ninth Circuit held that Hawai‘i had standing on that basis.<sup>78</sup> The court also considered the State’s “alternative” argument that it had standing based on its “sovereign interests in carrying out its refugee policies,” and held that that interest served as an independent basis for standing.<sup>79</sup>

In both travel ban cases, the courts correctly distinguished financial harms to the States’ proprietary interests from the States’ sovereign interests. Much like the operators of a private university, the States had standing because of the travel bans’ financial impacts on their public universities. Special solicitude was not required to find standing on this basis.

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72. *Id.* at 1161.

73. *See id.* at 1160-61, 1161 n.5; *see also id.* at 1159 (noting that the public universities are “branches of the States under state law”).

74. *See id.* at 1161 n.5.

75. *See id.* at 1160 (collecting cases in which “schools have been permitted to assert the rights of their students”).

76. *See* 859 F.3d 741, 757-60 (9th Cir.) (per curiam), *vacated as moot per curiam*, 138 S. Ct. 377 (2017); *see also* Exec. Order No. 13,780, 3 C.F.R. 301 (2017), *reprinted in* 8 U.S.C. § 1182 app. at 187 (2017).

77. *See Hawaii*, 859 F.3d at 763-64 (per curiam).

78. *Id.* at 765.

79. *See id.* The Supreme Court ultimately rejected a challenge to the Trump Administration’s third travel ban, which applied to six majority-Muslim countries as well as to North Korea and Venezuela, holding that this iteration of the ban likely did not violate the Establishment Clause. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2403-06, 2423 (2018); *see also* Proclamation No. 9645, 3 C.F.R. 135 (2017), *reprinted in* 8 U.S.C. § 1182 app. at 180.

2. Financial injuries to a state's sovereign interests

Not every injury to a state, however, mirrors an injury to a private entity's rights. States may also suffer financial injuries in their sovereign capacities. Such injuries may arise in any one of three ways.

a. Lost revenue for regulatory programs and government services

For one, a state may sue to redress a financial injury arising from lost revenue. Perhaps the state has lost a source of tax revenue. Or perhaps it has lost federal grant money. A private government contractor may, of course, also sue to redress a financial injury arising from a denial of federal grant money. But a state that seeks to redress a financial injury arising from lost revenue may be distinct from a private contractor in a crucial respect: The loss of revenue may directly implicate the state's uniquely public capacities to make and enforce law and to provide government services.

San Francisco and Santa Clara County's suit challenging the Trump Administration's sanctuary city policy is one example.<sup>80</sup> Under this policy, the Administration has threatened to withdraw federal funding from states and cities that have adopted sanctuary policies designed to disentangle state and local law enforcement from the enforcement of federal immigration law.<sup>81</sup> For example, the Administration threatened to deny funding under the Byrne Justice Assistance Grant (Byrne JAG), a federal program that provides law enforcement funding to state and local governments.<sup>82</sup> Because Byrne JAG funds are for law enforcement purposes, a state or local government that loses these funds would be harmed in its unique capacity as a government.

To deny standing where a state alleges this type of financial injury to its sovereign interests might be to treat it with special disfavor in the standing analysis. In holding that San Francisco and Santa Clara County had sufficiently alleged standing to sue by pointing to the threat of withdrawal of federal funds, the Ninth Circuit in *San Francisco v. Trump* relied upon the standing law that applies to private parties, making no mention of special solicitude for states.<sup>83</sup> If the threat of withdrawal of federal funding from a private plaintiff suffices as an Article III injury, then perhaps it should suffice for a state as well.

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80. See *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1231-33 (9th Cir. 2018); see also Exec. Order No. 13,768, 3 C.F.R. 268 (2017), reprinted in 8 U.S.C. § 1103 app. at 71. I participated as an amicus in support of the local governments in this litigation.

81. See Exec. Order No. 13,768, § 9(a), 82 Fed. Reg. at 8801.

82. See *City & County of San Francisco*, 897 F.3d at 1237-38; see also Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 590-94 (2017) (describing the Byrne JAG program).

83. See *City & County of San Francisco*, 897 F.3d at 1235-36.

b. Increase in the costs of providing government services

When a state sues to redress financial injuries it suffers in its sovereign capacity, such as an increase in the costs of providing government services, it may claim special solicitude in the standing analysis. For example, in *Texas v. United States*, Texas and twenty-five other states sued to enjoin implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.<sup>84</sup> DAPA directed the Department of Homeland Security to defer immigration enforcement for undocumented parents of American citizens and lawful permanent residents.<sup>85</sup> Among other things, DAPA-eligible individuals would be entitled to state driver's licenses under Texas law.<sup>86</sup> Issuing a driver's license to DAPA beneficiaries would have cost Texas at least \$130.89 per person, or tens of millions of dollars in total for the approximately 500,000 beneficiaries then residing in the state.<sup>87</sup> Based upon this "major effect" on the state fisc, the Fifth Circuit held that Texas had Article III standing to sue.<sup>88</sup>

Under this "driver's-license rationale," Texas's costs of issuing driver's licenses was an injury traceable to DAPA, which the court could redress through judicial relief—or so the Fifth Circuit held.<sup>89</sup> Texas suffered this financial injury in its capacity as a sovereign regulating driving and providing government services. The court might have held simply that this quantifiable financial injury to Texas sufficed for standing under the same Article III rules that apply to private parties.<sup>90</sup> The court did not, however, treat Texas simply like a private litigant. Citing the "direct, substantial pressure directed" at Texas to alter its driver's license regime in light of its financial injuries, the court also afforded "special solicitude" to the State.<sup>91</sup> As a sovereign, Texas had enacted a

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84. See 809 F.3d 134, 146-49 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

85. See *id.* at 147-48.

86. See *id.* at 149.

87. See *id.* at 155.

88. See *id.* at 152-53, 162.

89. See *id.* at 150-51.

90. Ernest Young argued as much in a scholarly amicus brief to the Fifth Circuit. See Brief of Professor Ernest A. Young as Amicus Curiae in Support of Appellees at 6-9, 15, *Texas*, 809 F.3d 134 (No. 15-40238), 2015 WL 2337568 (arguing that the States' "basic standing theory is straightforward" and "can be upheld under principles applicable to private actors").

91. See *Texas*, 809 F.3d at 153-55 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.10 (2015)). Because the "causal link" between Texas's proprietary injury and DAPA was "even closer" than the link between Massachusetts's loss of coastline and the EPA's inaction in *Massachusetts v. EPA*, the Fifth Circuit held that the State had demonstrated a sufficient financial injury caused by federal agency action. See *id.* at 159-60 ("Texas is entitled to the same 'special solicitude' as was

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law that entitled noncitizens who were lawfully present in the United States to obtain driver's licenses at a subsidized rate.<sup>92</sup> The federal government argued that Texas's injury was self-inflicted and therefore did not suffice for Article III standing.<sup>93</sup> The Fifth Circuit rejected that argument, invoking Texas's sovereign interest in enacting and enforcing its own laws.<sup>94</sup> In this sense, Texas's financial injury did not mirror one which a private party might suffer, and thus may have warranted special solicitude in the Article III standing analysis.

In a nutshell, the Article III objection to Texas's standing was that such standing has no logical stopping point and would involve the federal courts in too many political battles. Federal policies will often affect a state's costs of providing government services. And to the extent recognizing standing based upon this type of financial injury throws open the courthouse doors, it may embroil federal courts in a steady stream of pitched political battles between state attorneys general and the federal political branches.

c. General harm to a state's economy

Finally, a state may argue that it has Article III standing to sue because the federal government's action has generally harmed its economy. General harm to a state's economy might indirectly lead to a loss of revenue or an increase in the costs of government services. In addition, harm to a state's economy affects the state's residents, and a state might claim standing to sue the federal government to redress this harm to the general public.

In a recent suit, for example, California alleged that the Trump Administration's proposed construction of a border wall would impose several financial harms on the State.<sup>95</sup> These included not only increased costs related to the preservation of sensitive wetlands along the border, but also financial injuries to the State's economy.<sup>96</sup> Construction of the border wall would, the State alleged, "have a 'chilling effect' on California tourism from Mexico," which it claimed was a "lead economic driver' of the State."<sup>97</sup>

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Massachusetts, and the causal link is even closer here."); *see also* *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *supra* notes 40-46 and accompanying text.

92. *See Texas*, 809 F.3d at 153 & n.35, 155.

93. *See id.* at 157.

94. *See id.* at 156-57.

95. *See* Complaint in No. 17cv1911-GPC(WVG) ¶¶ 89-92, *In re* Border Infrastructure Envtl. Litig., 284 F. Supp. 3d 1092 (S.D. Cal. 2018) (Nos. 17cv1215-GPC(WVG), 17cv1873-GPC(WVG) & 17cv1911-GPC(WVG)), 2017 WL 4216386.

96. *See id.*

97. *Id.* ¶ 92; *see also id.* (alleging that tourism from Mexico would drop by 7% in 2017 due to construction of the wall). In concluding that California had standing to sue, the district court noted that the State alleged "injury to its real property that it owns and manages  
*footnote continued on next page*

Such injuries may be judicially cognizable, but the law is unsettled. In *Pennsylvania v. West Virginia*, the Supreme Court held that it had jurisdiction to hear two States' complaint that a third State's laws had injured them not only as consumers, but also as "representative[s] of the consuming public."<sup>98</sup> More recently, however, the Ninth Circuit dismissed litigation based upon a State's allegation of general harm to a segment of its economy, specifically, egg farming.<sup>99</sup> It is thus an open question whether a state has standing when it alleges a general harm to its economy. One thing is clear, however: The generalized grievance bar would deny standing to a private plaintiff who points only to a general harm to a state's economy.<sup>100</sup> Therefore, to claim standing to sue for a general injury to its economy, a state would need to show it is entitled to special solicitude.

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These examples of state litigation against the federal government share significant features. They involve controversial disputes about whether the executive branch has complied with federal law. In each case, the state has premised standing in whole or in part on financial injuries. And in several of these cases, the state requested nationwide preliminary relief.<sup>101</sup>

The new public standing requires us to rethink the terms of the debate about state standing to sue the federal government. On the one hand, financial injuries suffice for Article III standing. On the other hand, as the comparison of the travel ban cases with the DAPA litigation underscores, not all financial injuries to states are alike.

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adjacent to the border wall projects" and concluded that the State had "a procedural right and quasi-sovereign right in the environmental protections afforded by" federal environmental and administrative law. *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d at 1109-10. The Supreme Court denied the unusual petition for a writ of certiorari to the district court (which raised issues other than standing), see *Animal Legal Def. Fund v. Dep't of Homeland Sec.*, 139 S. Ct. 594 (2018) (mem.); *Petition for a Writ of Certiorari, Animal Legal Def. Fund*, 139 S. Ct. 594 (No. 18-247), 2018 WL 4105818, and the Ninth Circuit later affirmed the district court's decision, see *Ctr. for Biological Diversity v. U.S. Dep't of Homeland Sec. (In re Border Infrastructure Envtl. Litig.)*, 915 F.3d 1213 (9th Cir. 2019).

98. See 262 U.S. 553, 581-85, 591-92, *aff'd on reh'g*, 263 U.S. 350 (1923).

99. See *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 652 (9th Cir. 2017); see also *Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 670, 679-80 (D.C. Cir. 1976) (concluding, in a suit against a federal agency, that the State lacked standing to vindicate an injury to "its economy as a whole").

100. *Cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575-76 (1992) (explaining that an individual does not generally have standing merely to vindicate an interest that the individual shares with the general public).

101. See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017) (per curiam); *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

## II. The Story of the New Public Standing

Whether special disfavor or special solicitude is warranted when states sue the federal government based upon any of these four different types of financial injuries is a difficult normative question. To ground this Article's normative analysis, this Part describes ideological, institutional, and political factors that bear upon the new public standing's doctrinal development. Together, Parts II and III present this Article's descriptive and positive claims concerning the new public standing as necessary considerations in the doctrinal and normative prescriptions of Parts IV and V.

Methodologically, this Article aims to offer what Richard Fallon has called a "doctrinal Realist" account of the new public standing.<sup>102</sup> Such an account seeks to "pars[e] . . . opinions to identify their operative facts against background patterns that could also facilitate predictions of results in future cases" and is "often open to the insights of social science" when it develops "prescriptions for how judges should decide cases."<sup>103</sup> It assumes not only that judicial ideology and political contexts matter, but also that judicial decisionmaking is a unique form of political reasoning in which doctrinal argument and normative critique play important roles.<sup>104</sup> By taking into account the socio-legal factors that have contributed to the new public standing, this Article "aspires to promote realistic doctrinal reform, tailored in recognition" of the complex political dynamics of standing doctrine.<sup>105</sup>

The typical story of the political dynamics of standing emphasizes conflict between progressive litigants and conservative judges. Beginning in the 1970s, the Supreme Court tightened the injury-in-fact requirement in ways that limited the standing of progressive organizations and civil rights plaintiffs.<sup>106</sup> This restrictive standing doctrine was consistent with a general theme of "hostility to litigation" in the jurisprudence of an increasingly conservative Court.<sup>107</sup>

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102. See Richard H. Fallon, Jr., Essay, *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 107 (2014).

103. *Id.* at 106.

104. See Fallon, *supra* note 23, at 1115 ("Doctrinal Realist theorizing of this kind can frequently involve law professors in seeking to improve existing law, albeit typically incrementally, by depicting the patterns of cases that they have identified as already reflecting attractive values that judges should strive to realize more fully in the future.").

105. See *id.* at 1063.

106. See Elliott, *supra* note 28, at 559-62; Magill, *supra* note 3, at 1160-63.

107. See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006). See generally ERWIN CHEMERINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (2017) (arguing that over the past several decades, the

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This story does not, however, explain the new public standing. There are socio-legal factors that distinguish the new public standing from private standing for the public, including legal mobilization, federalism and federal executive power, and intellectual and ideological trends within the federal judiciary. This Part describes each of these factors as it tells the story of the new public standing.

The basic story is this: The new public standing is an important vehicle not only for progressive legal mobilization, but also for conservative legal mobilization—a vehicle that allows state executive officials of any ideology to bring partisan battles over the national public interest before the federal courts. This vehicle for public interest litigation has emerged from the rise of conservative legal mobilization since the 1970s; the deepening partisan divide in the United States and the emergence of state attorneys general as policymakers since the 1990s; and the lower federal courts’ increasing comfort with the use of nationwide injunctions to enforce their declarations of federal law. As a result, the story of the new public standing is much more complicated than a simple conflict between progressive litigants and conservative judges.<sup>108</sup>

#### A. The Changing Nature of Legal Mobilization

Stories of legal change through the courts usually focus on elections and judicial appointments.<sup>109</sup> But legal change depends on more than judges. The Article III case or controversy requirement means that federal courts cannot simply declare the law on their own motion. Instead, they need cases to be framed and brought before them. Thus, legal change—particularly constitutional change—“requires a cooperative ‘support structure,’” spanning interest

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Supreme Court has restricted access to federal courts in ways that reveal hostility to the underlying rights claimed).

108. The political valence of standing doctrine, in other words, can shift over time. According to Daniel Ho and Erica Ross, while standing decisions by the Court during the 1920s displayed no “systematic” political disagreements, questions of standing had become politically controversial by the 1930s and 1940s, “with progressive Justices disproportionately denying (and conservatives granting) standing,” particularly “in cases involving New Deal legislation and administrative agencies.” Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 595-96 (2010). Standing doctrine’s political valence had shifted again by 1950, at which point “liberals were uniformly more likely to favor—and conservatives more likely to deny—standing.” *Id.* at 596. The story of the new public standing underscores the potential for standing doctrine to have a complex and shifting relationship with politics.

109. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 490 (2006) (“When Presidents are able to appoint enough . . . judges and Justices, constitutional doctrines start to change.”).



groups, social movements, litigants, law firms and other legal organizations, and thought leaders.<sup>110</sup> Legal mobilization, in short, is crucial to legal change.

As a historical matter, the typical story of standing doctrine begins, federal courts adjudicated private rights regularly but public rights rarely until the 1940s or so.<sup>111</sup> For several decades thereafter, spurred on by the Supreme Court's new standing jurisprudence, private litigants increasingly brought actions based on public rights, and the federal courts started to reach the merits.<sup>112</sup> Legal mobilization on the left helped power the expansion of citizen and taxpayer standing in the 1960s and 1970s.<sup>113</sup> To put it simply, private standing for the public during that period meant progressive impact litigation. By that time, there was a thriving "liberal legal network" within the legal profession and interest groups focused on progressive impact litigation, such as the ACLU, the NAACP Legal Defense and Educational Fund, the National Resources Defense Council, and Ralph Nader's famous "Raiders."<sup>114</sup> But for reasons of principle and politics, the Supreme Court reversed course in the 1970s by tightening standing rules, particularly the injury-in-fact requirement.<sup>115</sup>

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110. See Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516, 518-20 (2011) (reviewing ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); and STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008)) (quoting CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 44 (1998)).
111. See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447, 483-84 (1923) ("It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law." (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 75 (1831) (Thompson, J., dissenting))).
112. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 85-88 (1968); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940); see also Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 839 (1969); Jaffe, *supra* note 1, at 1035-37.
113. See Magill, *supra* note 3, at 1183-85 (describing the "'public interest' era," in which "social and political movements organized around various quality of life issues" and brought progressive challenges to governmental action in court (capitalization altered)).
114. See TELES, *supra* note 110, at 22-23; Magill, *supra* note 3, at 1192-94.
115. See, e.g., F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 289-90 (2008) ("[D]uring the last twenty-five years, the Court has again restricted standing. . . . [T]he Court [has] revert[ed] to what is essentially a private rights model for standing . . ."); Magill, *supra* note 3, at 1159-82 (describing the "death of standing for the public in the Supreme Court" beginning in the 1970s (capitalization altered)); *The Supreme Court, 1999 Term—Leading Cases: Standing*, 114 HARV. L. REV. 329, 336 (2000) ("Much of the Supreme Court's standing jurisprudence in the past two decades reflects the view that Article III limits the federal courts to a private law litigation model.").

At the same time the Court was cutting back on private standing in response to progressive litigation, legal conservatives began the work of building their own networks to foster legal change.<sup>116</sup> By the 1980s, the fruits of this work had begun to ripen in the legal academy. In 1982, Steven Calabresi, Lee Liberman Otis, and David McIntosh established the Federalist Society,<sup>117</sup> which has become a thought leader and a vital node in conservative legal networks. The 1980s also saw the Reagan Revolution, and conservative movement leaders began “forging alliances” across government, the legal profession, and law schools that would sustain concerted efforts to bring about legal change.<sup>118</sup>

As a result, unlike in the 1970s, there is now a flourishing conservative legal movement.<sup>119</sup> Many of the “second generation” conservative public interest firms, such as the Institute for Justice and the Center for Individual Rights, have thrived.<sup>120</sup> But in comparison with the panoply of progressive public interest firms, not to mention law school clinics that tend to pursue progressive public interest litigation, the institutional capacity of “conservative public interest law firms” remains “relatively thin.”<sup>121</sup> As a result, conservatives have looked beyond public interest firms to find vehicles for legal mobilization.<sup>122</sup>

Some of the institutional capacity for legal mobilization in high-profile public interest cases consists of members of a relatively small group of regular Supreme Court practitioners, many of whom are members of elite law firms with offices in Washington, D.C.<sup>123</sup> Legal mobilization through this elite bar

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116. See Hollis-Brusky, *supra* note 110, at 522.

117. *Id.*

118. See *id.* at 523-24.

119. See generally SOUTHWORTH, *supra* note 110 (presenting an in-depth portrait of lawyers who have represented various constituencies of the conservative legal movement); TELES, *supra* note 110 (chronicling the development of the modern conservative legal movement).

120. See TELES, *supra* note 110, at 249 (noting that the Institute for Justice and the Center for Individual Rights “have succeeded in reorienting conservative public interest law” despite “fac[ing] important limits on their effectiveness”); see also *id.* at 220-21 (describing the development of a “second generation” of conservative public interest firms, which adopted the strategy of looking to “courts to establish new or reinvigorate old rights”).

121. See Mark Tushnet, *What Consequences Do Ideas Have?*, 87 TEX. L. REV. 447, 455 (2008) (reviewing TELES, *supra* note 110).

122. See *id.* at 456 (“Put another way, conservative public interest law firms were indeed part of the ‘rise of the conservative legal movement,’ but the heights to which they rose were lower than conservative legal activists had hoped at the outset.”).

123. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1497-502 (2008) (describing the development of “a private Supreme Court bar capable of replicating the

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has risen in prominence over the past several decades in the service of both progressive and conservative causes.<sup>124</sup> Supreme Court specialists are active not only in bringing cases before the Court, but also in coordinating interest groups' efforts to mobilize in support of such litigation.<sup>125</sup> That is not to say, however, that members of the Supreme Court bar are straightforwardly driven by their own progressive or conservative ideologies. Interest groups on both the right and the left have turned to these Supreme Court practitioners, who tend to emphasize a "client-driven agenda" that reflects clients' concerns and ideological goals.<sup>126</sup> Businesses, for example, have won major victories for a conservative legal agenda by turning to the Supreme Court bar for representation.<sup>127</sup> At the same time, members of the elite Supreme Court bar have also supported progressive causes in Supreme Court litigation.<sup>128</sup>

Cause lawyering outside the state is now a familiar phenomenon, whether it involves public interest firms or private firms representing clients with ideological goals. Less familiar, though no less important, are "cause lawyers inside the state."<sup>129</sup> Conservative legal mobilization, like its progressive counterpart, now includes cause lawyers inside the state—a relatively recent phenomenon that has changed the political stakes of standing doctrine.<sup>130</sup>

These stakes are deeply intertwined with the political aspirations of state attorneys general. Consider, for example, California's recent attorneys general. Prior to joining the U.S. Senate, Kamala Harris was Attorney General of California. And the "bedrock" of her Senate campaign included her record in

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expertise of the [U.S.] Solicitor General's office," and noting the development of the offices of state solicitors general as well as law school clinics specializing in Supreme Court practice).

124. *See id.*

125. *See, e.g.,* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1904 (2016).

126. *See* Tushnet, *supra* note 121, at 456-57 ("The businesses are the bar's direct clients, and the lawyers are members of large law firms that make no pretense of having anything other than a client-driven agenda.").

127. *See, e.g., id.* at 457 (suggesting the possibility "that the elite Supreme Court bar has done more to place limits on the regulatory state" than have conservative public interest law firms).

128. *See* Larsen & Devins, *supra* note 125, at 1905, 1957-65 (offering examples of influential amicus briefs filed by members of the Supreme Court bar, including some supporting progressive causes, and "push[ing] back against" the claim that the Supreme Court bar's participation in amicus briefing serves only business interests).

129. *See generally* Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649 (2012).

130. *Cf. id.* at 653 (explaining that government lawyers play a significant role in social movements).

that office.<sup>131</sup> Xavier Becerra, her successor as Attorney General, has sued the federal government “dozens” of times in high-profile public interest cases, leveraging his office’s budget and his national exposure to bring public interest actions on behalf of the State.<sup>132</sup> As Becerra has put it, Governor Jerry Brown appointed him to the office in light of his experience as a former congressman because “[t]he governor knew that much of what would occupy the next attorney general’s time would be things coming from Washington.”<sup>133</sup>

Cause lawyers inside the state have also emerged as important participants in conservative legal mobilization against the federal government.<sup>134</sup> Consider, for example, the office of the Texas Attorney General. During the Obama Administration, then-Attorney General Greg Abbott (now Governor) sued the federal government more than thirty times.<sup>135</sup> As he explained his work, “I go into the office, I sue the federal government and I go home.”<sup>136</sup> Abbott’s work in Texas was not done alone; he “mobiliz[ed] a coalition of Republican attorneys general in other states to oppose the Obama administration.”<sup>137</sup> With an annual budget of \$600 million as of 2016,<sup>138</sup> the Texas Attorney General has the resources to be a major player in impact litigation. “We don’t just represent Texas,” one official explained, but “Red State America’ or ‘Tea Party America,’” too.<sup>139</sup>

The State of Texas has also been at the vanguard of a movement to create state solicitor general offices with public interest portfolios. In 2003, for example, then-Attorney General Abbott appointed Ted Cruz as Solicitor General, directing Cruz to take on a “leadership role in the United States [Supreme Court] in articulating a vision of strict construction.”<sup>140</sup> For an ambitious conservative attorney, working for the State of Texas can be a way

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131. Phil Willon, *8 Things to Know About Senate Candidate Kamala Harris’ Career Gold Stars and Demerits*, L.A. TIMES (July 6, 2016, 12:05 AM), <https://perma.cc/N37L-998E>.

132. See Mike McPhate, *California Today: Suing the Trump Administration, Again and Again and Again*, N.Y. TIMES (Sept. 22, 2017), <https://perma.cc/77RW-UGAF>.

133. Michelle Cottle, *Golden State Warrior*, ATLANTIC (May 2017), <https://perma.cc/EGU9-NZBX>.

134. These lawyers can help address the conservative legal movement’s “supply problem.” See TELES, *supra* note 110, at 253-54.

135. Jon Herskovitz, *As Obama Pushes Agenda, Texas Leads Legal Push-Back*, REUTERS (Jan. 21, 2016, 8:04 AM), <https://perma.cc/GJ8G-FU2Y>.

136. Jazmine Ulloa & Melanie Mason, *Texas Was Obama’s Chief Antagonist. In Trump’s America, California Is Eager for the Part*, L.A. TIMES (Nov. 17, 2016, 3:45 PM), <https://perma.cc/68GS-XLLY>.

137. *Id.*

138. Herskovitz, *supra* note 135.

139. *Id.*

140. Jeffrey Toobin, *The Absolutist*, NEW YORKER (June 23, 2014), <https://perma.cc/UV33-CE98> (quoting Greg Abbott, Attorney Gen., State of Tex.).

to litigate nationally important and controversial questions of public law, perhaps even an alternative means to becoming a member of the elite Supreme Court bar. Much the same story could be told about the California Attorney General's office and its suits against the Trump Administration. But to the extent that the institutional capacity of conservative public interest law firms remains "relatively thin,"<sup>141</sup> conservative legal mobilization inside the state may be a particularly important vehicle for conservative legal change. At the least, mobilization through state litigation has become an important vehicle for conservative cause lawyering.

In short, state attorneys general and solicitors general—both progressive and conservative—have emerged as significant participants in legal mobilization. Standing doctrine has long been responsive to the politics of legal mobilization. The changing nature of such mobilization, particularly on the conservative side, is thus a factor in the rise of the new public standing.

#### B. The Confluence of Partisan Federalism and Executive Power

The new public standing represents a new wave of cause lawyering, one in which state executives are in competition with the federal government over policymaking. Several features of our contemporary federalism help explain the emergence of this new form of public interest litigation.

As a result of fiscal federalism, states depend upon federal funding and may therefore point to the potential loss of revenue to establish standing to challenge federal law. Federal grants and conditional spending programs have bound states, cities, and the federal government together in a system of funding government services that creates "conflict and cooperation in raising revenue."<sup>142</sup> States' and cities' dependence on federal funding in cooperative federalism programs creates many opportunities for state standing to bring public interest lawsuits based upon financial injuries. While state and local dependence on federal grants is not a recent phenomenon, the confluence of fiscal federalism with partisan battles centered in the executive branch has contributed to the emergence of the new public standing.

Consider, for example, a case in which a state or city challenges a condition that the federal government has placed on federal funding, such as the ongoing lawsuits concerning President Trump's threat to cut off federal funding to sanctuary jurisdictions, discussed in Part I above.<sup>143</sup> In *County of Santa Clara v. Trump*, local governments sought a preliminary injunction against President

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141. See Tushnet, *supra* note 121, at 455.

142. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2593-603 (2005) (capitalization altered).

143. See *supra* Part I.B.2.a.

Trump's executive order on so-called sanctuary jurisdictions.<sup>144</sup> The order, which reflected President Trump's campaign promise to deport millions of undocumented immigrants,<sup>145</sup> directed federal agencies to "[e]nsure" that sanctuary jurisdictions would not "receive Federal funds, except as mandated by law."<sup>146</sup> Santa Clara County, the lead plaintiff, had been receiving approximately 35% of its total annual revenue from federal funding.<sup>147</sup> The district court held that the local government plaintiffs had suffered an injury in fact due to the Administration's threat to cut off federal funding.<sup>148</sup> This injury consisted of budget uncertainty and the anticipated loss of millions of dollars.<sup>149</sup> The district court concluded that the local governments' various constitutional challenges were likely to succeed, and therefore granted a nationwide preliminary injunction to protect them from the Administration's attempt "to coerce them into changing their [law enforcement] policies in violation of the Tenth Amendment."<sup>150</sup>

California Attorney General Xavier Becerra has brought a similar suit on behalf of the State, which also stands to lose federal funding under the Administration's policy against sanctuary jurisdictions.<sup>151</sup> This suit also relies upon the financial threat to the State's fisc for standing purposes.<sup>152</sup> In short, state attorneys general (and their local counterparts) not only have firm doctrinal footing but also powerful incentives to bring public law actions based upon financial interests.

Our contemporary federalism has altered the state attorney general's role. In almost all states, the attorney general is an elected official with a partisan constituency.<sup>153</sup> Focusing on national public interest litigation was not

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144. See 250 F. Supp. 3d 497, 507 (N.D. Cal. 2017), *appeal dismissed as moot mem.*, Nos. 17-16886 & 17-16887, 2018 WL 1401847 (9th Cir. Jan. 4, 2018).

145. See, e.g., Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 783 (2017).

146. See Exec. Order No. 13,768, § 2(c), 3 C.F.R. 268, 268-69 (2017), *reprinted in* 8 U.S.C. § 1103 app. at 71, 71 (2017).

147. See *County of Santa Clara*, 250 F. Supp. 3d at 507, 512.

148. See *id.* at 526-29.

149. See *id.* at 528-29 ("[T]he Counties have demonstrated that the Order threatens to withhold federal grant money and that the threat of the Order is presently causing the Counties injury in the form of significant budget uncertainty.").

150. See *id.* at 536-39.

151. See *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1019 (N.D. Cal. 2018); see also *id.* at 1029, 1036-37 (concluding that the State's financial injuries sufficed for Article III standing but declining to issue a preliminary injunction).

152. See *id.* at 1026-29.

153. See, e.g., Margaret H. Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743, 1753-55 (2017).

traditionally part of the state attorney general's portfolio.<sup>154</sup> In the last several decades, however, state attorneys general have begun to look to litigation against private corporations as a policymaking tool.<sup>155</sup> In particular, tobacco litigation in the 1990s taught attorneys general the value of interstate cooperation in litigation.<sup>156</sup>

Shortly thereafter, the Republican Attorneys General Association and its Democratic counterpart emerged as important policymaking organizations and as vehicles for coordinating partisan opposition to federal policies.<sup>157</sup> Nonpartisan organizations, such as the National Association of Attorneys General, have seen their influence wane with the rise of these partisan associations, which have become the sites of intense lobbying for influence.<sup>158</sup> On some issues, bipartisan cooperation remains the norm.<sup>159</sup> But on others, partisan “[p]olarization runs deep.”<sup>160</sup>

The rising influence of partisan attorney general associations is an example of what Jessica Bulman-Pozen has called “partisan federalism.”<sup>161</sup> State government has emerged as an institution through which partisans who are out of federal power in Washington can challenge the partisans who wield that power. More specifically, federalism “channel[s] partisan conflict” through

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154. See Dru Stevenson, *Special Solicitudude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 39 (2007) (“In recent decades, the role of the [attorney general] has evolved from Counsel for the Executive Branch into the People’s Lawyer, and today it is much more so.”).

155. See, e.g., Paul Nolette, *Law Enforcement as Legal Mobilization: Reforming the Pharmaceutical Industry Through Government Litigation*, 40 LAW & SOC. INQUIRY 123, 125-26 (2015). See generally Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525 (1994).

156. See generally Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 LAW & POL’Y 429 (2003) (chronicling state litigation against tobacco companies and explaining how such litigation encouraged state attorneys general to coordinate on national public interest litigation).

157. See, e.g., David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 808 n.223 (2017); Eric Lipton, *Energy Firms in Secretive Alliance with Attorneys General*, N.Y. TIMES (Dec. 6, 2014), <https://perma.cc/27PG-BZ98>.

158. See Walter Olson, *Partisan Prosecutions: How State Attorneys General Dove into Politics*, N.Y. POST (Mar. 30, 2017, 7:27 PM), <https://perma.cc/2TH3-KR7G>.

159. See, e.g., Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1254 (2015) (analyzing state amicus filings in U.S. Supreme Court cases from the 1979 to 2013 Terms and concluding that some cases “draw a bipartisan mix” of attorneys general).

160. See Schleicher, *supra* note 157, at 808 n.223; see also Lemos & Quinn, *supra* note 159, at 1255 & fig.8 (charting polarization in state amicus filings in Supreme Court cases, including those involving criminal procedure, federalism, and privacy).

161. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014).

state executives,<sup>162</sup> who compete (or cooperate) with federal executive officials in a process some scholars have called “executive federalism.”<sup>163</sup> As Bulman-Pozen has described, within this system of partisan federalism, state officials do not act solely based upon state or local interests.<sup>164</sup> Rather, their policy positions (and political ambitions) reflect national politics, refracted through the lens of partisan competition.<sup>165</sup>

Federal and state executive officials have come to play central roles within partisan federalism. In the modern era, Congress has delegated broad policymaking authority to the executive branch, including in areas where Congress has also provided for state implementation of federal policy.<sup>166</sup> And as Congress has become increasingly gridlocked by partisan strife, state and federal executive officials have become prime movers of partisan competition within the federal system.<sup>167</sup>

Against this backdrop, the new public standing is less a threat to government power than a way for state officials to shape national lawmaking even when their party is out of power in Washington. It is a doctrine for an era of hyperpartisanship and executive federalism, one in which executive officials representing polarized constituencies battle over public law.<sup>168</sup>

### C. Ideological and Intellectual Shifts Within the Article III Judiciary

The new public standing is also a consequence of a federal judiciary committed to a law declaration model. By the early 1970s, if not sooner, the ideology of the federal courts had shifted in the direction of this model, one in which courts strike down statutes based upon judicial declarations of what the

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162. *See id.* at 1081 (“[States] check the federal government by channeling partisan conflict through federalism’s institutional framework.”).

163. For discussions of executive federalism, see, for example, Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); and Michael S. Greve, *Federalism in a Polarized Age*, in PARCHMENT BARRIERS: POLITICAL POLARIZATION AND THE LIMITS OF CONSTITUTIONAL ORDER 119 (Zachary Courser et al. eds., 2018).

164. *See* Bulman-Pozen, *supra* note 161, at 1092.

165. *See id.*

166. *See* Bulman-Pozen, *supra* note 163, at 969 (“There are federal laws on the books in nearly all important domestic policy areas, and many of these laws provide for state implementation.”).

167. *See id.* at 954 (arguing that because “partisan polarization impedes new legislation,” executive action has become “critical” in “shap[ing] both national policy and our federalism”); Greve, *supra* note 163, at 125.

168. On the emergence of hyperpolarized political parties and the depth of partisanship more generally, see Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011); and Cass R. Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1.



law is.<sup>169</sup> In abandoning the traditional “legal right” test in favor of a malleable injury-in-fact requirement,<sup>170</sup> the Court gave itself and lower federal courts flexibility in deciding whether a particular plaintiff is a proper party to invoke the judicial power to declare the law.<sup>171</sup>

The law declaration model of the federal courts is also consistent with the rise of the nationwide injunction. Under the law declaration model, a court that strikes down a statute or an agency action has a logical reason to give its declaration nationwide effect,<sup>172</sup> as lower courts have done in cases premised upon the new public standing.<sup>173</sup> Put simply, why should a statute that has been “struck down” by a federal court have legal effect anywhere in the nation?

Consider the recent example of *Nevada v. United States Department of Labor*.<sup>174</sup> This case involved the Department of Labor’s rule on overtime pay,<sup>175</sup> which commentators have described as “one of the Obama administration’s labor policy cornerstones.”<sup>176</sup> Promulgated under the Fair Labor Standards Act (FLSA), the rule required employers to pay overtime for employees making less than about \$48,000 a year who performed more than forty hours of work in a week.<sup>177</sup> This requirement applied both to private employers and to states.<sup>178</sup>

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169. See, e.g., Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973) (offering a foundational account of the law declaration model and tracing its foundations all the way back to *Marbury v. Madison*); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

170. See Lee & Ellis, *supra* note 22, at 176 (“The most important thing to understand about injury-in-fact is in the ‘in-fact’ part. For years, the Court based a plaintiff’s standing to challenge federal agency action on something called the legal right test: Did the defendant violate a vested legal right held by the plaintiff?”).

171. Cf. Monaghan, *supra* note 26, at 679-83 (discussing how the Supreme Court has controlled its agenda by applying doctrines like standing and mootness). See generally Magill, *supra* note 3, at 1136-82 (discussing the traditional legal right (or “legal wrong”) test and the emergence of the injury-in-fact requirement).

172. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 449-52 (2017). See generally *id.* at 437-65 (tracing the emergence of the nationwide injunction).

173. See, e.g., *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016).

174. 218 F. Supp. 3d 520 (E.D. Tex. 2016).

175. See *id.* at 524-25.

176. See Amy Held, *Labor Department Rethinking Obama-Era Overtime Pay Rule*, NPR: TWO-WAY (June 27, 2017, 7:11 PM ET), <https://perma.cc/Q3UY-FKUQ>.

177. See *Nevada*, 218 F. Supp. 3d at 524-25; see also Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2017)); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016) (codified as amended in scattered sections of 29 C.F.R. pt. 541).

178. See *Nevada*, 218 F. Supp. 3d at 525 (explaining that both states and business organizations sued to challenge the rule’s application).

Twenty-one States sued the federal government about two months before the rule's effective date, asking the district court to enjoin it.<sup>179</sup> Shortly thereafter, private businesses similarly requested preliminary relief.<sup>180</sup> The district court consolidated the cases and granted the States' motion.<sup>181</sup> The court had little difficulty finding that the State plaintiffs had standing, reasoning that they "face[d] imminent monetary loss that is traceable" to the overtime rule.<sup>182</sup>

This example of the new public standing may seem uncontroversial, but it underscores the potential scope of state standing when combined with courts' willingness to grant preliminary nationwide relief on the merits. In *Nevada v. United States Department of Labor*, the States pressed a Tenth Amendment challenge to the application of the FLSA to them as employers<sup>183</sup>—the sort of federalism challenge that private employers may have lacked standing to bring.<sup>184</sup> The district court thought the States' challenge on these grounds might have merit, but concluded that it was "constrained to follow" contrary Supreme Court precedent "absent an express statement from the Supreme Court overruling it."<sup>185</sup> Though the States' direct Tenth Amendment challenge failed, their administrative law arguments fared better, as the court concluded the overtime rule was "unlawful."<sup>186</sup> In balancing the interests at the remedial stage, the district court gave weight to the States' Tenth Amendment interests in preserving "governmental functions" and preliminarily enjoined the rule<sup>187</sup>—

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179. *See id.* at 524-25.

180. *See id.* at 525.

181. *See id.* at 525, 534.

182. *Id.* at 526. Indeed, the government did not even contest standing. *Id.*

183. *See id.* at 527.

184. In *Bond v. United States*, the Supreme Court held that a criminal defendant has standing to raise a federalism-based challenge to the law under which she is prosecuted. *See* 564 U.S. 211, 214, 225-26 (2011). But this holding may reflect nothing more than the valid rule requirement, which says that the government may not prosecute someone for violating an invalid law. *See id.* at 226 (Ginsburg, J., concurring). On that reading, *Bond* does not stand for the proposition that private parties generally have standing to raise Tenth Amendment challenges regardless of whether the government has brought an enforcement action against them. *Cf.* *Nance v. EPA*, 645 F.2d 701, 716 (9th Cir. 1981) (noting that the private litigants' standing to raise a Tenth Amendment claim "may be seriously questioned," but declining to decide the issue); *Huq*, *supra* note 51, at 1440 (arguing that there should not be private standing to litigate Tenth Amendment claims unless "litigants assert a due process-like interest isomorphic with Article III").

185. *See Nevada*, 218 F. Supp. 3d at 534.

186. *See id.* at 530-31.

187. *See id.* at 533.

with nationwide effect.<sup>188</sup> All fifty states would suffer proprietary injuries from the rule, the court explained, and, therefore, “the scope of the alleged irreparable injury extends nationwide.”<sup>189</sup>

Whatever its internal logic, the rise of the nationwide injunction<sup>190</sup> creates challenges for the Supreme Court’s supervision of the lawmaking agenda within the federal courts. The same ideological forces that support the logic of the nationwide injunction also support the Court’s “drive” to control the agenda of law declaration within the Article III courts.<sup>191</sup> Federal district courts that issue nationwide injunctions arguably arrogate control of this agenda from the Supreme Court.

The rise of the nationwide injunction is an important component of the story of the new public standing. The new public standing empowers two types of “local” actors to act as national lawmakers: state attorneys general and federal district court judges. In so doing, it channels legal mobilization toward intergovernmental litigation, and raises concerns about the politicization of the judiciary and the corrosive effects of partisan federalism. These concerns might be addressed by creating new constitutional limits on state standing.

### III. The Prospects of the New Public Standing

Perhaps the most pointed Article III objection—that the new public standing disrupts the Court’s control over the lawmaking agenda of the federal courts—is a reason the Court might constitutionalize new limits on the new public standing.<sup>192</sup> But as a positive matter, there is no reason to assume that the Roberts Court will view the new public standing with special disfavor.

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188. *Id.* at 534.

189. *Id.*

190. See Bray, *supra* note 172, at 437-45 (explaining that when federal courts first began to issue nationwide injunctions during the 1960s, such injunctions “were not immediately widespread”).

191. See Monaghan, *supra* note 26, at 669 (explaining that “[c]urrent doctrinal developments reflect a powerful drive” toward hierarchical supervision and agenda control by the Supreme Court); cf. Stearns, *supra* note 26, at 1318 (“[S]tanding substantially reduces . . . the ability of litigants to manipulate the substantive evolution of legal doctrine by controlling the order, or ‘path,’ of case decisions.”).

192. Cf. Stearns, *supra* note 26, at 1350-53 (arguing that standing doctrine is a tool of agenda control and a mechanism for limiting ideological litigants’ ability to manipulate the order in which legal issues are presented before the federal courts).

A. The Possibility of Special Disfavor

At first glance, the new public standing seems, like citizen standing in the 1970s, to threaten government power by allowing challenges to federal law.<sup>193</sup> A simple attitudinal model of standing doctrine might therefore suggest that the new public standing will suffer the same fate as citizen standing in the 1970s.<sup>194</sup> The Court may, in other words, come to view the new public standing with special disfavor, denying standing to states that suffer financial injuries even though similarly situated private parties would have standing.<sup>195</sup>

There are two stylized versions of a simple attitudinal model of standing doctrine that we might contrast. One holds that the “conservative” position is to restrict Article III standing, while the “liberal” position is to open it up. The other model focuses on standing as a device to protect government power from private parties.

The first model presents a misleading snapshot of standing doctrine’s ideological valence. The “conservative” and “liberal” positions on standing are not static. In the 1970s, to be sure, an increasingly conservative Court denied standing to liberal plaintiffs it disparaged as “special interest” groups that had lost in the political process and were therefore turning to the courts.<sup>196</sup> But restrictive standing rules can also bar conservative challenges to liberal policies, a point underscored by standing doctrine’s history as well as some modern cases.<sup>197</sup>

The second version of the simple attitudinal model stands on better footing. This model posits that because a more restrictive standing doctrine can shield government policies from challenges by private parties, standing decisions reflect judges’ positions on those who hold government power and the policies they adopt. We might model standing doctrine, in other words, in terms of the courts’ attitudes toward private challenges to government power.

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193. See *supra* notes 113-15 and accompanying text (discussing citizen and taxpayer standing).

194. See *supra* note 115 and accompanying text (discussing the Supreme Court’s decision to tighten standing requirements for citizen standing).

195. Cf. Tracey E. George & Robert J. Pushaw, Jr., *How Is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1275 (2002) (reviewing MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000)*) (“Access doctrines like standing allow the Court to deny relief to those seeking to challenge existing political power arrangements. Thus, the Court’s treatment of standing is irretrievably linked to its position on those with access to power in the first instance.”).

196. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972).

197. See Elliott, *supra* note 28, at 563-86 (discussing several recent cases in which conservative plaintiffs have lost on standing grounds before the conservative Supreme Court).

But the new public standing has a more complex relationship with government power: It pits state and federal governments against each other. Recognizing state standing to sue the federal government may therefore be consistent with the Court's use of other constitutional doctrines to protect state government power.<sup>198</sup> For several decades, the Court has shown special solicitude of a sort for the states in constitutional law.<sup>199</sup>

The new public standing not only empowers state governments, but also serves the interests of partisan constituencies inside and outside government. There is little reason to think that state litigants will soon cease claiming standing to sue the federal government. As a *defendant*, the federal government has incentives to seek to limit the new public standing. But as a potential *plaintiff*, the federal government has reason not to attack the constitutional core of government standing based upon financial injuries. After all, the federal government in many cases premises its own standing on financial injuries.<sup>200</sup> It is therefore unsurprising that the federal government in cases such as *Texas v. United States* did not call into question the basic doctrinal premise of the new public standing.<sup>201</sup>

It is nevertheless conceivable that hostility to litigation will lead the Roberts Court to cut back on the new public standing. After all, Chief Justice Roberts's dissent in *Massachusetts v. EPA* seemed to suggest that states might be due special *disfavor* in the standing analysis.<sup>202</sup> Moreover, during the Trump Administration, the new public standing has become an important tool in progressive impact litigation.<sup>203</sup> It might seem obvious, then, that Chief Justice

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198. See, e.g., Seth Davis, *Equal Sovereignty as a Right Against a Remedy*, 76 LA. L. REV. 83, 103-06 (2015) (discussing the Supreme Court's use of the equal sovereignty doctrine to strike down provisions of the Voting Rights Act); C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 864 (1985) ("[T]he Burger Court's justiciability decisions, taken as a whole, have elevated separation of powers and closely related federalism considerations to a primary, perhaps predominant, role in interpreting and applying all aspects of the justiciability doctrine, including the question of standing." (footnote omitted)).

199. See, e.g., *United States v. Morrison*, 529 U.S. 598, 648 n.18 (2000) (Souter, J., dissenting) (criticizing the majority's "special solicitude for 'areas of traditional state regulation'" (quoting *id.* at 615 (majority opinion))).

200. See Davis, *supra* note 38, at 15-18.

201. See 809 F.3d 134, 155-57 (5th Cir. 2015) (rejecting the United States's arguments that the costs Texas incurred by complying with a federal program were offset by the program's benefits, and that Texas's costs were a self-inflicted harm), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

202. See 549 U.S. 497, 536 (2007) (Roberts, C.J., dissenting) ("Relaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence . . ."); *id.* at 538 (arguing that states should face an "additional hurdle" when they raise *parens patriae* claims to protect private parties).

203. See *supra* notes 10-12 and accompanying text.

Roberts will make good on his suggestion that states should be made to face additional barriers when they seek to sue the federal government in public law actions.<sup>204</sup>

It is not obvious, however, that the Roberts Court will create new constitutional limits on the new public standing. Partisan polarization being what it is at the national level, a conservative Court should expect to see its ideological foes controlling the federal executive branch from time to time. And partisan polarization being what it is within the states, a conservative Court will reliably find ideological allies among the state attorneys general, and some of the claims they advance may depend upon the new public standing. All of this suggests, at a minimum, that there is little reason to think that a conservative Court is one necessarily hostile to the new public standing in all its forms.

That is particularly true to the extent that the new public standing helps address the “supply problem” that conservative legal mobilization faces.<sup>205</sup> State litigation against the federal government has scored progressive victories: *Massachusetts v. EPA* and the travel ban litigation are but two examples.<sup>206</sup> But the new public standing has also supported conservative legal mobilization in cases like *Texas v. United States*, where there may not have been any plaintiff other than the State of Texas with Article III standing.<sup>207</sup>

#### B. The Possibility of Special Solitude

As a positive matter, what may prove important are the long-term ideological composition of the lower courts and patterns in state attorney general elections. These factors will bear upon the Court’s use of standing doctrine as a tool of access control.

A sophisticated model of standing developed by Maxwell Stearns treats the doctrine as a device of agenda control.<sup>208</sup> In light of stare decisis, he argues, the evolution of judicial doctrine is “path dependent.”<sup>209</sup> That is, interest groups have incentives to time the sequence of their lawsuits carefully and to seek out favorable paths within the federal judiciary for the development of legal doctrine.<sup>210</sup> Standing doctrine “limit[s] the extent to which litigants can benefit by opportunistically manipulating the order in which issues are presented to

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204. See *Massachusetts*, 549 U.S. at 538 (Roberts, C.J., dissenting).

205. See TELES, *supra* note 110, at 249-55; *supra* Part II.A.

206. See *supra* Parts I.A, I.B.1.b.

207. See *supra* note 19 and accompanying text.

208. See generally Stearns, *supra* note 26.

209. See *id.* at 1315.

210. See *id.* at 1381-82.

federal [courts of appeals] and, ultimately, to the Supreme Court.”<sup>211</sup> Requiring litigants to demonstrate standing limits federal jurisdiction to cases in which the alleged harms are not entirely within “litigant path manipulation,” but instead involve “fortuitous historical events.”<sup>212</sup>

This model has implications for the incentives of the Supreme Court in relaxing or restricting standing doctrine. Writing in 2008, Stearns argued that if the ideological center of gravity at the Court is aligned with the majority of the federal courts of appeal, then the Court “will seek to relax the strictest features of standing doctrine” if that allows it to “work[] in alignment with the conservative lower federal judiciary” to “move substantive constitutional doctrine in its preferred ideological direction.”<sup>213</sup>

Under plausible assumptions about judicial appointments and state elections, the Roberts Court might expand special *solicitude* for the new public standing, notwithstanding Chief Justice Roberts’s skepticism in *Massachusetts v. EPA*.<sup>214</sup> As President Trump continues to transform the federal judiciary by appointing judges at a swift pace,<sup>215</sup> the Roberts Court may find that it has incentives to expand standing doctrine for plaintiffs likely to advance causes to which it is sympathetic. And if conservatives continue to control a significant number of the state attorney general offices,<sup>216</sup> then the new public standing will continue to be an important tool in conservative legal mobilization. This tool will be particularly important to the extent that the country stays polarized; presidential elections remain closely contested, with control of the White House flipping between Republicans and Democrats; and Congress continues to struggle to check executive branch lawmaking.

Notably, a conservative Court could treat states that suffer financial injuries in a sovereign capacity with special *solicitude* without relaxing

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211. *Id.* at 1351.

212. *See id.* at 1401-03.

213. Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 880 (2008).

214. *See* 549 U.S. 497, 536 (2007) (Roberts, C.J., dissenting) (“Relaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence . . .”).

215. *See* Carrie Johnson, *Trump’s Judicial Appointments Were Confirmed at Historic Pace in 2018*, NPR (Jan. 2, 2019, 5:00 AM ET), <https://perma.cc/25EA-U4WU> (“The Trump administration more than doubled the number of judges it confirmed to federal appeals courts in 2018, exceeding the pace of the last five presidents . . . .”); Jeffrey Toobin, *Trump’s Real Personnel Victory: More Conservative Judges*, NEW YORKER (Aug. 2, 2017), <https://perma.cc/SH5J-CHG9> (“Trump is poised to reshape the judiciary in a notably conservative direction . . .”).

216. *See State Political Parties*, KAISER FAM. FOUND., <https://perma.cc/MB3Y-4FYW> (archived Apr. 23, 2019) (reporting that as of January 2019, twenty state attorneys general were elected Republicans, twenty-three were elected Democrats, and seven were appointed).

standing doctrine for private litigants.<sup>217</sup> Standing doctrine is already different for public litigants than it is for private ones.<sup>218</sup> The Court need not expand private standing for the public in order to empower the states to advance its lawmaking agenda.

This analysis suggests that if anything, the prospects of the new public standing may look more like state standing to protect state law than like private standing for the public. States have enjoyed special solicitude when suing to protect state law. In 1920, for example, the Court held in *Missouri v. Holland* that the State of Missouri had standing to challenge federal legislation that threatened the enforceability of state law.<sup>219</sup> In this type of case, federal courts have tended to afford states special solicitude by allowing them to protect state law without showing the sort of concrete and personal injury that private plaintiffs must show.<sup>220</sup>

It is unlikely, however, that the Roberts Court will afford states special solicitude whenever they claim a financial injury. If the Court were to afford special solicitude whenever a state claims a financial injury, it would be difficult for the Justices to “carve out favored and disfavored” state litigants, and thus difficult to control their docket.<sup>221</sup> The same concern might arise if the Court were to permit states to sue to protect state law whenever a state’s law simply “declares that private citizens are not subject to legal requirements,” but the Court’s special solicitude for state standing does not extend that far.<sup>222</sup>

States may claim financial injuries in ways that do not mirror private standing based upon financial injuries. A state may claim financial injury based upon the costs of providing government services, as Texas did when challenging the Obama Administration’s immigration policies.<sup>223</sup> Or a government may allege a general harm to its economy, which may indirectly lead to a loss of revenue or to increased costs from providing more government services. Affording the states special solicitude for each of these types of

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217. See generally Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211 (2014) (discussing ways in which doctrines developed in one remedial context may spill over to alter doctrines developed in a different remedial context).

218. See Seth Davis, *Standing Doctrine’s State Action Problem*, 91 NOTRE DAME L. REV. 585, 587 (2015) (“There are different standing rules for state actors than for private litigants.”).

219. See 252 U.S. 416, 430-31 (1920); see also Davis, *supra* note 38, at 81.

220. See Davis, *supra* note 38, at 81; Grove, *supra* note 52, at 865-68.

221. See Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1454 (2016) (“[T]he very fluidity of standing doctrine empowers the Justices to carve out favored and disfavored classes of litigants (and hence, legal issues) in ways that reassert judicial primacy.”).

222. See Grove, *supra* note 52, at 877 (emphasis omitted).

223. See *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016); *supra* Part I.B.2.b.



injuries, particularly those involving general harm to the state's economy, would indeed empower state attorneys general to be a "roving constitutional watchdog."<sup>224</sup> While the Roberts Court is unlikely to roll back the new public standing, it is also unlikely to license state attorneys general with unfettered standing to sue the federal government.

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The aim of this positive account has been to ground the normative analysis of the doctrine in an understanding of the ways in which political valences of the new public standing may shape its prospects. In the next two Parts, I build upon the descriptive analysis presented in Part II above and the positive analysis presented in this Part, which I take to constrain the range of likely doctrinal possibilities. Of course, "courts, like other institutions and agents, are motivated by a variety of factors, and there is no guarantee they will follow the normatively correct course even where there is one."<sup>225</sup> My argument in the following Parts can be understood in one of two ways. The basic, but weaker, claim is that there are sound normative reasons to preserve the new public standing. The second, more critical claim is that the rise of the new public standing provides grounds for reassessing the sharp distinction between financial injuries and ideological interests in standing doctrine.

#### **IV. The Normative Dimensions of the New Public Standing**

Assuming that the new public standing is here to stay in some form, what should its scope be? In particular, should federal courts treat the new public standing with special disfavor or with special solicitude? There are strong arguments that states should be treated with special disfavor in the standing analysis when they sue the federal government based upon financial injuries. And even though these arguments are not decisive, they go a long way toward showing that federal courts should be circumspect in invoking special solicitude when assessing whether a state may sue the federal government based upon a financial injury.

##### **A. Arguments for Special Disfavor**

There are conceptual and doctrinal arguments as well as functional arguments for showing special disfavor to states when they sue the federal government based upon financial injuries. The basic conceptual and doctrinal

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224. See *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011) ("[I]f we were to adopt Virginia's standing theory, each state could become a roving constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state's power to litigate in federal court.").

225. Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499, 550 (2017).

argument is that the reasons why federal courts have accepted private standing based upon financial injuries do not necessarily apply to states. And the basic functional argument is that ideological litigation by state attorneys general against the federal government presents the same sort of concerns that led the federal courts to cut back upon citizen and taxpayer standing. Perhaps, then, federal courts should not be as willing to grant standing to states based upon financial injuries as they are to grant standing to private parties who suffer such injuries.

### 1. Conceptual and doctrinal arguments

Private party suits to redress financial injuries present the “paradigmatic” case for standing.<sup>226</sup> But even if “[e]conomic harm to a business clearly constitutes an injury-in-fact,” no matter if the harm is de minimis or indirect, and even if a “substantial probability” of this sort of harm suffices to make out causation and redressability,<sup>227</sup> it does not follow that a state has standing to sue the federal government whenever there is a substantial probability of a financial injury, no matter how small or indirect.

One of the most interesting features of the law concerning financial injuries and Article III is how little explanation there is of why financial injuries suffice for standing purposes. As then-Judge Kavanaugh put it: “Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant.”<sup>228</sup> Or, as Justice Breyer has explained, “a loss of even a small account of money is ordinarily an ‘injury.’”<sup>229</sup> Standing based upon financial injuries, as then-Judge Alito noted, “is often assumed without discussion.”<sup>230</sup> The *Federal Reporter* is full of similar statements.<sup>231</sup> The threatened loss of even a “few pennies” is enough to give a litigant standing in an Article III court.<sup>232</sup>

Why is that? Tracing the idea back to its origin does not seem to help answer the question. A typical citation is to *Ass’n of Data Processing Service Organizations v. Camp*, which held that data processing companies had standing to challenge a ruling by the Comptroller of the Currency that permitted

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226. See, e.g., *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (Alito, J.).

227. See *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5-6 (D.C. Cir. 2017) (Kavanaugh, J.); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1379 (8th Cir. 1997) (“[I]ndirect economic injury constitutes an injury in fact.”).

228. *Carpenters Indus. Council*, 854 F.3d at 5.

229. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017).

230. *Danvers*, 432 F.3d at 293.

231. See, e.g., *Adams v. Watson*, 10 F.3d 915, 920-22, 921 n.13 (1st Cir. 1993) (citing many examples of decisions assuming that financial injuries suffice for standing).

232. See *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1029 (8th Cir. 2014).

national banks to compete in the market for data processing services.<sup>233</sup> But while the Court held that there was “no doubt” that the plaintiffs in that case had Article III standing,<sup>234</sup> it also cautioned that “[g]eneralizations about standing to sue are largely worthless as such.”<sup>235</sup> That is a slender reed, indeed, upon which to rest a rule that now goes without question.

The history of standing doctrine, moreover, is more complex than today’s consensus. Under the traditional test, a plaintiff needed a “legal right” to support standing in federal court.<sup>236</sup> Such legal rights could arise from the common law or from statutes.<sup>237</sup> But a plaintiff without a legal right could not sue, even if it had suffered the sort of economic harm that now suffices for an injury in fact.<sup>238</sup> In the 1940s, the Court held that economic injuries could suffice for standing, and thus ushered in an era during which private parties could stand for the public in challenging federal agency action, at least where Congress had authorized suit by any “aggrieved” party.<sup>239</sup> Thus, the history deepens rather than resolves the puzzle of today’s consensus. On the one hand, federal courts have retreated from the sort of private standing for the public that the Court seemed to embrace in the 1940s.<sup>240</sup> On the other hand, they have come to take for granted that a financial injury gives rise to Article III standing.

In this instance, then, perhaps an ounce of logic is worth a pound of history. It is possible to tease out from the cases a few rationales for the federal courts’ unquestioning acceptance of financial injuries as sufficient for standing. But those rationales do not necessarily apply to state litigants.

a. The form of the loss

Perhaps the form of the loss explains why federal courts take financial injuries for granted in the standing analysis. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, the Court distinguished between “plaintiffs seeking to enforce . . . statutes as private attorneys general, whose injuries are ‘noneconomic’ and probably noncompensable, and persons . . . who assert that they have suffered tangible economic injuries.”<sup>241</sup> More recently, in

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233. See 397 U.S. 150, 151, 158 (1970).

234. *Id.* at 152.

235. *Id.* at 151.

236. See, e.g., *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939), *abrogated* by *Bond v. United States*, 564 U.S. 211 (2011).

237. See *id.* at 137-38.

238. See *id.* at 137-40 (holding that the plaintiffs, who alleged harm to economic interests, had no legal right to be free from competition and thus no standing to sue).

239. See Magill, *supra* note 3, at 1139-40.

240. See *supra* note 115 and accompanying text.

241. 453 U.S. 1, 16-17 (1981).

*Spokeo, Inc. v. Robins*, the Court noted that “tangible injuries are perhaps easier to recognize” than intangible injuries.<sup>242</sup> Financial injuries are tangible losses, and their tangibility means that the standing analysis tends to be straightforward.<sup>243</sup>

This rationale seems promising when applied to states. Surely a state’s financial injuries are tangible in the same way that a private party’s financial injuries are tangible. It turns out, however, that it is hard to pin down just what the courts mean when they cast financial injuries as “tangible.”

There is nothing “inevitable,” as a matter of law or logic, in the notion that financial injuries are tangible, as Rachel Bayefsky has argued in her recent comprehensive critique of the Supreme Court’s distinction between tangible and intangible injuries.<sup>244</sup> As she discusses, many forms of personal and intellectual property are labeled “intangible” in the casebooks.<sup>245</sup> And courts have described the loss of money as “intangible” in various contexts, including insurance law and tort law.<sup>246</sup> In tort law, for instance, courts have distinguished between “intangible” financial losses and “tangible” physical harms.<sup>247</sup>

Financial injury is “tangible,” therefore, in some sense other than its inherent nature. Perhaps financial injuries are tangible because they can be readily quantified and proven in court.<sup>248</sup> If that is the rationale for courts to treat financial injuries as the paradigmatic case for Article III standing, then there are some cases where state standing will fit within the paradigm. But that begs the question why quantifiability and susceptibility to proof are reasons to treat the standing analysis as straightforward.<sup>249</sup>

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242. 136 S. Ct. 1540, 1549 (2016).

243. *See* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 642 (2007) (Souter, J., dissenting) (“In the case of economic or physical harms, of course, the ‘injury in fact’ question is straightforward.”); *see also* Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2308 (2018) (“*Spokeo* suggests, at a minimum, that tangible harms are recognized in a more straightforward way than intangible ones . . .”).

244. *See* Bayefsky, *supra* note 243, at 2330.

245. *See id.*

246. *See id.* at 2331.

247. *See, e.g.*, *Walsh v. Cluba*, 117 A.3d 798, 808 (Vt. 2015) (“Negligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another unless one’s conduct has inflicted some accompanying physical harm.” (quoting *O’Connell v. Killington, Ltd.*, 665 A.2d 39, 42 (Vt. 1995))); *see also, e.g.*, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* § 6.1.3, at 123 (Dennis Patterson ed., 2010); Bayefsky, *supra* note 243, at 2331.

248. *See* Bayefsky, *supra* note 243, at 2341-52.

249. *See id.* at 2346-47.

One possibility is that the distinction between quantifiable and nonquantifiable harms is a proxy for the distinction between personally injured plaintiffs and ideological plaintiffs.<sup>250</sup> But even if that possibility holds true for private litigation, it does not hold true for state standing. A state attorney general may sue the federal government as an ideological litigant by pointing to financial injuries that impact the state as a whole. The quantifiable injury to the state, in other words, would allow the state attorney general to bring a public action with the aim of vindicating a nonquantifiable ideological interest against the federal government.

Another possibility is that the nature of proof of financial injuries matters for the standing analysis. The idea would run like this: Plaintiffs can “always establish *some* amount of intangible harm,”<sup>251</sup> particularly if ideological objections and the like suffice for Article III standing. Proof of financial injuries, by contrast, does not depend solely on the plaintiff’s say-so. It is not enough for a plaintiff pleading a financial injury to say that the defendant’s actions were bothersome, offensive, or the like. Rather, the plaintiff must come forward with proof of an actual financial loss, however small that loss may be. Therefore, unlike standing based upon ideological objections or other intangible harms, standing based upon financial injuries does not threaten to overwhelm the Article III judiciary with a flood of politically controversial suits over government policies.

Whatever its merits in private litigation, this rationale for taking financial injuries for granted is not as persuasive in the context of state standing to sue the federal government. Given the interdependence of state governments and the federal government, any number of federal actions will affect a state’s finances to some degree, and, therefore, any number of state attorneys general will be able to point to financial injuries as a basis for suing the federal government.

b. The form of the underlying rights and remedies

Another set of rationales for the treatment of financial injuries looks to the form of the underlying rights and remedies involved. Perhaps it is obvious that financial injuries give rise to private standing because such injuries involve harm to property rights. The common law forms of action provided remedies for harms to private property rights. And today, “[s]tanding is found readily, particularly when injury to some traditional form of property is asserted.”<sup>252</sup>

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250. *See id.* at 2345.

251. *See id.* at 2359-60.

252. 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.4, at 140-41 (3d ed. 2008) (footnote omitted).

Not all financial injuries, however, involve harms to traditional property rights.<sup>253</sup> Most relevant here, not all financial injuries to a state concern the state's "private," proprietary rights. For example, a state may argue that it has Article III standing to sue because the federal government has generally harmed its economy. In some cases, a harm to a state's economy has sufficed for state standing to sue other states or private parties.<sup>254</sup> But this sort of harm does not involve the state's property rights. The "property rights" rationale for accepting private standing for financial injuries extends no further than a state's "private" rights to property, if it even extends that far.<sup>255</sup>

A second formal rationale looks to the form that a remedy for financial injuries may take. As then-Judge Alito put it, "[s]tanding always should exist to claim damages, unless perhaps the theory of damages is totally fanciful."<sup>256</sup> Whatever the merits of this rationale when one private party sues another, it does little to explain state standing to sue the federal government based upon financial injuries where a state seeks declaratory and injunctive relief rather than damages.

c. The substance of the underlying claims and interests

A third set of rationales for preferring financial injuries in standing analysis points toward the substance of the underlying claims and interests. Perhaps financial injuries correspond to a set of substantively important legal claims or human interests, ones that federal courts have a special obligation to vindicate.

Such substantive preferences on the part of federal judges might be unprincipled, of course. Standing law's treatment of financial injuries might reflect nothing more than a naked preference for moneyed interests, for example. There are indeed important stories to be told about unprincipled preferences in modern standing law.<sup>257</sup>

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253. Cf. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 738 (1964) ("[T]oday more and more of our wealth takes the form of rights or status rather than of tangible goods.").

254. See, e.g., *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 450-51 (1945), *superseded in other part by statute*, Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948); *Pennsylvania v. West Virginia*, 262 U.S. 553, 581, 591-92, *aff'd on reh'g*, 263 U.S. 350 (1923).

255. One would need to ask why the property rights rationale seems obvious when private standing is at stake. The reasons, I suspect, would build upon moral intuitions about the values that private property rights protect, including individual liberty—a rationale obviously inapplicable to states.

256. *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (Alito, J.) (quoting Wright & Miller's *Federal Practice and Procedure*).

257. See Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1423-24 (1995) (arguing that modern standing law reflects the institutional role of the Supreme Court in "facilitat[ing] the subordination of racial-minority interests to white majority interests"); cf. Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of*  
*footnote continued on next page*

Standing law's treatment of financial injuries might systematically favor the well-heeled, but it does not exclusively benefit them. In *Barlow v. Collins*, a case oft cited for the proposition that economic injuries are paradigmatic injuries in fact, tenant farmers sued to challenge an administrative regulation that they argued would undermine their "economic independence" from their landlords.<sup>258</sup> The Court concluded that there was "no doubt" that the farmers had the "personal stake" necessary to give them Article III standing to sue.<sup>259</sup> Where a financial loss was tantamount to a loss of individual liberty,<sup>260</sup> standing to sue was not controversial.<sup>261</sup>

A preference for standing premised upon financial injuries might be justified as matter of principle on libertarian grounds. Cass Sunstein and Adrian Vermeule have argued that the D.C. Circuit's apparent preference for financial injuries is an example of "libertarian administrative law," a vision of administrative law that favors the claims of regulated entities that challenge economic and environmental regulations.<sup>262</sup> This approach to standing might be justified by reference to a public choice account of the pathologies of public administration, and to a libertarian theory of the scope of permissible state interference with individual freedom and private property.<sup>263</sup>

There are libertarian strands to the new public standing, too. The travel ban litigation, for example, involved states' standing to protect individuals' freedom to travel to the United States.<sup>264</sup> But the new public standing also includes many cases that do not fit within a libertarian vision, including

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*Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 287-88 (2015) (arguing that under settled law, the Supreme Court should have never heard the white plaintiff's challenge to affirmative action in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013)).

258. See 397 U.S. 159, 162-64 (1970) (quoting the complaint); see also *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) ("[E]conomic injury is a quintessential injury upon which to base standing." (citing *Barlow*, 397 U.S. at 163-64)).

259. *Barlow*, 397 U.S. at 164.

260. Cf. Reich, *supra* note 253, at 733 ("[I]n a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.").

261. Note that this sort of rationale need not extend to states that suffer financial losses. "There is no such thing as the State," W.H. Auden, *September 1, 1939* (1939), in CHARLES OSBORNE, W.H. AUDEN: THE LIFE OF A POET 194 (1979), and whatever else it may be, a state is not something with individual liberty to lose.

262. See Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398, 454 (2015).

263. See *id.* at 465-66.

264. See *supra* Part I.B.1.b.

Texas's challenge to the Obama Administration's DAPA policy<sup>265</sup> and more recent state challenges to the Trump Administration's attempts to hobble provisions of the Affordable Care Act.<sup>266</sup>

## 2. Functional arguments

In short, it is far from clear that the rationales for private standing based upon financial injuries apply to state standing based upon the same sorts of injuries. And there are functional reasons to think states are due special disfavor in the standing analysis. The first concerns judicial competence: State standing to bring public actions against the federal government based upon financial injuries may threaten to politicize the federal judiciary, perhaps to a degree that private standing based upon financial injuries does not. The second rests upon notions of federalism and the political process: We might disfavor state standing to litigate questions of national public interest, even when the states have suffered financial injuries, because we think that state officials should be focused on state and local concerns, not national ones. At the same time, we might think that states can safeguard their interests through the federal political process better than private parties can, which might in turn mean that federal courts should deny standing to states in some cases where similarly situated private parties would have standing to vindicate financial injuries. The third and final argument focuses upon private rights: Perhaps the new public standing will crowd out private enforcement of federal law.<sup>267</sup>

Each of these arguments provides a reason for denying Article III standing to states to sue the federal government, even when the states point to the sort of financial injuries that a private party might claim as a basis for standing. This Subpart considers each argument and concludes that none of them provide a decisive case for showing special disfavor to states in standing analysis, in part because they raise concerns that the Article III standing analysis addresses poorly, if at all. Moreover, these concerns may be better addressed not by treating states with special disfavor in the standing analysis, but instead through careful assessment of the scope of public rights of action, calibration of the remedial authority of federal courts, and careful thinking about preclusion in government litigation.

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265. See *supra* Part I.B.2.b.

266. See, e.g., *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 560-69 (E.D. Pa. 2017), *argued*, No. 18-1253 (3d Cir. May 21, 2019).

267. See *Davis*, *supra* note 218, at 619-21 (discussing the “link between the day-in-court right and standing”).



a. Judicial competence

Article III standing doctrine reflects the idea that courts should not be brought into political battles about the public interest. They must stay above the fray to the extent possible, deferring to the political branches and preserving their own legitimacy by exercising restraint.<sup>268</sup> That is why the injury-in-fact requirement of Article III standing doctrine is thought to be so important: It limits litigation of politically controversial legal questions by requiring a plaintiff to show that she has suffered a concrete injury.<sup>269</sup>

The Article III concern is that state standing to sue the federal government based upon financial injuries would embroil the federal courts in too many politically charged controversies. There are myriad ways in which a state might suffer a financial injury, and thus affording a state standing to sue over any such injury could lead to a flood of litigation against the federal government. Treating states with special disfavor in the standing analysis would be one way to address this concern.

But addressing this concern does not require treating states with special disfavor. It only requires distinguishing among the different ways in which a state may suffer a financial injury. When a state claims a general harm to its economy, for example, it is not in the same position as a private litigant claiming a personal pocketbook injury. It is not claiming, for example, that it has suffered a competitive injury from federal action that benefits its competitors.<sup>270</sup> Nor is it claiming that it has lost profits because of federal regulation of an industry in which it participates.<sup>271</sup> To limit standing in such a case may not be to treat the state with special disfavor, since there is no analogous case in which a private party claiming the same injury would be granted standing.

Another Article III objection is that the new public standing empowers federal judges to decide controversial questions on a national scale in a preliminary posture poorly suited to sound decisionmaking.<sup>272</sup> Much of this

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268. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115 (2d ed. 1986).

269. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552-53 (2016) (Thomas, J., concurring) (“[S]tanding doctrine keeps courts out of political disputes by denying private litigants the right to test the abstract legality of government action.”).

270. Cf., e.g., *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151-52 (1970) (holding that private plaintiffs had standing based on alleged harm due to “competition from national banks”).

271. Cf., e.g., *NRA of Am. v. Magaw*, 132 F.3d 272, 281 (6th Cir. 1997) (holding that gun manufacturers had standing to challenge a law banning some firearms because the law caused them “immediate economic harm”).

272. See Woolhandler, *Governmental Sovereignty Actions*, *supra* note 47, at 210 (“Discouraging sovereignty-based claims would also help to avoid abstract judicial determinations of the validity of governmental action.”).

concern arises not from standing doctrine itself, but from the increasingly frequent use of nationwide injunctions when states sue the federal government.<sup>273</sup> Thus, this concern may be directly addressed through procedural and remedial law. For example, the Supreme Court limited the scope of injunctive relief in the litigation challenging the Trump Administration's second travel ban.<sup>274</sup> Thus, remedial law provides a direct way to address concerns about the nationwide scale of the relief requested by states in cases involving the new public standing.

A related objection, as noted in Part III above, is that the new public standing disrupts the Court's control of the agenda of lawmaking within the federal judiciary by empowering state attorneys general to manipulate the presentation of public law issues in the lower federal courts.<sup>275</sup> The new public standing empowers state attorneys general and their interest group allies to shop within the federal court system for the most favorable forums. But it is not clear that such forum shopping, though it undeniably occurs,<sup>276</sup> poses a constitutional problem. The new public standing provides a reminder that Article III standing doctrine does not bar ideological litigants from the federal courts.<sup>277</sup> Rather, it channels ideological litigation by assigning the power to sue and thus shaping how interest groups structure their litigation strategies.<sup>278</sup> To the extent, however, that this channeling raises constitutional concerns, it is not clear why those concerns should be addressed by treating

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273. See Bray, *supra* note 172, at 457-64 (critiquing the practice of district courts issuing nationwide injunctions, including in cases involving the new public standing); see also *supra* Part II.C.

274. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam); *infra* text accompanying note 420.

275. See, e.g., Stearns, *supra* note 26, at 1351 (arguing that standing doctrine "limit[s] the extent to which litigants can benefit by opportunistically manipulating the order in which issues are presented to federal [courts of appeals] and, ultimately, to the Supreme Court"); see also *supra* Part III.B.

276. See, e.g., Emma Platoff, *By Gutting Obamacare, Judge Reed O'Connor Handed Texas a Win. It Wasn't the First Time.*, TEX. TRIB. (Dec. 19, 2018, 2:00 PM), <https://perma.cc/R5W8-T383> ("The Texas Attorney General's Office has made a habit of filing lawsuits against the federal government that land in O'Connor's court.").

277. See Mark V. Tushnet, Comment, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1708 (1980) (responding to Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979)) ("[T]he sociology of litigation suggests . . . that all plaintiffs, even 'willing beneficiaries,' are essentially ideological litigants.").

278. For a description of "standing as channeling" in a different sense, see Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357, 1369-70 (2012) ("[S]tanding should be viewed as a channeling mechanism, whereby all harmed individuals are channeled through procedural mechanisms that reveal the most egregiously injured plaintiffs, that is, those plaintiffs with the best (or worst, from the individual perspective) harms.").

states differently from private litigants who sue to vindicate financial injuries. Rather, the constitutional concern might point toward rethinking financial injuries as the paradigmatic Article III harm—which the Court does not seem inclined to do.<sup>279</sup>

In sum, if there is a basis for treating states with special disfavor when they sue based upon financial injuries, it is not to be found in Article III alone.

b. Federalism

Another set of concerns sounds in federalism. The new public standing, it might be argued, encourages state attorneys general to meddle in national matters that should not be their concern.<sup>280</sup> And by focusing on national policymaking in politically controversial areas, it might also be argued, state executives exacerbate the corrosive effects of partisan politics.<sup>281</sup>

The Supreme Court has distinguished between matters that are “truly national,” and therefore of national concern, and matters that are “truly local,” and therefore of state and local concern.<sup>282</sup> Some social problems, the Court has thus suggested, match up with the unique competencies of the federal government, while others match up with those of the states. Criminal law, for example, may be a matter within the special competence of the states, at least

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279. See *supra* text accompanying notes 33-34.

280. Cf. Schleicher, *supra* note 157, at 771-72 (“[T]hose who seek the ends of federalism should focus not only on protecting the authority of states but also on enhancing the quality of state democracy.”).

In a recent article on state public interest litigation, Margaret Lemos and Ernie Young distinguish “vertical conflicts . . . about who decides” from “horizontal conflicts . . . about what is to be decided,” arguing that state attorneys general “should focus less of their time and resources on horizontal conflicts.” Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 97-98 (2018). Although, as Lemos and Young acknowledge, “many state public-law lawsuits will not fall cleanly into one category or the other,” *id.* at 99, they make a powerful case that state attorneys general “are participating in polarized conflict” when they seek to “impose” “their own political or moral vision . . . nationwide,” *id.* at 98. But, as they also argue, the “more salient question is . . . : how do states compare with other institutional options for pursuing public-law litigation?” *Id.* at 109. And that question is particularly important where, as in this Subpart, the question is whether states are due special disfavor in the standing analysis.

281. See Rick Hills, *Should States Always Have Standing to Sue the President?: Texas, Washington State, and Standing to Enforce (or Fight) National Immigration Law*, PRAWFSBLAWG (Feb. 6, 2017, 5:01 AM), <https://perma.cc/UUK9-5J7B> (“State politicians’ turning the crank on the national partisan noise machine reduces the tolerance-inducing power of subnational polit[i]cs.”).

282. See, e.g., *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

when it comes to certain kinds of crimes.<sup>283</sup> That is, state lawmakers, prosecutors, and juries may more adequately represent the values of their communities when it comes to criminal law than do federal officials.

To the extent this account of federalism is compelling, we might think that state attorneys general should not be encouraged to file public actions against the federal government. We might think instead that they should focus on their traditional role as enforcers of state law, including state criminal law. Focusing on controversial questions of federal law may exacerbate partisan divides at the state and local level. Perhaps it would be better for the federal courts to close the courthouse doors to state attorneys general more often, encouraging them to focus on enforcing state laws that reflect a democratic consensus at the state and local level.

This argument for special disfavor for state standing is not decisive, however, as it paints a misleading picture of contemporary federalism. States and the federal government are not categorically separate. As discussed in Part II above, the states are deeply embedded in national governance through fiscal federalism and cooperative federalism programs.<sup>284</sup> Something more than an argument rooted in categorical federalism is necessary to justify special disfavor for states in the new public standing.<sup>285</sup>

The political safeguards of federalism might provide an additional argument for distinguishing states from private parties. States are better able to protect themselves through the political process, or at least so the argument goes.<sup>286</sup> As a normative matter, therefore, there is less need for federal judicial intervention to protect states.<sup>287</sup> Because intergovernmental litigation threatens to politicize the judiciary, special disfavor might be warranted whenever a state sues the federal government, even if it claims a financial injury—the “paradigmatic” injury in fact.<sup>288</sup>

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283. *See, e.g., id.* at 618 (“[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”).

284. *See supra* Part II.B.

285. *Cf.* Judith Resnik, Essay, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *YALE L.J.* 619, 620 (2001) (describing “categorical federalism” as “constructed around two sets of human activities, the subject matter of regulation and the locus of governance, with each assumed to have intelligible boundaries and autonomous spheres”).

286. *Cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543, 546-47 (1954) (arguing that states’ concerns “cannot fail to find reflection in the Congress” in light of federalism safeguards built into the political process).

287. *See generally* JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 171-259 (1980) (arguing for limited judicial review of federalism issues).

288. *See, e.g., Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (Alito, J.).

Together, these arguments have some appeal. But the positive argument for political safeguards is at best overstated: Congress cannot consistently be relied upon to safeguard state interests, particularly in an era of sharp political divides that transcend state boundaries. And while the potential federalism costs may be reason for concern about the new public standing, this concern can be better addressed through state law limits on the authority of attorneys general, prudential doctrines of federal court jurisdiction, and substantive reforms to federalism jurisprudence.

Consider first the concern that intergovernmental litigation frustrates federalism by focusing state officials on national issues rather than on state and local matters. If this is a problem, then it is one for state constituents to address, not one for federal courts to solve through Article III standing doctrine.<sup>289</sup> For instance, a state could define the duties of its attorney general in a way that excludes national public interest litigation. But where a state authorizes the attorney general to pursue such litigation, it is not clear why there is cause for the federal courts to deny standing in order, ostensibly, to protect that state.<sup>290</sup>

There is also a concern that the new public standing contributes to partisan dysfunction in the federal government. One response might emphasize the benefits of “partisan federalism”: Among other things, it “realiz[es] a federalist form of surrogate representation.”<sup>291</sup> What seems like corrosive hyperpartisan competition between the states and the federal government might, for all its unsightliness, be a sign of states acting as necessary “counterweights” to a federal government that represents only one side of our partisan divide.<sup>292</sup>

Another response is that channeling hyperpartisan disputes between state and federal officials through the federal courts might actually reduce the corrosive effects of political dysfunction. By deciding these disputes according to law, the federal courts introduce considerations of principle into debates that might otherwise be dominated by raw politics. By settling these disputes, the federal courts bring much-needed repose. The upshot is that federal courts might address concerns about the politicization of public law through rulings on the merits rather than through standing doctrine.

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289. See Davis, *supra* note 218, at 622 (“State law determines who may stand for a state in the first instance because states have the authority to structure their own governments under our system of federalism.”).

290. There might be cause to deny standing in order to protect *individual* rights rather than to protect the state’s rights. See, e.g., *id.* (“The primary constitutional limit on a state legislature’s discretion to delegate the power of state standing is the Due Process Clause.”).

291. See Bulman-Pozen, *supra* note 161, at 1081-82.

292. See *id.* at 1135.

Whatever the attractiveness of these responses, the concern that the new public standing will exacerbate political dysfunction is an important one. But this concern should not be addressed by restricting standing doctrine as it concerns states. While special solicitude for states may not be warranted because of the concern for the partisan politics of attorney general lawsuits, that does not mean special disfavor is due instead even when a state has suffered a paradigmatic Article III injury.

### 3. Private enforcement

A third concern, which sounds less in structural constitutional law than in due process, is that the new public standing will crowd out private enforcement of federal law.<sup>293</sup> States have financial relationships with any number of private parties, including employees, regulated parties, and recipients of government benefits. Consider, for example, the students, faculty, and visitors whose rights were at stake in the travel ban litigation.<sup>294</sup> Permitting states to sue the federal government to vindicate individual rights might mean that some rightsholders lose their day in court.<sup>295</sup>

There are several ways to address this concern, including third-party prudential standing doctrine and the law of preclusion.<sup>296</sup> So long as federal courts hold states to the same third-party standing requirements as private parties, there seems little reason to be especially concerned about the rights of third parties not before the court. To be sure, when a state sues in a *parens patriae* capacity—that is, one representing its citizens—the federal courts do not hold it to the typical requirements of third-party standing doctrine.<sup>297</sup> A state suing as a *parens patriae* representative need not have a close relationship with the third parties whose rights it is espousing.<sup>298</sup> Thus, *parens patriae* standing may pose a unique concern about crowding out private enforcement. Federal courts should, therefore, carefully distinguish between

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293. See Woolhandler, *Governmental Sovereignty Actions*, *supra* note 47, at 210 (“[P]reference for suits between individuals and government enhance[s] the status of individuals as rights-holders against government, particularly with respect to structural claims.”).

294. See *supra* Part I.B.1.b.

295. See Davis, *supra* note 218, at 631 (arguing that state standing to litigate the individual rights of state citizens “triggers concerns about the day-in-court right”).

296. For a discussion of preclusion and state standing, see *id.* at 643-44.

297. Compare Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982) (identifying the requirements for state *parens patriae* standing), with Singleton v. Wulff, 428 U.S. 106, 114 (1976) (identifying the requirements for third-party standing).

298. See Alfred L. Snapp, 458 U.S. at 607 (explaining that states need only “articulate an interest apart from the interests of particular private parties”).

parens patriae cases and cases such as *Washington v. Trump*, in which states have Article III standing based upon their financial injuries *and* third-party standing under the same principles that would apply to private litigants.<sup>299</sup>

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There are plausible conceptual, doctrinal, and functional arguments that states should be treated with special disfavor in the standing analysis when they sue the federal government based upon financial injuries. These arguments suggest that instead of treating the new public standing as they have treated private standing based upon financial injuries, federal courts should disfavor the new public standing the way they have disfavored citizen and taxpayer standing. Yet many of the concerns that the new public standing raises might be better addressed through more tailored, non-Article III solutions that take account of the reasons why we might favor states in the standing analysis.

#### B. The Arguments for Special Solitude

There are three arguments for affording special solicitude to a state that sues the federal government to redress a financial injury. One argument is doctrinal: The doctrine has distinguished state standing from private standing when states sue to vindicate their interest in protecting state law; it might be argued that special solicitude is no less warranted when states sue for financial injuries, particularly because states may suffer those injuries in a sovereign capacity. A second argument focuses on the political accountability of state officials: Special solicitude may be warranted because state attorneys general, unlike private parties, are politically accountable. Finally, a third argument focuses on holding federal executive officials accountable: State standing to sue the federal executive branch may be a necessary check on executive overreach, one sorely needed in an era where Congress is not an effective check on the President.

This Subpart identifies the limits of these arguments. It concludes that none of them make a decisive case for special solicitude in every case in which a state sues the federal government based upon a financial injury. Federal courts should therefore be circumspect when affording special solicitude to the new public standing.

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299. See 847 F.3d 1151, 1160-61, 1161 n.5 (9th Cir. 2017) (*per curiam*) (distinguishing between the States' third-party standing and their *parens patriae* standing).

1. Doctrine

The first point is doctrinal. When a state sues as proprietor to vindicate the sorts of interests that a private entity might have, the federal courts have treated the state like a private litigant for standing purposes. As the Supreme Court explained in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*: “[L]ike other associations and private parties, a State is bound to have a variety of proprietary interests. . . . And like other such proprietors it may at times need to pursue those interests in court.”<sup>300</sup>

The Ninth Circuit took this approach to proprietary interests in *Washington v. Trump*, one of the travel ban cases.<sup>301</sup> The state plaintiffs cited both proprietary and sovereign interests in suing to enjoin the travel ban.<sup>302</sup> The court of appeals distinguished proprietary from sovereign interests and held that the States’ proprietary interest in their public universities sufficed for Article III standing, without any need for special solicitude.<sup>303</sup> Traditional third-party standing principles permitted the States to sue to vindicate the constitutional rights of their faculty, students, and visitors denied entry under the ban.<sup>304</sup>

When a state sues the federal government as a sovereign to vindicate a financial injury, it might seem that special solicitude is necessarily warranted. In *Massachusetts v. EPA*, for example, the Court seemed to lump the State’s proprietary interest in its coastline with its sovereign interests in addressing climate change through state law and its quasi-sovereign interest in protecting its citizens’ health and well-being.<sup>305</sup> The Court’s decision might be read as affording states “special solicitude”<sup>306</sup> whenever they have demonstrated a financial injury *and* have a sovereign interest at stake. But the Court’s holding on the standing issue might also be read in traditional Article III terms as focusing on the State’s interests as an owner of coastal property.<sup>307</sup>

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300. 458 U.S. 592, 601-02 (1982).

301. See 847 F.3d at 1161 & n.5 (per curiam); see also *supra* text accompanying notes 70-75.

302. See *supra* text accompanying notes 70-75.

303. See *Washington*, 847 F.3d at 1161 n.5 (per curiam) (“The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States’ proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.”).

304. See *id.* at 1160.

305. See 549 U.S. 497, 518-23 (2007).

306. See *id.* at 520.

307. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 70 (“The third prong of the majority’s standing analysis, which is independent of the ‘special solicitude’ afforded to states, argues entirely within the *Lujan* framework that the state’s injuries as a landowner were sufficiently concrete and

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Whichever is the better reading of *Massachusetts v. EPA*, the Court's precedents do not as a whole afford states special solicitude whenever they sue the federal government.<sup>308</sup> In *Missouri v. Holland*, the Court held that a state has standing to bring a Tenth Amendment claim against the federal government to protect state law.<sup>309</sup> This holding explains, for example, why a state may have standing in an Article III court to defend its laws against preemption. But it does not necessarily extend to the new public standing. When a state sues because federal law has increased its costs of providing government services or has generally harmed its economy, the state is not necessarily suing to protect state law from federal preemption.<sup>310</sup> And other Supreme Court precedent suggests that a state's financial injuries do not suffice for federal jurisdiction when the injury arises from a federal law that indirectly reduces the state's tax revenue.<sup>311</sup> It is one thing, in other words, for the federal courts to grant special solicitude to a state bringing a Tenth Amendment claim to protect state law. It is another thing altogether for the federal courts to grant states special solicitude whenever they can demonstrate that federal law has indirectly impacted their economies or the costs of providing government services. Thus, the doctrine does not support special solicitude every time a state sues the federal government to vindicate a financial injury.

In some cases, however, a state's financial injury may be bound up with its interest in protecting state law. *Texas v. United States* was one of those cases.<sup>312</sup> As the Fifth Circuit saw it, Texas's "driver's-license rationale" for standing depended in part upon its interest in protecting laws regulating driving in the State.<sup>313</sup> The federal government argued that any injury Texas suffered as a result of DAPA was self-inflicted, because the State could simply change its law.<sup>314</sup> The Fifth Circuit rejected that argument, and in light of the "direct, substantial pressure directed" at Texas to alter its laws, the court extended

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were redressable by the requested relief . . ." (emphasis omitted) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992))).

308. *Cf. Grove*, *supra* note 52, at 854-55 ("I argue that States are entitled to 'special solicitude' in the standing analysis in only one context: when they seek to enforce or defend state law.").

309. *See* 252 U.S. 416, 431 (1920); *see also* *Grove*, *supra* note 52, at 865.

310. *See, e.g., Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 670, 672 (D.C. Cir. 1976) (holding, in a case that did not involve an allegation of federal preemption of a specific state law, that the State's allegation that its tax revenues were reduced due to the action of the federal government "embodie[d] a comprehensible harm to the economic interests of the state government" but was not "cognizable for purposes of standing").

311. *See Florida v. Mellon*, 273 U.S. 12, 17-18 (1927); *see also* *Walsh*, *supra* note 58, at 73-74.

312. *See* 809 F.3d 134, 152-53 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *see also supra* Part I.B.2.b.

313. *See Texas*, 809 F.3d at 150, 153.

314. *See id.* at 156-57.

special solicitude to the State.<sup>315</sup> But, the court of appeals cautioned, “pressure to change state law may not be enough—by itself—in other situations.”<sup>316</sup> Thus, special solicitude is not warranted whenever federal action affects the states as sovereigns.

## 2. Political accountability of state officials

The second argument for special solicitude focuses on the political accountability of state officials. Unlike private plaintiffs, state officials are accountable to the people either through elections or, if they are appointed, through the elected officials who appointed them.<sup>317</sup> It might be argued, therefore, that federal courts should afford them greater leeway to bring public actions against the federal government.<sup>318</sup> Given their political accountability, there is reason to assume state attorneys general will provide important and representative perspectives on the public interest issues at stake.<sup>319</sup> Perhaps they should receive special solicitude on this basis.

The Court’s standing decision in *Hollingsworth v. Perry* suggests this distinction between private plaintiffs and state officials is relevant to the Article III standing analysis.<sup>320</sup> That case concerned the constitutionality of California’s Proposition 8, which defined “marriage [as] between a man and a woman.”<sup>321</sup> Same-sex couples challenged Proposition 8 on federal constitutional grounds, and after a federal district court ruled that the law violated the Constitution, California’s Governor and Attorney General refused to defend it.<sup>322</sup> Proposition 8’s proponents, a group of private individuals,

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315. *See id.* at 154-55.

316. *Id.* at 155.

317. *See* Lemos & Young, *supra* note 280, at 113 (“The most obvious, and important, difference between state and private litigation is that states are democratic governments.”).

318. *See, e.g.,* Massey, *supra* note 51, at 253 (“The structure of federalism provides the best justification for allowing states to assert in federal court generalized injuries suffered in common by all its citizens that are attributable to claimed violations of public rights.”).

319. *See, e.g.,* Davis, *supra* note 38, at 28; Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 707 (2011).

320. *See* 133 S. Ct. 2652, 2664-65 (2013).

321. *See id.* at 2659 (quoting CAL. CONST. art. I, § 7.5).

322. *Id.* at 2660; *see also* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). On appeal from the district court’s decision in *Perry v. Schwarzenegger*, the Ninth Circuit certified a question regarding the Proposition 8 proponents’ standing to the California Supreme Court. *See Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011) (per curiam). After the California Supreme Court held that the proponents had standing, *see Perry v. Brown*, 265 P.3d 1002, 1165 (Cal. 2011), the Ninth Circuit affirmed the district court’s opinion, *see Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012), but the U.S. Supreme Court vacated in *Hollingsworth*, *see* 133 S. Ct. at 2668.

intervened to take up the law's defense.<sup>323</sup> The Court held, however, that Proposition 8's proponents lacked Article III standing to defend the law.<sup>324</sup> The Court drew a distinction between an elected or appointed public official, such as a state attorney general, and a private party that had proposed a ballot initiative. State attorneys general are agents accountable to the people, the Court reasoned, while private litigants are not.<sup>325</sup> Therefore, Proposition 8's proponents were not entitled to the special solicitude that a state attorney general might enjoy when litigating on behalf of the state.<sup>326</sup> And without special solicitude, the Proposition's proponents lacked Article III standing because they could not show a concrete and particularized injury to their individual interests.<sup>327</sup>

On that reasoning, political accountability is a value to be considered in the standing analysis, one that might distinguish private plaintiffs from state officials in public actions. The comparatively greater accountability of state officials might be a reason to afford them special solicitude in the standing analysis.<sup>328</sup>

The analysis cannot stop, however, with a simple comparison between the accountability of state actors and that of private public interest organizations, because, as sketched in Part II above, the two are intertwined in the new public standing. Particularly after *Massachusetts v. EPA*, which may be read to suggest that states are due "special solicitude" when they sue in any of their varied capacities, state litigation has become a vehicle through which public officials, political parties, and public interest groups mobilize in national contests about public law.<sup>329</sup> This pattern confounds typical stories about political accountability in some interesting ways.

Perhaps the most obvious way in which the typical stories are upturned involves accountability in the sense of local responsiveness. The idea of accountability here is that the more "local" an institution is, the more accountable it is to the people; this comparatively greater accountability supports devolution of authority from the "national" toward the "local."<sup>330</sup> This

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323. See *Hollingsworth*, 133 S. Ct. at 2660.

324. See *id.* at 2668.

325. See *id.* at 2666-67.

326. See *id.* at 2664-65.

327. See *id.* at 2663-64.

328. See, e.g., Massey, *supra* note 51, at 284 (arguing that states are due special solicitude in standing analysis because state officials "are constrained by substantial fetters of political accountability").

329. See *supra* Part II.A.

330. Cf. Edward Rubin, Essay, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005) (noting that the term "accountability" is used in the literature to refer to the ideas that "local institutions are more accountable to

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idea is a familiar one about federalism, and it might support special solicitude for states in standing analysis. This idea is also one that supports devolution of authority to private parties.<sup>331</sup>

The new public standing does not fit neatly within this sort of story about accountability. The story of the new public standing is a story of partisan federalism in which the federal structure creates spaces for partisans who are out of power in Washington to dissent from the policies adopted by the federal government.<sup>332</sup> We might think of this story as one about “local” accountability, one in which states stand for their local constituents’ right to decide matters at the local level. But that story is a hard one to tell, particularly with respect to many examples of the new public standing, which often involve state officials bringing public actions that call upon the federal courts to decide matters of national controversy. Is this local accountability, or national politics through local offices? To the extent that the argument for special solicitude depends upon this sense of accountability as local responsiveness, it tends to break down upon inspection.

On the other hand—and this is the more interesting point—we might think the new public standing is unique because it combines devolution to state officials *and* to private parties. In restricting taxpayer and citizen standing to bring public actions, the Burger Court adverted to a concern about narrow special interests capturing the courts.<sup>333</sup> This concern is mitigated, perhaps, when public interest organizations work through and with state officials to bring public actions. Perhaps the new public standing is due special solicitude because it involves a kind of double devolution of authority from Washington, one that empowers states and private parties together to prevent domination by the party in control of the federal government.

This sort of argument begins to invoke a second idea about accountability, one that bears a much closer resemblance to the notion of accountability that the Court seemed concerned about in *Hollingsworth*. This idea distinguishes democratically elected officials by the fact of their election.<sup>334</sup> We might think that state officials who sue in the name of their states are due special solicitude because they are democratically elected, or at least appointed by someone who is elected. There are a few versions of this argument.

For one, we might think that state officials are systematically more likely to make litigation decisions based upon the public interest rather than narrow

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the people or that people should be given the opportunity to be accountable for themselves”).

331. *See id.* at 2074.

332. *See supra* Part II.B.

333. *See, e.g.,* *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972).

334. *See* Rubin, *supra* note 330, at 2073, 2075-76.

special interests.<sup>335</sup> The Burger Court's concern about special interest litigation might have less bite when it comes to state standing to sue. Private organizations may be accountable to particular citizens (say, those who donate money to fund them). But state officials are accountable to the general public. This democratic accountability might itself justify special solicitude as a matter of principle, even if we do not think that state officials are systematically better stewards of the public interest in practice. In evaluating whether to bring a suit, a state official may be less likely than taxpayers or citizens to focus solely on special interests or the "mission" of the litigation. Instead, they may consider a wider range of factors bearing upon the public interest.<sup>336</sup>

There are several reasons why we might think that state officials would be better stewards of the public interest than the decisionmakers in private organizations. First, interbranch political processes may discipline state officials' decisionmaking and provide incentives for them to focus on the public interest when deciding whether and how to litigate a case. Second, and relatedly, internal administrative processes—internal rules governing case selection, and so on—may also be a meaningful check on state officials' litigation decisions. Third, and most obviously, voters may hold state officials accountable for these decisions through the democratic process.<sup>337</sup>

While compelling, these arguments for special solicitude are vulnerable to important objections that undermine the notion that special solicitude is due in every case in which a state sues the federal government. In practice, it is not clear how well the mechanisms of political accountability will work when it comes to litigation decisions made by a state attorney general or solicitor general. For one, "although one might hope that [attorneys general] consider the interests of *all* citizens, [their] incentives to do so are, at the very least, questionable."<sup>338</sup> Moreover, it is doubtful that any one litigation decision by a state attorney general or solicitor general will be salient for voters.<sup>339</sup> And because of that doubt, it is not clear that electoral mechanisms exert a powerful disciplining force on state officials when they make litigation decisions. Nor is it clear that state attorneys general or solicitors general are subject to robust external constraints from other branches of state government, particularly

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335. See Lemos, *supra* note 319, at 720-23 (discussing the incentives and expertise of state attorneys general).

336. See Lemos & Young, *supra* note 280, at 114 (arguing that state attorneys general are "accountable and responsive to broader interests than the subset of their citizens directly affected by a particular lawsuit").

337. See Massey, *supra* note 51, at 274 & n.103 (distinguishing state attorneys general from private litigants insofar as the former "are politically constrained").

338. Lemos & Young, *supra* note 280, at 114.

339. See *id.* (noting that "high-profile public lawsuits" sometimes become salient in the political campaigns of state attorneys general).

when control of those branches is unified under one party.<sup>340</sup> And when control is split, a state attorney general might take litigation positions that depart from the policy preferences of other state actors, and thus it can be difficult even to parse what it would mean to grant the “state” special solicitude. In any case, when a state attorney general reports his typical workday by saying, “I go into the office, I sue the federal government and I go home,”<sup>341</sup> there is reason to wonder whether stewardship of the public interest is at play—and, if it is, whether the state is systematically a better steward of that interest than a public interest organization would be.

### 3. Holding the federal executive branch accountable

There is, however, a third argument for special solicitude that corresponds quite well to the notion that a state attorney general’s job is to go into the office, sue the President, and go home. The new public standing empowers state executives to check the federal government. We might think that state standing is an important, even necessary, way to hold the federal executive branch accountable in court.

In theory, Congress might play the primary role in checking federal executive authority. But Congress is a gridlocked institution in times of divided government, and one too often willing to go along with the executive branch in times of unified control.<sup>342</sup> State attorneys general do not have Congress’s tools of oversight, but they may have standing to call upon the federal courts to enforce federal law against the executive.<sup>343</sup> As an institutional matter, state attorneys general may play this role well. At the very least, there is no reason to assume that they will be systematically less capable than private litigants in presenting cases before the federal courts.

One way to understand the flurry of state litigation against the Trump Administration, for example, is that it represents a necessary check on

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340. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006) (arguing, with respect to the federal government, that “the degree and kind of competition between the legislative and executive branches vary significantly” depending on whether control of the political branches is “divided or unified by political party”).

341. See Ulloa & Mason, *supra* note 136.

342. See Levinson & Pildes, *supra* note 340, at 2315; see also Coenen & Davis, *supra* note 145, at 836-38.

343. See Massey, *supra* note 51, at 284 (“A foundational element of federalism is the diffusion of power between states and the federal government, with the prospect of the states acting as a check upon unlawful or unwarranted federal power. Vesting the states with limited authority to challenge the validity of federal action that harms everyone (but no one in a sufficiently personal fashion to support individual standing) buttresses that key element of federalism.”).

presidential power in a time where a compliant Congress has failed in its institutional role. California Attorney General Xavier Becerra, for example, has sued the federal government nearly forty times, and his lawsuits have focused on enforcing statutory and constitutional law against the Trump Administration.<sup>344</sup>

*Massachusetts v. EPA* can be understood in these terms. The Commonwealth of Massachusetts sued to hold the Environmental Protection Agency to constraints imposed by Congress in the Clean Air Act.<sup>345</sup> The Court extended “special solicitude” to the Commonwealth, permitting it to sue based upon a financial injury to its coastline while relaxing the causation and redressability elements of the Article III standing analysis.<sup>346</sup> By extending special solicitude to the Commonwealth, the Court reached the merits and checked the federal government.<sup>347</sup>

Special solicitude on this basis does not depend upon a state’s independence from the federal government. Instead, special solicitude springs from the state’s integration in national policymaking.<sup>348</sup> Thus in *Massachusetts v. EPA*, in standing upon the injury to its receding coastline, the Commonwealth of Massachusetts stood in for Congress as a check on the executive branch.

It is, however, the very integration of states within federal policymaking that suggests that something more than a financial injury, even one suffered in a state’s sovereign or quasi-sovereign capacity, should be necessary to justify special solicitude for state standing. States may suffer financial injuries from federal administrative action in any of several capacities, and affording them special solicitude whenever they sue the federal government based upon such injuries would be unwarranted as a matter of precedent and unwise as a matter of judicial policy. Even though the arguments for special disfavor are not decisive, they help show that federal courts should be circumspect in invoking special solicitude when assessing whether a state may sue the federal government based upon a financial injury.

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344. See Patrick McGreevy, *California Has Sued the Trump Administration 38 Times. Here’s a Look at the Legal Challenges*, L.A. TIMES (July 22, 2018, 12:05 AM), <https://perma.cc/6XHP-LTBM>.

345. See 549 U.S. 497, 505 (2007); see also Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

346. See *Massachusetts*, 549 U.S. at 520, 522-23; *id.* at 536 (Roberts, C.J., dissenting).

347. See *id.* at 534-35 (majority opinion).

348. See Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and “The New Process Federalism,”* 105 CALIF. L. REV. 1739, 1740 (2017) (“Given the deep integration of state and federal actors along administrative and partisan lines, states play a role in calibrating the federal separation of powers and shaping the execution of federal law.”).

## V. A Framework for the New Public Standing

This final Part sketches a framework for thinking about the new public standing. It spells out the doctrinal implications of the normative arguments in Part IV. And, as a positive matter, it identifies some likely pressure points in the doctrine, raising questions about how an increasingly conservative judiciary might develop the law of the new public standing.

### A. Constitutional Standing

#### 1. Private standing to sue based upon financial injuries

The doctrine of private standing typically assumes “without discussion” that financial injuries suffice,<sup>349</sup> even if the amount of financial loss is de minimis and that loss indirectly results from the defendant’s actions.<sup>350</sup> “[E]ven an ‘identifiable trifle,’” in other words, “is enough to confer standing.”<sup>351</sup> The loss of this trifle need not be the direct result of the defendant’s actions and, where a threat of future loss is concerned, it need not be clear that the loss will occur. In some cases where private parties have challenged federal administrative action, the Supreme Court has reasoned that it is enough that the indirect financial loss “might” occur.<sup>352</sup> The D.C. Circuit has adopted a more demanding formulation of the causation and redressability elements of the Article III standing analysis, holding that where a plaintiff alleges the threat of future financial loss from government action, it must show a “substantial probability” that the loss will occur.<sup>353</sup>

To treat a state with special solicitude in the standing analysis would be to relax these constitutional requirements when a state alleges a financial injury. *Arpaio v. Obama*<sup>354</sup> illustrates this possibility and its potential problems. In that case, Sheriff Joe Arpaio of Maricopa County, Arizona, sued the Obama

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349. See *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (Alito, J.).

350. See *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5-6 (D.C. Cir. 2017) (Kavanaugh, J.); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1379 (8th Cir. 1997) (“[I]ndirect economic injury constitutes an injury in fact.”).

351. *Adams v. Watson*, 10 F.3d 915, 924 (1st Cir. 1993); see also *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (“The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.” (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968))).

352. See, e.g., *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970).

353. See *Carpenters Indus. Council*, 854 F.3d at 5; cf. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409-10, 414 & n.5 (2013) (noting that an alleged injury must be “certainly impending” rather than “premised on a speculative chain of possibilities”).

354. 797 F.3d 11 (D.C. Cir. 2015).



Administration to enjoin its deferred action policies, under which the Department of Homeland Security was deferring enforcement of “low-priority removals” of individuals illegally in the United States.<sup>355</sup> Arpaio, whose office had a long history of “costly legal payouts” arising from its illegal racial profiling of Latinos,<sup>356</sup> premised his standing on the allegation that the Obama Administration’s enforcement policy would increase the number of undocumented individuals residing in Maricopa County, which in turn would increase the financial costs of law enforcement for the County.<sup>357</sup> The D.C. Circuit held that such financial costs are injuries in fact for standing purposes but that Arpaio had not pled causation and redressability with the specificity necessary to satisfy Article III.<sup>358</sup> The Sheriff’s racially discriminatory assumptions about the behavior of immigrants did not suffice for standing purposes.<sup>359</sup>

Judge Brown wrote separately, however, to criticize what she called a “modern obsession with a myopic and constrained notion of standing.”<sup>360</sup> Arpaio’s theory of standing, she suggested, would have found support in *Massachusetts v. EPA*, but for the facts that Arpaio was a county-level, not a state-level, official, and that the Sheriff, unlike Massachusetts in its suit against the EPA, did not “hire[] experts and introduce[] detailed information” on causation.<sup>361</sup> As Judge Brown put it, “[j]ust as EPA’s inaction harmed Massachusetts’ shores, inaction on immigration is said to harm Sheriff Arpaio’s streets,” and under the principle of special solicitude thus understood, “any contribution of any size to a cognizable injury’ seems to be ‘sufficient for causation, and any step, no matter how small,’ seems to be ‘sufficient to provide the necessary redress.’”<sup>362</sup>

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355. *See id.* at 14.

356. *See, e.g.,* Yvonne Wingett Sanchez, *At 86, Joe Arpaio’s Senate Run Worries GOP Voters. His Response: Age Doesn’t Mean Anything*, AZCENTRAL (updated July 6, 2018, 4:07 PM MT), <https://perma.cc/BR4F-973R>.

357. *See Arpaio*, 797 F.3d at 19-20; Brief of Plaintiff-Appellant for Reversal of the District Court’s Order & Request for Oral Argument at 35-38, *Arpaio*, 797 F.3d 11 (No. 14-5325), 2015 WL 394087.

358. *See Arpaio*, 797 F.3d at 19-22 (concluding that Arpaio’s alleged injuries were “indeed concrete” but that “[a]ny injury Sheriff Arpaio suffers from the financial burdens . . . would not be fairly traceable” to the Obama Administration’s actions).

359. *See id.* at 20 (“Even were we to ignore the disconnect between the challenged policies and the increased law enforcement expenditures that Sheriff Arpaio predicts, his reliance on the anticipated action of unrelated third parties makes it considerably harder to show the causation required to support standing.”).

360. *Id.* at 25 (Brown, J., concurring).

361. *See id.* at 27-28.

362. *Id.* at 27 (quoting Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1078 (2009)).

Whatever else it stands for, *Massachusetts v. EPA* should not be read that broadly. If any amount of financial loss to a state were to suffice to give it standing to sue the federal government, then the new public standing may well come to dominate public law litigation in the federal courts. And if any chain of causation and redressability were to suffice, that problem would be compounded.

## 2. A state's proprietary losses

State standing to sue the federal government for a financial loss suffered in a proprietary capacity does not, however, present the same problem of limitless state standing. Where, as in *District of Columbia v. Trump*, a state alleges the same sort of financial loss that a private entity might allege, there is no need or warrant for special solicitude.<sup>363</sup> When a private litigant claims a “wallet’ injury,”<sup>364</sup> even a trifling loss may suffice.<sup>365</sup> Where a state alleges a wallet injury as a competitor in the marketplace, it should not be afforded special solicitude in the standing analysis. The state’s unique governance and representative capacities are not at stake when it premises standing upon a competitive injury, and there seems to be no reason to allow states to call upon the federal courts to redress competitive injuries when private competitors in a market could not. Federal courts should therefore resist any impulse to relax the causation or redressability requirements for states that sue based upon financial losses suffered in a proprietary capacity.

## 3. A state's sovereign losses

When a state sues for financial losses suffered in its sovereign capacity, something more than a trifling loss arising from federal action should be necessary for constitutional standing. Recent cases have begun to develop a distinction between substantial injuries to a state’s fisc and trifling ones. A substantial financial loss is one that will have a demonstrable and non-de minimis impact on the state’s ability to manage its budget and provide government services. Such a loss is not “purely speculative,” and is more than

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363. See 291 F. Supp. 3d 725, 743-44 (D. Md. 2018), *argued*, No. 18-2488 (4th Cir. Mar. 19, 2019); *supra* Part I.B.1.a.

364. See Lee & Ellis, *supra* note 22, at 178-79 (“[T]he Court has said that ‘pocketbook’ or ‘wallet’ injury always qualifies, but that mere ‘ideological’ or ‘psychic’ harm never does.”).

365. See *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) (Kavanaugh, J.) (“A dollar of economic harm is still an injury-in-fact for standing purposes.”).

“remote and indirect.”<sup>366</sup> While this distinction leaves considerable room for argument, it would rightly limit states from coming into federal court whenever federal action has some potential impact on the state fisc.

In *Pennsylvania v. Trump*, for example, a federal district court reasoned that a state may have standing to challenge federal action based upon a substantial “injury to its fiscs.”<sup>367</sup> The Commonwealth of Pennsylvania challenged the Trump Administration’s expansion of a religious exemption and creation of a moral exemption from the Affordable Care Act’s requirement that employer-sponsored health care plans provide no-cost contraceptive coverage.<sup>368</sup> The Commonwealth alleged that these exemptions would cause it injury in its capacity as a provider of government services.<sup>369</sup> In particular, women whose employers availed themselves of the exemptions would turn to state-funded sources of contraceptive healthcare.<sup>370</sup> The Commonwealth would, in turn, have to spend more on this government service.<sup>371</sup> The increased expenditures would be much more than de minimis: The Commonwealth argued that the Administration’s new rules would cause it to “suffer direct financial harm,”<sup>372</sup> and the district court concluded that the alleged “major effect on the states’ fiscs” sufficed for the injury-in-fact requirement.<sup>373</sup> Causation and redressability, moreover, were more than conceivable; this was not a case where the plaintiff had alleged nothing more than the possibility that the defendant’s action “might” cause a financial loss.<sup>374</sup> Rather, the financial loss

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366. See *Florida v. Mellon*, 273 U.S. 12, 18 (1927) (holding that the State had not suffered a judicially cognizable injury where the “anticipated result” of the challenged federal action was “purely speculative, and, at most, only remote and indirect”).

367. See 281 F. Supp. 3d 553, 567-69 (E.D. Pa. 2017), *argued*, No. 18-1253 (3d Cir. May 21, 2019).

368. See *id.* at 560-64; see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (to be codified in scattered sections of the Code of Federal Regulations); Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (to be codified in scattered sections of the Code of Federal Regulations).

369. See *Pennsylvania*, 281 F. Supp. 3d at 567.

370. *Id.*

371. See *id.*

372. See Plaintiff’s Opposition to Defendants’ Motion to Dismiss at 2, *Pennsylvania*, 281 F. Supp. 3d 553 (No. 17-4540), 2017 WL 10620329.

373. See *Pennsylvania*, 281 F. Supp. 3d at 569 & n.5.

374. *Cf., e.g., Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970) (holding that the plaintiffs had standing because they did “not only allege that [the challenged action] *might* entail some future loss of profits” (emphasis added)).

was “direct” and “imminent,” as “confirm[ed]” by several expert affidavits concluding that “women . . . will come to rely more on State-funded sources” “once employers take advantage of the [n]ew [exemptions].”<sup>375</sup>

The notion that a drain on a state’s resources may give rise to standing has an analog in the law of private standing. In *Havens Realty Corp. v. Coleman*, the Supreme Court held that a fair housing organization had standing to challenge a realty company’s racial steering practices because those practices “perceptibly impaired [its] ability to provide counseling and referral services for low- and moderate-income homeseekers,” causing a “drain on the organization’s resources.”<sup>376</sup> Lower courts have extended *Havens* to hold that “an organization has standing where it is forced to expend resources to prevent some adverse or harmful consequence on a well-defined and particularized class of individuals.”<sup>377</sup> Similarly, a state might suffer a judicially cognizable injury when it is forced to expend additional resources to serve its residents.

This sort of standing, however, is a pressure point in the doctrine. *Havens* has been called into question by federal courts that have read it in cramped ways and reasoned that an organization’s decision about how to spend its resources may be “insufficient to establish an injury in fact.”<sup>378</sup> The concern here is to limit federal jurisdiction based upon self-inflicted injuries; indeed, in *Pennsylvania v. Trump*, the Administration argued that the “Commonwealth’s fiscal injury is ‘self-inflicted.’”<sup>379</sup>

The Supreme Court has similarly reasoned that “self-inflicted” injuries may not suffice for constitutional standing. In *Pennsylvania v. New Jersey*, for example, the Court held that Pennsylvania could not sue New Jersey under the Court’s original jurisdiction based upon an allegation that New Jersey had diverted taxes from Pennsylvania’s treasury.<sup>380</sup> The Court held that Pennsylvania’s injury was “self-inflicted” because Pennsylvania had voluntarily decided to give tax credits to its residents who paid taxes in New Jersey.<sup>381</sup> More recently, in *Clapper v. Amnesty International USA*, attorneys, human rights organizations, labor organizations, and media organizations sued to challenge a provision of the Foreign Intelligence Surveillance Act, alleging that they had sensitive communications with individuals who were likely targets of

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375. See *Pennsylvania*, 281 F. Supp. 3d at 567-68, 582.

376. See 455 U.S. 363, 366-68, 379 (1982).

377. See *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 190 (S.D.N.Y. 2017), *argued*, No. 18-474 (2d Cir. Oct. 30, 2018).

378. See, e.g., *id.* at 191.

379. See 281 F. Supp. 3d at 568.

380. See 426 U.S. 660, 663, 666 (1976) (per curiam).

381. See *id.* at 662-64.

surveillance under that statute.<sup>382</sup> They argued standing on two bases, the second of which pointed to the costs they had to undertake to protect the confidentiality of their sensitive communications in light of the allegedly unconstitutional surveillance.<sup>383</sup> At least some of these costs were monetizable financial losses, such as the costs of travel so that the plaintiffs could have in-person conversations and avoid surveillance.<sup>384</sup> Justice Alito's opinion for the Court did not view this sort of financial loss as sufficient for standing.<sup>385</sup> Instead, he concluded that the plaintiffs' costs were "self-inflicted" injuries that did not suffice for standing purposes because the plaintiffs did not face "a threat of certainly impending" surveillance.<sup>386</sup>

Thus far, federal courts have tended to reject arguments that a state's injury is self-inflicted when the state premises its standing upon an increased cost in providing government services.<sup>387</sup> And for good reason: *Pennsylvania v. New Jersey*, which dismissed a state's injury as self-inflicted, concerned the Supreme Court's original jurisdiction,<sup>388</sup> not the jurisdiction of the federal district courts, and "[t]he institutional limits on the Court's ability to accommodate suits accentuates the need for more restrictive access to the original docket."<sup>389</sup> The doctrine of self-inflicted injury from *Pennsylvania v. New Jersey* may therefore have a smaller role to play in limiting access to the lower federal courts.

A state has a judicially cognizable sovereign interest in its "power to create and enforce a legal code."<sup>390</sup> It is this interest that gives a state standing to defend its laws in federal court.<sup>391</sup> It is also this interest that gives a state standing to sue the federal government "to protect state law from interference by federal agencies."<sup>392</sup> And, in cases like *Pennsylvania v. Trump*, it is this

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382. See 568 U.S. 398, 401, 406 (2013); see also Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1885c (2017)).

383. See *Clapper*, 568 U.S. at 401-02.

384. See *id.* at 415.

385. *But cf.* *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (Alito, J.) (explaining that "[m]onetary harm is a classic form of injury-in-fact" and "is often assumed without discussion").

386. See *Clapper*, 568 U.S. at 417-18.

387. See, e.g., *Texas v. United States*, 809 F.3d 134, 157-59 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 568 (E.D. Pa. 2017), *argued*, No. 18-1253 (3d Cir. May 21, 2019).

388. See 426 U.S. 660, 661 (1976) (per curiam).

389. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 611 (1982) (Brennan, J., concurring).

390. See *id.* at 601 (majority opinion).

391. See, e.g., *Davis*, *supra* note 218, at 639-40 (discussing defendant standing in the context of state standing).

392. See *Grove*, *supra* note 52, at 873.

interest that supports special solicitude when the federal government argues that a state's financial loss is self-inflicted and therefore insufficient to support standing. Where federal law forces a state either to spend money on particular government services or to change its laws, the state has suffered an Article III injury in fact based upon the financial harm and the "special solicitude" afforded its sovereign interest in making its own laws.

It is not hard to imagine, however, that the self-inflicted injury analysis may become a way for federal courts to distinguish between favored and disfavored state suits against the federal government. A court might distinguish between a case like *Texas v. United States*, where Texas's alleged injury arose from its own requirement that every driver obtain a license and its subsidization of those licenses,<sup>393</sup> from a case like *Pennsylvania v. Trump*, where Pennsylvania's alleged injury arose from its subsidization of contraceptives for women who chose to obtain them.<sup>394</sup> The first involved the creation and enforcement of a legal code in a way the second did not, or so a court might reason.<sup>395</sup> But in both cases, there was a substantial and direct financial injury resulting from the challenged federal action, and avoiding that injury would have required altering state law. State standing premised upon this basis should suffice for Article III.

As a constitutional matter, in short, a state should have standing to bring a public action when the federal government has taken actions that directly result in substantial harm to the state's fisc.<sup>396</sup> That may occur when the federal government withholds (or threatens to withhold) money due to the state under a federal grant. It may also occur when the federal government takes actions that significantly increase the state's costs of providing government services required by state law. In either case, a state's injury is not insufficient for Article III standing simply because the state could choose to change its laws and thereby avoid the financial loss.

## B. Prudential Standing

Some of the examples of the new public standing raise questions of prudential standing, particularly where a state seeks to represent its residents

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393. See 809 F.3d 134, 153 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

394. See 281 F. Supp. 3d 553, 564, 566 (E.D. Pa. 2017), *argued*, No. 18-1253 (3d Cir. May 21, 2019).

395. *Cf. id.* at 568 (stating, somewhat inexplicably, that "the injunction that the Commonwealth seeks . . . is untethered to any state law that the Commonwealth itself has enacted").

396. In addition, when a state sues in a proprietary capacity to vindicate a financial injury, it should be treated as any private entity would be treated. See *supra* Part V.A.2.

in general or some specific subset of them. A private litigant with Article III standing in a personal capacity may nevertheless lack prudential standing to sue to vindicate a third party's rights.<sup>397</sup> This prudential limitation also may be at stake in the new public standing.

### 1. Third-party standing

In the travel ban litigation, for instance, the States argued that they had suffered financial losses in their proprietary capacities and that they had third-party standing to raise the individual rights of the faculty, staff, and students in their public universities.<sup>398</sup> In *Washington v. Trump*, the Ninth Circuit held that the States could sue based upon proprietary injuries and third-party standing.<sup>399</sup> Just as a private university would be harmed if its students and faculty could not enter the country to study and teach, the court reasoned, so too is a public university harmed when its faculty and students cannot enter the country.<sup>400</sup> Applying traditional third-party standing principles, the court permitted the States to sue to vindicate the constitutional rights of their faculty, students, and visitors.<sup>401</sup>

When a state claims standing on the same terms as a private litigant might, the doctrinal question is whether the state is due special disfavor in the standing analysis. As argued in Part IV above, the concerns that might justify special disfavor are real but not decisive. If the federal courts hold states to the same third-party standing requirements as private parties, then state standing to litigate another's rights would not present any unique concerns not present when a private party invokes third-party standing. And when it comes to politicizing the judiciary, the question in cases like *Washington v. Trump* is whether state standing is uniquely likely to lead to that troubling result. The answer to that question, I think, is "no," particularly in cases like *Washington v. Trump*, where there are also private litigants with standing to raise the same issues.

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397. See, e.g., *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004).

398. See *Washington v. Trump*, 847 F.3d 1151, 1159-60 (9th Cir. 2017) (per curiam).

399. See *id.* at 1160-61; *supra* text accompanying notes 74-75.

400. See *Washington*, 847 F.3d at 1160 ("[S]chools have been permitted to assert the rights of their students.").

401. See *id.* ("Under the 'third party standing' doctrine, these injuries to the state universities give the States standing to assert the rights of the students, scholars, and faculty affected by the Executive Order.").

## 2. *Parens patriae* standing

This Part has yet to discuss the fourth way in which a state may claim standing to sue the federal government based upon a financial injury: A state may claim standing based upon a general harm to its economy. It might argue that such a harm indirectly leads to a loss of revenue or an increase in the costs of government services. Based upon the analysis in the previous Subpart, a federal court should be wary of state standing premised upon such an allegation.<sup>402</sup> But a state might also argue that it has *parens patriae* standing to protect the “economic welfare” of its residents.<sup>403</sup> In *Georgia v. Pennsylvania Railroad Co.*, for example, the State of Georgia was allowed to bring suit against twenty railroad companies under the federal antitrust laws based upon allegations that the companies’ antitrust violations had “seriously” harmed the State’s economy.<sup>404</sup>

*Parens patriae* standing is not limitless, however, particularly when a state sues the federal government. In 1923, the Supreme Court held in *Massachusetts v. Mellon* that Massachusetts could not challenge a federal statute, neither to vindicate its sovereign interests under the Tenth Amendment nor to assert the rights of its citizens.<sup>405</sup> The Commonwealth challenged a federal law that created a program “to reduce maternal and infant mortality.”<sup>406</sup> The Court held that the Commonwealth lacked standing to sue. The Court noted that while a state may sometimes sue to vindicate the interests of its citizens, “it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.”<sup>407</sup> As the Court saw it, the United States, not the states, “represents [the citizenry] as *parens patriae*” when it comes to matters of national concern.<sup>408</sup>

Subsequent cases have made clear that *Mellon* is not an absolute bar to state litigation against the federal government.<sup>409</sup> The doctrinal question is whether *Mellon* is a constitutional or prudential bar on state standing. In an opinion for a panel of the D.C. Circuit, then-Judge Scalia concluded that it was a prudential

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402. See, e.g., *Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 679 (D.C. Cir. 1976) (concluding that Pennsylvania lacked standing to vindicate an injury to “its economy as a whole”).

403. See, e.g., *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 745–46 (D. Md. 2018), argued, No. 18-2488 (4th Cir. Mar. 19, 2019).

404. See 324 U.S. 439, 443, 447, 450 (1945), *superseded in other part by statute*, Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948).

405. See 262 U.S. 447, 480, 482, 485 (1923).

406. *Id.* at 479; see also Maternity Act, Pub. L. No. 67-97, 42 Stat. 224 (1921) (repealed 1927).

407. *Mellon*, 262 U.S. at 485–86.

408. *Id.*

409. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 520–21, 520 n.17 (2007).



bar, one “that the courts must dispense with if Congress so provides.”<sup>410</sup> As he reasoned, “[t]he prerogative of the federal government to represent the interests of its citizens, unlike the prerogatives of the three separate federal branches to perform their constitutionally assigned roles, is not endangered so long as Congress has the power of conferring or withholding standing.”<sup>411</sup> On that understanding, Congress may authorize a state to sue the federal government as *parens patriae*. Thus, when a state brings such an action, the first question is whether Congress has expressly authorized it; where Congress has not, federal courts should not lightly imply such authorization.

State standing to sue the federal government based upon general harms to a state’s economy seems to be the sort of sweeping authorization to sue that should require input from Congress.<sup>412</sup> When a state alleges a general harm to its economy as the basis for standing to sue the federal government, federal courts should be circumspect about throwing the courthouse doors open.

### C. The Link Between the New Public Standing and the Nationwide Injunction

Much of the concern about the new public standing involves the fact that states may point to financial injuries to bring politically controversial public actions while asking for nationwide relief in a preliminary posture. Critics of nationwide injunctions have trained their criticisms on examples of the new public standing.<sup>413</sup> They argue that such relief invites forum shopping by state attorneys general and may interfere with sound administration and decisionmaking of the federal courts.<sup>414</sup>

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410. See *Md. People’s Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985) (Scalia, J.).

411. *Id.* Elsewhere I have argued that the federal courts should not lightly conclude that Congress has authorized the states to represent their citizens as *parens patriae*, see Davis, *supra* note 38, at 68-72, but like then-Judge Scalia, I think the *Mellon* bar is (primarily) prudential. Then-Judge Scalia did leave open the possibility that the *Mellon* bar has a constitutional component, suggesting that Congress might be prohibited from altering the traditional *parens patriae* criteria or from allowing a state to sue when none of its residents have suffered a concrete injury. See *Md. People’s Counsel*, 760 F.2d at 322.

412. Some such suits may not suffice to make out constitutional standing, particularly where the state cannot show that any of its residents have suffered a concrete injury. Cf. *Md. People’s Counsel*, 760 F.2d at 322 (suggesting that Congress’s power to abrogate the *Mellon* bar may depend on the fact that “the citizen interests represented [by the state] are concrete interests which the citizens would have standing to protect in the courts themselves”).

413. See, e.g., Bray, *supra* note 172, at 418-19.

414. See, e.g., *id.* at 460-62.

Injunctions against federal defendants, critics such as Sam Bray have argued, should be no broader than necessary to protect the plaintiffs.<sup>415</sup> In *Texas v. United States*, for example, the injunction might have been no broader than necessary to ensure that Texas did not suffer the financial loss from subsidizing driver's licenses for DAPA recipients.<sup>416</sup> That could have been accomplished without enjoining DAPA nationwide.

Defenders of nationwide injunctions against federal defendants emphasize the prevention of irreparable harm and the limits of other forms of aggregate relief.<sup>417</sup> “[T]he Chancellor would be proud,” Suzette Malveaux has argued, to see nationwide injunctions like those in the travel ban cases, where equity—historically the domain of the English Chancellor—was invoked to protect vulnerable individuals by vindicating the rule of law.<sup>418</sup> This is an area, in other words, where we should entrust some discretion to judges.<sup>419</sup>

While this is not the place to explore fully the nationwide injunction, it is worth considering how the remedial scope of the new public standing is a pressure point on which the federal courts have already begun to push. In one of the travel ban cases, for example, the Supreme Court concluded that the “concrete burdens” on the individual plaintiffs and the State of Hawai‘i did not justify an injunction barring enforcement of the ban against foreign nationals who had no connection with the United States.<sup>420</sup> This is the sort of remedial tinkering with the new public standing that we may expect to see even as the Roberts Court leaves the federal courthouse doors open to states that have suffered financial losses from federal action.

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415. See *id.* at 469 (“Let’s begin with a simple rule: injunctions should not protect nonparties.”).

416. See *id.* at 470; see also *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016); *supra* Part II.B.1.b.

417. See, e.g., Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 51 (2017) (responding to Bray, *supra* note 172) (arguing that “preventing irreparable harm” is a “core purpose[]” of nationwide injunctions); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 58-60 (2017) (responding to Bray, *supra* note 172) (arguing that “[a]ggregate litigation is being undermined” and suggesting that the nationwide injunction can fill this enforcement gap).

418. See Malveaux, *supra* note 417, at 58, 63-64.

419. See *id.* at 56.

420. See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087-88 (2017) (per curiam).

### **Conclusion**

Today, federal courts regularly adjudicate politically controversial questions of public law. The new public standing empowers states to raise such questions. The most compelling justification for affording states a special role in bringing public actions against the federal government lies with the democratic bona fides of state attorneys general. And the most compelling concern is that state lawsuits will exacerbate the corrosive effects of hyperpartisan politics both inside and outside the federal judiciary.

Current standing law is not well calibrated to address the countervailing concerns that the new public standing raises. Standing doctrine distinguishes “ideological” litigants who lack standing to sue from those who have suffered a financial injury that suffices for standing purposes. Yet litigants who have suffered financial injuries may be ideological litigants, as the new public standing makes clear.

Thus, close examination of the new public standing might call into question not only the role that special solicitude (or special disfavor) should play in state standing analysis, but also the role that the distinction between financial and ideological injuries plays in private standing doctrine. Standing doctrine has been criticized as “a word game played by secret rules.”<sup>421</sup> The new public standing might be understood to lay bare the rules of that game: State attorneys general that seek to litigate ideological claims may do so when they can point to a financial injury to their states. Perhaps the lesson of the new public standing is that the federal courts should stop playing the game altogether, freeing not only state attorneys general but also private litigants to stand for the public interest without having to fit their concerns within the frame of financial or other so-called “concrete” injuries.

As long as the federal courts continue to distinguish “concrete” from “ideological” injuries, however, we can expect the new public standing to be an important vehicle for public actions. Article III standing doctrine has an effect on the paths that public interest litigation will follow. The new public standing in particular has channeled high-profile public interest litigation through the offices of state attorneys general.

At its most fundamental, this Article has argued that standing has become less about whether we will have politically controversial public actions and

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421. See *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

more about the allocation of public versus private power to enforce public law. In Louis Jaffe's vision of standing, an individual might set the judicial machinery in motion for the benefit of all.<sup>422</sup> Such a system, he suggested, is consistent with principles of democracy in a world in which government power is expanding while "individual participation in the exercise of power contracts."<sup>423</sup>

This participatory vision of private standing for the public was not to be. The Burger Court closed the courthouse doors to the individual standing upon her conscience, while leaving them open to entities with financial injuries. What was lost then will not be regained through the new public standing.

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422. See Jaffe, *supra* note 1, at 1047 ("[S]ociety has been recognizing the importance of the individual's conscience. . . . [T]he courts should do the same.").

423. See *id.* at 1044.