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## State Standing's Uncertain Stakes

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# STATE STANDING’S UNCERTAIN STAKES

*Aziz Z. Huq\**

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## INTRODUCTION

Whether states have Article III standing is a question that has in recent years induced a puzzling and nonstandard patterning of votes amongst the Justices of the Supreme Court. It is, of course, not uncommon for that bench to be characterized by sharp ideological divides. What is unusual and symptomatic in the state standing litigation context is rather this: specific Justices seem to adopt divergent, seemingly inconsistent, positions on the same basic question of constitutional law when it is presented in different litigation mat-

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ters.<sup>1</sup> When it comes to state standing, the Court's ideological divide is not merely acute but also inconstant and unstable.

Consider, for example, two recent cases in an evenly divided eight-member Court which was unable to reach a decision on this Article III issue. The Court as a result demurred from a decision in both cases, albeit to divergent effect in the two matters.<sup>2</sup> Although we do not know the breakdown in votes in either case, I think it is reasonable to assign the "liberal" and "conservative"<sup>3</sup> Justices to the opposite sides of the state standing issue in these two cases based on the questions and preferences evinced in the oral arguments.<sup>4</sup> That is, the liberals (conservatives) sometimes embraced state standing, and sometimes uniformly rejected it. This suggests that the question of state standing does not have an obvious and unidirectional ideological valence. It rather implies that its ideological valence is unstable for individual Justices, even holding constant the bench's composition.

A dismayingly plausible interpretation of this dynamic would begin with the basic unpredictability of Article III standing doctrine and its consequent vulnerability to partisan polarization effects among the Justices in high-profile public law litigation. Where a state presses a left-leaning position, the logic goes, Justices and commentators take predictable positions pro and contra—and vice versa. This happens because the doctrine either cannot or more contingently does not impose a frictional constraint on the expression of their normative priors. The ensuing constellation of votes, and hence majority or dissenting opinions, can be predicted with some confidence if one knows which President appointed a Justice and how they would vote on the merits of a case.

1 At a high enough generality, of course, it is possible to identify a number of parallel cases. Consider the choice between constitutional rules and standards. See Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 98 (1992) ("[S]trong substantive theories of rules as conservative and standards as liberal—or vice versa—are wrong."). State standing is unusual insofar as the pivots by individual Justices occur across cases with the same kind of plaintiff pressing slight variants on the same basic interest.

2 Compare *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011) (affirming the existence of state standing to pursue federal common-law nuisance claims), with *Texas v. United States*, 809 F.3d 134, 155–60 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016) (affirming state standing to challenge a federal policy related to immigration).

3 I think these labels are increasingly irrelevant and misleading. "Liberal" Justices are in many ways quite Burkean, while "conservatives" will increasingly be in the position of trashing long-standing understandings of the law. It seems to me that better labels are required, but that is not my project here. I therefore stick to the conventional labels.

4 It is clear in *American Electric Power* that the Justices appointed by Democratic Presidents would have found standing while those appointed by Republican Presidents would not. See *Am. Elec. Power Co.*, 564 U.S. at 420. That the opposite was the case in *United States v. Texas* is evident from an examination of the transcript of the oral argument. See, e.g., Transcript of Oral Argument at 4, 11–12, 14–16, *Texas*, 136 S. Ct. 2771 (No.15-674).

Such a view would not break new ground. Law reviews and journals resound with complaints about standing doctrine's mutability<sup>5</sup> as well as its mismatch with attractive normative accounts of Article III ends.<sup>6</sup> But complaints about its unique incoherence are somewhat overstated. Some degree of instability is probably inevitable in multimember bodies such as the Supreme Court given social choice dynamics.<sup>7</sup> That this instability would take on familiar partisan form in cases concerning policy questions with obvious and strong partisan coloring—such as immigration law,<sup>8</sup> environmental law,<sup>9</sup> and national healthcare policy<sup>10</sup>—is by no stretch surprising given the larger pattern of partisan polarization among the Justices.

Still, it is not very satisfying to end the analysis with this stark “legal realist” conclusion.<sup>11</sup> Nor do I think it is enough to simply assume it is possible to assert some “principled” account of state standing without thinking about *why* the doctrine has generated these concurrent but diametrically opposed votes on similar cases. Brute resort to partisanship as an explanation is insufficient not because it lacks predictive power, or because it is somehow false. Rather, in the United States of the early twenty-first century, national partisan divides tend to track deep and consequential normative divides.<sup>12</sup> Resiling to partisanship to account for doctrinal difference may be accurate,<sup>13</sup> but it obscures far more interesting questions about *how* and *why* reconditte matters of federal jurisdiction take on more readily cognized political colors. It fails to illuminate why a division of votes happens. To the extent that legal scholarship aims to map, and then plot potential pathways across, normative contestation, partisanship-based *explanans* can be both powerful and

5 See, e.g., Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1061–62 (2015) (describing, in critical terms, current doctrinal fragmentation); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 480 (1996) (arguing that standing doctrine is “theoretically incoherent”).

6 See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 486–88 (2008) (criticizing standing doctrine’s distributional effects).

7 The leading application of social choice theory to multimember benches is Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 102–15 (1986).

8 See, e.g., *Texas*, 136 S. Ct. 2271. There have also been several suits lodged by states against the federal government related to “sanctuary jurisdiction” policies. See Vikram David Amar, Essay, *Federalism Friction in the First Year of the Trump Presidency*, 45 HASTINGS CONST. L.Q. 401, 401–02, 402 n.4 (2018) (documenting suits).

9 See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007).

10 See, e.g., *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011); *Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part and rev’d in part sub nom. NFIB v. Sebelius*, 567 U.S. 519 (2012).

11 See, e.g., Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (“Decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim.”).

12 See, e.g., STEPHEN HAWKINS ET AL., *HIDDEN TRIBES: A STUDY OF AMERICA’S POLARIZED LANDSCAPE* (2018), [https://hiddentribes.us/pdf/hidden\\_tribes\\_report.pdf](https://hiddentribes.us/pdf/hidden_tribes_report.pdf).

13 For a useful discussion of various intertemporal measures of ideological preferences, see Michael A. Bailey, *Is Today’s Court the Most Conservative in Sixty Years? Challenges and Opportunities in Measuring Judicial Preferences*, 75 J. POL. 821 (2013).

simultaneously unavailing for the task at hand. They beg the question of how we are to interpret ideological divisions on the Court by ousting an analysis of ideas with the brute act of taxonomy.

Nor do I think it is plausible to stipulate by fiat a single normative key to the state standing problem by appealing to text, original public meaning, or the like. There is already some air between the lexical anchors of Article III standing—the terms “case” and “controversy” in disconnected elements of the Constitution’s text—and the normative motors of current standing doctrine. That doctrine has further developed largely in terms of cases lodged by private litigants; its translation to state actors is not necessarily a neat or obvious one.<sup>14</sup> There are hence a large number of disarticulated joints in the doctrinal armature tying constitutional meaning to its application in specific circumstances.

As a result of these gaps, theoretical *ipse dixit*s are decidedly underwhelming. The litigated world is too fluid to be nailed down by formalist or originalist certainties. This problem undermines perhaps the most cogent alternative analytic method to the approach I take here. This approach would turn to a historical consideration of states’ ability to lodge certain kinds of suits in federal courts.<sup>15</sup> The leading historical study in this vein, however, implicitly assumes that the background relationships of states vertically with the federal government and its own citizens, and also horizontally to other states, have been constant and stable enough to enable meaningful transhistorical comparisons. I am not sure that is right (in fact, I am pretty sure it is wrong). The need for some translation of historical doctrine to a contemporary context creates a need for normative criteria to evaluate whether the linkages between anterior doctrinal forms and constitutional norms persist or have evaporated.<sup>16</sup> History, in short, entails normative exegesis as much as any other modality of constitutional inquiry.

In what follows, I offer a quite modest contribution to debates on state standing.<sup>17</sup> I do not offer “right answers.” Rather, I posit that it is useful to

14 Cf. Fallon, *supra* note 5, at 1080 (“The Supreme Court apparently never intended that the injury in fact, causation, and redressability requirements would apply to the federal and state governments in the same way as to private litigants.”).

15 The leading (and still invaluable) account is Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995).

16 For criticisms and defenses of historically infused accounts on these terms, compare Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 51–53 (2014) (arguing that separate spheres no longer accurately describe government and that governmental standing rules should be modified accordingly), with Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 236 (2014) (cataloging reasons for resisting such updating).

17 My own normative thinking on institutional standing is nuanced. First, I have suggested that “institutional litigants [such as states] . . . will do a *better* job than their individual counterparts” in pressing structural constitutional claims. Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1509 (2013) [hereinafter Huq, *Standing*]. I underscored that this claim had “but limited reach” insofar as it was a comparative and not an absolute claim. *Id.* To the extent other scholars have been kind enough to read and

understand the “stakes” of state standing. By “stakes,” I mean the practical consequences of resolving, one way or another, the unsettled doctrinal choices respecting the ability of states to initiate a matter in federal courts. Why, that is, does state standing matter? An inquiry into stakes can usefully proceed stepwise. A first task is to identify the subset of state standing cases that presently elicit division among the Justices. A second task is to articulate the interesting normative consequences of narrowing or widening the Article III gauge in this contested class. Parts I and II attend respectively to these tasks.

In particular, I aim here to flesh out the *multifarious* character of downstream consequences plausibly related to state standing doctrine. For example, it is already a familiar claim in litigation over this Article III question that a denial of state standing will lead to an issue’s nonjusticiability. My analysis suggests we should be a bit skeptical of that notion. This skepticism, in turn, helps decenter what has become a modal concern in state standing debates. Instead, it suggests the value of attending to other, less familiar institutional-design implications, such as effects on the structural Constitution and the incentives of state officials. In the end, I suggest that the latter may well be more important than any other concern.

My conclusion then draws back from the specifics of state standing to develop some more general reflections on the contents and aims of federal courts scholarship in an era of obvious and powerful partisan and ideological polarization. Put crudely, the animating worry there is whether the deeply polarizing of American society, which the Court cannot escape, alters the way that scholars—putatively above the partisan fray—should talk about and think about the law of federal jurisdiction.

## I. DOMAINS OF UNCERTAINTY AND STABILITY IN STATE STANDING DOCTRINE

Doctrinal and scholarly debates about state standing occur against a backdrop of the reasonably stable, albeit still underspecified, doctrinal framework of general Article III standing jurisprudence. In consequence, it is useful to begin by locating state standing debates in that larger doctrinal context. I then disentangle two strands of state standing jurisprudence in terms of their stability. Some forms are relatively uncontroversial and so fixed, I suggest, while others generate sharp discord and fluidity. The second category of contested applications of state standing is the subset of greatest interest here. Having isolated that contested domain, I briefly consider two recent academic treatments of state standing to demonstrate how much remains unsettled even among scholars.

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note that piece, they have elided the comparative nature of the claim and construed me as embracing institutional standing *tout court*. See, e.g., Woolhandler, *supra* note 16, at 211 n.12. With all due respect, this is a misreading. Also, in subsequent work, I have argued more broadly against the justiciability of federalism interests. See Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 295–98 (2014) [hereinafter Huq, *Collective Action*]; see also Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014) (developing a bargaining-based model of such contestation).

### A. *State Standing as a Standing Problem*

The term “standing” emerged in the early twentieth century to describe the regulatory principle governing access to the federal courts.<sup>18</sup> If an analog understanding obtained in the nineteenth century, it took more uncertain and blurred form. Standing’s precursors drew on “general principles of jurisprudence” as well as inchoate notions of “popular sovereignty, limited government, and the separation of powers.”<sup>19</sup> As presently implemented in doctrinal form, standing comprises a familiar trinity: injury in fact, causation, and redressability.<sup>20</sup> Although each of these elements is in different ways contested, it is the first injury-in-fact requirement that animates the lion’s share of ambiguity in both run-of-the-mill standing cases and in state standing disputes. This parallelism matters. If uncertainty about state standing is a simple function of unclarity in respect to the corresponding piece of more general doctrine, there is unlikely to be any way of resolving state standing’s uncertainty without a clarification of Article III standing doctrine more generally.

Consider, to begin with, the ambiguity arising principally from the injury-in-fact requirement when a state is not the plaintiff.<sup>21</sup> A judge applying this element of Article III doctrine needs to measure a plaintiff’s allegations against some concept of constitutionally sufficient “injury.” In the early

18 John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (asserting that the Supreme Court “fabricat[ed] the doctrine [ ] of standing” in the twentieth century); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1451–52 (1988) (dating the emergence of constitutional standing doctrine in the post–New Deal period); accord Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 166 (1992) [hereinafter Sunstein, *What’s Standing?*] (describing standing doctrine as a judicial “invention” of the twentieth century).

19 Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 694 (2004); *id.* at 712 (appealing to “the more general notion that public officers pursue public rights and private parties pursue private rights”). Woolhandler and Nelson recognized that “early American courts did not use the term ‘standing’ much.” *Id.* at 691. They instead seek to find analogs with other nomenclature. *See, e.g., id.* at 705–06 (characterizing “the restriction on private invocations of public rights” at common law as an early standing doctrine).

20 *See, e.g.,* *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011) (explaining that establishing standing requires an injury in fact, a causal link between the injury and the action complained of, and a likelihood that the injury will be redressed by a favorable decision); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (same); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (same); *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (same); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (same). You get the idea.

21 For the pathmarking use of this phrase, see *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (“The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”); Sunstein, *What’s Standing?*, *supra* note 18, at 185 (tracing the injury-in-fact demand to the “remarkably sloppy” opinion in *Data Processing*).

days of standing doctrine, a private law understanding infused with common-law concepts of contract and tort provided raw material for this baseline.<sup>22</sup> The injury inquiry, however, becomes more complicated when the judge is asked to decide whether a right created by *statute* suffices for Article III purposes.<sup>23</sup> How are statutory interests to be ranked with a common-law ruler?<sup>24</sup> There are conflicting signs. On the one hand, the Supreme Court has said that “the injury-in-fact test . . . suggested that there was a prelegal category of injuries.”<sup>25</sup> On the other hand, early cases also suggested that some “direct stake in the outcome of a litigation—even though small” would suffice.<sup>26</sup> But then still, later cases took more restrictive stances.<sup>27</sup> The standard doctrinal formulation that an injury in fact is “concrete, particularized, and actual or imminent” does little to illuminate the problem.<sup>28</sup> With the doctrine pointing in all directions at once, the judge is left with a seemingly unappetizing choice between simply treating all interests that a legislature creates as sufficient for Article III purposes, or else fashioning *ex nihilo* some threshold that legislatively created rights must cross in order to be treated as a sufficient injury.<sup>29</sup> But since statutory rights are often created precisely because there is no analog common-law interest on the books, this task lacks any obvious compass or framework.

Perhaps then we should not be all that surprised that the Court has never fully resolved the question of when “a right created by Congress nonetheless fall[s] below the ‘hard floor’ of Article III jurisdiction.”<sup>30</sup> Evidence of

22 Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) (noting “the use of common-law understandings to define the judicial role in public-law cases”).

23 Doctrines such as injury in fact “are superfluous in cases involving the violation of private rights.” F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 290 (2008). For examples of the generally skeptical approach to Congress’s power to create new injuries-in-fact, see Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 166–67 (2011) (canvassing options for Congress to work around Article III limits, and finding them limited); Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 57 ARIZ. L. REV. 745, 748 (2015) (arguing that “Congress cannot create standing, but that it can recognize interests and thereby influence judicial evaluation of whether an interest is sufficiently concrete and immediate to justify standing”).

24 See Sunstein, *supra* note 22, at 1434.

25 *Id.* at 1448.

26 *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973).

27 See, e.g., *Allen v. Wright*, 468 U.S. 737, 755–56 (1984) (refusing to find standing for stigmatic injury because “such injury is not judicially cognizable”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (holding that psychological injury is insufficient to confer standing).

28 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)); see also *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (requiring that plaintiffs have a “personal stake in the outcome of a controversy” (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975))).

29 This dilemma is spelled out in some detail in William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 199–222.

30 *Id.* at 209.



the lingering uncertainty can be found in the Court's recent divided ruling in *Spokeo, Inc. v. Robins*.<sup>31</sup> The *Spokeo* plaintiff filed suit under the Fair Credit Reporting Act alleging that the defendant website operator had published inaccurate, albeit nondefamatory, information about him.<sup>32</sup> The majority opinion at once recognized that "Congress has the power to define injuries and articulate chains of causation . . . where none existed before."<sup>33</sup> At the same time, it also endorsed "Article III minima" that legislation cannot abrogate.<sup>34</sup> Rather than mapping a line between these conflicting principles, the Court issued a narrow ruling that the plaintiff's injury had not been "concrete" in that sense that "it must actually exist" and be "'real,' and not 'abstract.'"<sup>35</sup> I leave it to readers to determine how much wiser they feel with that Solomonic guidance in hand.

Ambiguity in the definition of injury in fact in the mine-run of cases concerning Article III standing spills over directly into ambiguity in the terms of state standing. The Court has not abandoned standing's familiar tripartite formulation when the plaintiff seeking jurisdiction is a state rather than a natural person. To the contrary, recent state standing cases invoke that familiar doctrinal refrain.<sup>36</sup> The Court has also, in much debated language, suggested that states receive "special solicitude" when they assert Article III standing<sup>37</sup>—but this has not, to my knowledge, been understood to constitute a derogation of the familiar injury-in-fact rule. Indeed, as much attention as this "special solicitude" language has attracted, I am not sure that the doctrine would be any less pellucid had it never been used.

Instead of focusing on the "special solicitude" that states receive, a useful way to encapsulate the zone of contestation in state standing doctrine is to trace a parallel to disputes about legislatively created interests: draw a line around the domain of cases in which the state is *not* asserting a familiar common-law interest but instead is pointing to an interest without a clear or uncontested common-law analog. Just as the Court in cases such as *Spokeo* struggles with the problem of defining some litmus test to measure the adequacy of a congressionally forged interest, so too a federal court must find

31 136 S. Ct. 1540 (2016).

32 *Id.* at 1544, 1546.

33 *Id.* at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

34 *Id.* at 1548 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

35 *Id.* at 1548. The Court also emphasized that it did not mean to imply that the injury must be tangible, or that it could not be probabilistic in nature. *Id.* at 1549.

36 *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("[A] litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.>").

37 *Id.* at 520.

some external baseline to test what kind of state-specific interests fit within the box of Article III injury in fact.<sup>38</sup>

### B. *Easy and Hard Problems in the Jurisprudence of State Standing*

There is already an embarrassment of taxonomies for organizing state standing cases.<sup>39</sup> My aim in this Section is not to add a new taxonomy. It is instead to draw attention to the ways in which state standing is or is not contested. This is a prelude to a more robust consideration of how the resolution of the underlying disputes will shape various outcomes of consequence.

With this ambition in mind, it is possible to divide roughly the Court's state standing jurisprudence into two classes—easy and hard. That distinction roughly tracks the distinction, described above,<sup>40</sup> between instances in which Article III standing analysis can draw upon a historical, often common-law, analog, and those instances in which a legislative body has created an interest that lacks clear historical precedent. When the interest pressed by the state is akin to a common-law interest, or otherwise has a historical pedigree, there is no terribly interesting injury-in-fact puzzle. But where the state through its elected branches articulates an interest without obvious historical or common-law analog, judges must confront the question whether there is indeed an injury in fact without a clear measuring rod. Just as there is no fixed benchmark in nonstate standing cases,<sup>41</sup> so too there is not a clear benchmark for unfamiliar interests in state standing cases. The result is a

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38 I do not mean, however, to suggest that there is never contestation over other elements of the doctrine. For example, in *Massachusetts v. EPA*, causation was a flash point between the majority and the dissent. Compare *id.* at 523–24, with *id.* at 542–43 (Roberts, C.J., dissenting). One way to understand the *Massachusetts v. EPA* decision is in terms of a different debate concerning whether “the so-called Case or Controversy Clause has different requirements for private cases and for procedural rights cases in which Congress deliberately conferred a right of review on the general public.” Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 235 (2012). This construal of the decision explains why the main divide in the case concerned the causation and redressability prongs of the standing test, rather than the injury-in-fact requirement.

39 See Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 595 (2015) (identifying four categories of interest); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 640 (2016) (identifying three interests); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2055 (2011) (identifying three kinds of interest); see also Woolhandler & Collins, *supra* note 15, at 406–34 (distinguishing three kinds of interest, but distinct ones from Crocker's). Several of these typologies distinguish between “sovereign” and “quasi-sovereign” interests. See, e.g., Crocker, *supra*, at 2055; see also *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (using the term “quasi-sovereign”). I do not use those terms in the main text because I think that they are not clear. See *infra* text accompanying note 48 (discussing the ambiguity of the term “sovereignty”). For the purpose of my analysis, I think it is more helpful to identify lines of cases in terms of a less abstract, more concrete formulation of the injury in fact asserted by the state plaintiff.

40 See discussion *supra* Section I.A.

41 See *supra* text accompanying notes 21–29.

zone of hard, contested cases. My ultimate aim here is to better comprehend the practical stakes of the decision whether to preserve or to eliminate standing in that zone.

That said, there is one way in which the dichotomy cutting across state standing cases poses a distinct problem from the problem haunting nonstate standing cases. In the latter, the Court is caught between two competing normative impulses: give Congress its due as the principal lawmaking body of the nation on the one hand, or ensure that there is a judicially enforceable constraint on the range of matters that can come before Article III bodies.<sup>42</sup> This tension is perceived as real and grave.<sup>43</sup> At the same time, there is a nagging question as to why it matters. Congress has very broad, and perhaps plenary, power to create or eliminate Article III tribunals beyond the Supreme Court's original jurisdiction. Given that there are almost no clear constraints on the *negative* exercise of this power,<sup>44</sup> it is at least analytically puzzling why so much attention should be paid to the outer bounds of *positive* uses of the power. Why, that is, is the surfeit of Article III bounty perceived as so much more hazardous than its absence?<sup>45</sup>

In the state standing context, by contrast, it is state, rather than federal, political choice that sits in the scales across from Article III autonomy. The separation of powers dynamic of standing<sup>46</sup> is thus not directly implicated in

42 The federal common-law rules that determine access to a national court for vindication of a constitutional right are shaped by the courts' desire to exercise control over the mix of cases they must adjudicate. See Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 63–70 (2015). Standing doctrine might be explained, as a matter of political sociology, in similar terms.

43 See, e.g., Baude, *supra* note 29, at 209.

44 For a summary of the pertinent law, see Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010).

45 Appeal to the text of the Constitution provides no good answer. The idea of “standing” as a limit on Article III jurisdiction is a bold inference from the disparate and separate incidences of the terms “cases” and “controversies” in the Constitution's text. Those terms might have quite different implications. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 244 n.128 (1985) (explaining that “case” and “controversies” are used to distinguish mandatory from discretionary forms of jurisdiction); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 599 (1994) (“I contend that the ‘all Cases’ reference in the Original Jurisdiction Clause incorporates not only the ‘controversies’ in which states appear as parties but also the ‘cases’ that the menu describes as such.”). Moreover, it is not at all clear that Article III precludes, as an originalist or historical matter, the assignment of noncontroverted matters to federal courts. See James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 175–82 (2018) (summarizing historical evidence). That is, the Court's interpellation of standing into constitutional jurisprudence may thus rest on quite dubious grounds from the originalist perspective.

46 In fact, there are “at least four ways that standing protects the separation of powers.” F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 684 (2017) (illustrating these theories).

all cases.<sup>47</sup> Rather, the central analytic difficulty arises from a different source: what counts as a valid and judicially cognizable interest of a state qua state is not a function of empirical observation. It also cannot be resolved by looking to the common law. Rather, the question is often framed as a matter of “sovereignty.”<sup>48</sup> But what does the term sovereignty mean in American law? The notion of “sovereignty” has a long, complex intellectual history in European political thought, from Bodin and Grotius onward.<sup>49</sup> Its transplantation into the American context entailed intellectual ferment, and some sharp deviations in that tradition’s arc.<sup>50</sup> Today, its content and contours remain at best “somewhat elusive.”<sup>51</sup> Given the mutable and elusive nature of sovereignty as a conceptual matter, it was probably inevitable that any effort to create a doctrinal rule for state standing rooted in that concept would generate confusion and instability. As a result, even if the notion of “sovereignty” can provide a comforting verbal touchstone for analysis of state standing,<sup>52</sup> it is unlikely to shed any meaningful analytic clarity on the matter.

There is one final point before I turn to the taxonomical analysis. I should clarify and defend a simplifying assumption I will make in the analysis that follows. As observed above, the formulation of injury in fact dates from 1970.<sup>53</sup> But the number of Supreme Court cases that address state standing after that date is relatively small. These cases, moreover, cite back to pre-1970 precedent in ways that suggest the latter’s continued validity. Accordingly, I will ignore the timing of cases. Instead, I will approach the caselaw as if both pre-1970 and post-1970 cases were equally relevant. I realize that this is not an obvious, or obviously sociologically accurate, assumption. I do think, however, that the prochronic assumption that pre-1970 cases

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47 Consider cases in which both plaintiff and defendant are states. See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992) (permitting standing). Nor is obvious that state standing will always have a particular separation of powers valence.

48 See, e.g., Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 858 (2016) (rooting analysis of sovereignty in the background “concept that a sovereign government must have standing to enforce and defend its laws in court”). In contrast, others view sovereignty-based claims as the epitome of what *cannot* be vindicated in federal court. See Woolhandler & Collins, *supra* note 15, at 410–12. So there is not even agreement on sovereignty’s valence for assertions of state standing.

49 For a history of the concept of sovereignty in modern political thought, see generally RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2016). For a summary of Tuck’s account and extending it to the contemporary U.S. context, see Aziz Z. Huq, *The People Reconsidered*, NEW RAMBLER (Oct. 17, 2016), <http://newramblerreview.com/book-reviews/political-science/the-people-reconsidered>.

50 See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 8–10, 133–35, 178–79 (2010) (arguing that the significant innovation of the American federal idea was to authorize the division of sovereignty and to create viable legal categories that could contain multiple sources of governmental power within one overarching system).

51 Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 230 (2005).

52 See Grove, *supra* note 48, at 858.

53 See *supra* text accompanying note 21.

accounted for the injury-in-fact rule is a relatively standard one given the assumptions concerning precedent in constitutional decisions.<sup>54</sup>

## 1. Easy Problems

Let us start by enumerating “easy” cases for state standing doctrine. These can fall both inside and outside the line of Article III permissibility. Consider some that fall within the line of permissibility. First, since the early days of the republic, states have been allowed to litigate their common-law interests in federal court.<sup>55</sup> Hence, a state can assert an interest in real property as a basis for standing or sue in federal court to enforce a contract.<sup>56</sup> In some cases, standing founded on property has been distinguished from standing “in virtue of its sovereignty” as a ground for Article III access.<sup>57</sup> Such language intimates, without confirming, the unavailability of sovereignty as a basis for standing.

Second, the Supreme Court in 1838 affirmed its power to resolve boundary disputes between states.<sup>58</sup> It reasoned that there was “no power in the contending states to settle a controverted boundary between themselves, as states competent to act by their own authority on the subject matter, or in any department of the government, if it was not in this [Court].”<sup>59</sup> Boundary disputes are analytically interesting because they share some of the qualities of a common-law property dispute, but also entangle “sovereignty” of some sort in a quite material way. They hence pose a hard problem for theories, such as the one proposed by Professors Ann Woolhandler and Michael Collins, that assert a sharp distinction between sovereign and nonsovereign interests. Indeed, Woolhandler and Collins are a bit sheepish when they concede that boundary disputes are “the primary and largely exclusive example

54 At the same time, I recognize that the law of state standing has changed over time. See Woolhandler & Collins, *supra* note 15, at 474 (“The early expansion of governmental standing highlighted the difficulty of defining litigable interests once the Court departed from the common-law menu for standing.”).

55 *Id.* at 406–07 (discussing examples).

56 *Missouri v. Illinois*, 180 U.S. 208, 240–41 (1901) (finding federal jurisdiction appropriate “in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State”); *cf.* *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405 (1792) (opinion of Johnson, J.) (rejecting request by State for equitable remedy in a contract action, but leaving open a remedy at law). But not all property disputes are cognizable. See *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867) (refusing to assert jurisdiction, where Georgia asserted federal infringements on its property interests because the “matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief”).

57 *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 559–60 (1851).

58 *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

59 *Id.*; see also *Virginia v. Maryland*, 540 U.S. 57, 75 (2003) (finding for Virginia in a suit over riverine rights); *Illinois v. Kentucky*, 500 U.S. 380, 381 (1991) (resolving boundary disputes turning on the Ohio River’s course).

of the early Court's willingness to allow states to vindicate sovereignty interests."<sup>60</sup>

On the other side of the ledger are a number of state "injuries" that have long been held to fall outside the reach of Article III justiciability. First, a state's allegation that the federal government "attempt[s] to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States" creates no justiciable controversy.<sup>61</sup> A state, however, can challenge another state's law on the ground that it violates the Dormant Commerce Clause.<sup>62</sup>

Second, states as well as the federal government plainly have power to file suit to enforce their own (criminal or civil) laws in their own tribunals.<sup>63</sup> But states do not have standing to sue to enforce their own laws in federal court.<sup>64</sup> There is an exception of sorts when Congress authorizes the removal of a criminal or a civil case from state to federal court. This exception, to be fair, is so infrequently invoked that it is of limited significance. It also appears to be relatively settled that a state cannot resort to federal court to vindicate—in the sense of enforcing—its own law on the ground that the same case could be brought in state court. For instance, the Court has unanimously deflected state efforts to invoke the Declaratory Judgment Act for state-law enforcement purposes when a state (but not a federal) declaratory action would have been available.<sup>65</sup>

It is difficult to summarize these islands of stability in state standing doctrine. The early cases seem to distinguish proprietary from sovereign interests—except in boundary disputes, which are probably the most important sort of a sovereignty-based claim in the early republic. States are stymied

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60 Woolhandler & Collins, *supra* note 15, at 416.

61 *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923).

62 See, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923) (finding a state suit justiciable when it raises the question "whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other" as "essentially a judicial question").

63 Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251 (1999) (noting that the United States can prosecute crimes "based on nothing more than the 'harm to the common concern for obedience to law,' and the 'abstract . . . injury to the interest in seeing that the law is obeyed'" (alteration in original) (quoting *FEC v. Akins*, 524 U.S. 11, 23–24 (1998))); see also Woolhandler & Collins, *supra* note 15, at 422 ("States could, of course, litigate their sovereignty interests by enforcement actions in their own courts. General jurisdictional principles operative during the nineteenth century, however, did not allow a state to begin a prosecution under its laws in the courts of another sovereign.").

64 See, e.g., *Huntington v. Attrill*, 146 U.S. 657, 672–73 (1892) (making this point in respect to criminal laws). An exception to this is when a state official files a habeas action in federal court challenging detention based on his or her enforcement of state law in violation of a federal injunction. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908).

65 *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 21 (1983) ("There are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law.").

when they insist on the conformity of federal action with constitutional norms (at least absent any other injury), but are also held at bay if they wish to insist on the force of their own statutory law. Hence, choice-of-law explanations for the cognizability of different interests for Article III purposes are not easy to get off the ground. The result is a patchwork of rules that perhaps invites circumvention or substitution. The resulting zones of friction, which I turn to next, might hence be preliminarily explained as a result of strategic litigation in light of an invitingly incomplete latticework of rules.

## 2. Hard Problems

There are three zones in which state standing cases are “hard,” in the sense that it is presently unsettled whether litigation by a state actor can proceed, or where the current doctrinal dispensation seems to rest on fine, and hence untenable, distinctions between different formulations of state interests. The three lines of cases, I should acknowledge up front, are not distinct from each other. The third, indeed, spills over from the first and second categories. But I think it is helpful to introduce the three lines of cases separately because they hinge on the treatment of three distinct putative injuries-in-fact. Further, I should be clear that in mapping these three areas, I make no claim to resolve the disagreements manifest on the Court. Rather, for present purposes, my concern is with understanding the doctrinal well-springs of uncertainty.

A first class of hard cases concerns instances in which the state acts as a so-called “*parens patriae*.” *Parens patriae* loosely means “parent of the country.”<sup>66</sup> States invoke the *parens patriae* doctrine to bring actions to federal courts on behalf of their citizens.<sup>67</sup> For example, states have successfully asserted the interests of their citizens, without adumbrating their own “sovereign” rights, against a quarantine that impinged on interstate commerce,<sup>68</sup> against the producers of interstate air pollution,<sup>69</sup> against aquatic pollution that threatened the “health and comfort of the inhabitants of [the plaintiff State],”<sup>70</sup> and for the alleged maltreatment of state citizens in violation of federal law.<sup>71</sup>

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66 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600, 607 (1982) (envisaging such a suit where a “sufficiently substantial segment of [the state’s] population” suffers the relevant harm); *see also* *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) (noting that “the term was used to refer to the King’s power as guardian of persons under legal disabilities to act for themselves,” and “the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England”).

67 Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 799 n.12 (2009).

68 *See* *Louisiana v. Texas*, 176 U.S. 1, 19 (1900).

69 *See* *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236–37 (1907).

70 *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

71 *See Alfred L. Snapp*, 458 U.S. at 608. Courts are divided on whether a state can pursue a *parens patriae* action if private citizens could themselves sue. *Compare* *New York v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982) (no), *vacated on other grounds*, 718 F.2d 22 (2d

In some instances, though, an assertion of *parens patriae* status may rub up against the bar against state challenges to the constitutionality of another sovereign's actions. Famously in *Massachusetts v. Mellon*, the Court distinguished between *parens patriae* actions against coordinate states, and such actions against the federal government.<sup>72</sup> Justice George Sutherland's majority opinion asserted that "it is the United States, and not the State" that is *parens patriae* in such instances.<sup>73</sup> *Mellon* is one of the few occasions in which a plaintiff's standing seems to turn explicitly on the identity of the defendant.

There is now uncertainty as to the appropriate role of the state as *parens patriae*.<sup>74</sup> In *Massachusetts v. EPA*, for example, the Court seemed to lean on a *parens patriae* theory of standing to enable a state challenge to a federal agency's failure to regulate over a categorical dissent by four more conservative Justices.<sup>75</sup> Those same four Justices objected to state standing four years later in *American Electric Power Co. v. Connecticut*, where the defendant was not a federal (or even a state) actor.<sup>76</sup> That is, they seemed to suggest that the *Mellon* bar applies to *parens patriae* cases against the federal government and private parties. In contrast, the other Justices seemed to think that the bar extends neither to instances in which the national government nor a nonfederal actor is the defendant. In light of this divide over *Mellon*'s scope, it seems fair to rank *parens patriae* as an area of abiding doctrinal uncertainty.

Second, state efforts to challenge other jurisdictions' actions based on allegations of fiscal impact have been divisive. On the one hand, a complaint alleging that another state has legislated in such a way as to deprive the plaintiff state of "specific" tax revenues does engender standing.<sup>77</sup> On the other hand, the question whether federal action that induces a state to expend more funds has generated sharp debate. For example, in a challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, the U.S. Court of Appeals for the Fifth Circuit found that the State of Texas had standing because of costs associated with the issuance

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Cir. 1983) (en banc), with *Pennsylvania v. Porter*, 659 F.2d 306, 317–18 & nn.15–16 (3d Cir. 1981) (en banc) (per curiam) (yes).

72 *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966) (similar for due process claims by individual citizens against federal antidiscrimination statute).

73 *Mellon*, 262 U.S. at 486.

74 Crocker, *supra* note 39, at 2073 ("*Parens patriae* doctrine and the *Mellon* bar in particular . . . remain frustratingly muddled.>").

75 *Massachusetts v. EPA*, 549 U.S. 497, 520, 523 n.20 (2007). But see Crocker, *supra* note 39, at 2080–81 (arguing that the *Mellon* bar only applies to *parens patriae* standing, and not when "sovereign" interests are invoked). It is hard to make much of the *Massachusetts v. EPA* decision or its special solicitude language given the plurality of fragmentary theories of standing in evidence there. See Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 40 (2011). I am not inclined therefore to place much weight on that opinion.

76 *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011) (noting four–four split on Court).

77 See *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992); accord *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977) (similar standing analysis).



of driving licenses to DAPA beneficiaries.<sup>78</sup> The Supreme Court's affirmance of that judgment by an equally divided Court implied that at least four (conservative) Justices believed that Texas had standing on a theory of fiscal loss. Four other (liberal) Justices either rejected that theory of standing or would have found against Texas on the merits.

Fiscal effects are of particular importance as a basis for state standing because it will almost always be the case that the state can gin up a fiscal effect based on another sovereign's action. For example, Texas could have responded to DAPA by declining to issue licenses to undocumented individuals; it was the State's choice to extend that benefit that generated the injury in fact subsequently asserted in federal court.<sup>79</sup> Rare will be the instance in which the state has no choice but to spend.

Third, state efforts to creep around the *Mellon* rule against direct challenges to the validity of federal statutes or federal regulatory actions have generated difficulty and apparent discord among the Justices. This category of cases in which a state seeks to challenge federal action includes both *parens patriae* and fiscal effects categories, but it is also more general in scope. The uncertainty about state standing in suits against the federal government extends beyond instances in which *parens patriae* or fiscal effects are alleged to establish an injury in fact.

The question of state standing to challenge federal measures can arise where federal law and state law come into conflict, and a state questions the displacement of its norm. This can be characterized as a challenge to federal law or as an effort to defend state law. On the one hand, *Mellon* suggests that a state's frontal challenge to a federal statute should fail. So, when a state promulgates a measure that conflicts with the federal statute, it would seem to follow that the state cannot circumvent the *Mellon* rule by the simple expedient of enacting a rule that is preempted by the federal statute. In the wake of federal healthcare reform legislation in 2010, for example, Virginia pursued this tack by passing a law exempting its citizens from any federal health insurance mandate. Its consequent suit was shut down on standing grounds in the U.S. Court of Appeals for the Fourth Circuit.<sup>80</sup>

On the other hand, other cases suggest that a state may be the *only* proper party to defend the validity of state law in federal court, and as such is

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78 *Texas v. United States*, 809 F.3d 134, 155–60 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016) (affirming state standing to challenge a federal policy related to immigration).

79 *Cf. Grove*, *supra* note 48, at 894–95 (exploring this possibility).

80 *See Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 266 (4th Cir. 2011); *see also Crocker*, *supra* note 39, at 2089–92 (discussing the background to this litigation). In a parallel case, the Eleventh Circuit found that individual plaintiffs had standing to challenge the insurance mandate, obviating the need to consider state standing in that regard, but also concluded that the states had standing to challenge the Medicaid expansion. *Florida ex rel. Attorney Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1243–44 (11th Cir. 2011), *aff'd in part and rev'd in part sub nom. NFIB v. Sebelius*, 567 U.S. 519 (2012).

a legitimate plaintiff.<sup>81</sup> Hence, in *Missouri v. Holland*, the Supreme Court permitted a suit by Missouri challenging the validity of a treaty on the ground that it impinged upon “the alleged quasi sovereign rights of a State.”<sup>82</sup> The *Holland* Court cited two cases in which state standing had been recognized on a *parens patriae* theory,<sup>83</sup> that is, on the theory that “if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.”<sup>84</sup>

Even in the absence of a plausible *parens patriae* claim, states have been permitted to lodge direct challenges to federal action that impinges on states’ regulatory freedom. For example, states have been able to directly challenge federal conditional spending measures<sup>85</sup> and federal statutes that allegedly violate the bar on commandeering<sup>86</sup> and federal statutes regulating state electoral processes.<sup>87</sup> Other cases, such as the 2005 decision in *Gonzales v. Oregon*, have involved state challenges to federal regulations on federal statutory grounds.<sup>88</sup> And in a variation on ‘pure’ state standing, the Court recently affirmed the ability of a state legislature to challenge a ballot initiative removing its redistricting authority as a violation of its constitutionally

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81 See, e.g., *Diamond v. Charles*, 476 U.S. 54, 64–67 (1986) (“Because the State alone . . . has [a] ‘direct stake’ . . . in defending” its laws, private individuals lack standing to protect their continued enforceability absent some other injury in fact); see also *Grove*, *supra* note 48, at 860–61 (collecting cases).

82 *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

83 *Id.* (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); *Kansas v. Colorado*, 185 U.S. 125, 142 (1902)).

84 *Kansas*, 185 U.S. at 141–42. *Grove* argues that *Holland*’s standing holding rests on “the State’s sovereign interest in the continued enforceability of state law.” *Grove*, *supra* note 48, at 865. I respectfully disagree. The cases upon which the *Holland* Court relied do not focus on this interest, but on the interests of citizens in engaging in practices that would be foreclosed or hindered by another sovereign’s actions. The same analysis holds for another case that *Grove* cites, see *id.* at 866–67, the decision in *Colorado v. Toll*, 268 U.S. 228, 229–30 (1925), in which the State challenged a federal regulation of roads within a national park. *Toll*’s standing holding was explained on “quasi-sovereign[ty]” grounds, citing *Holland*. 268 U.S. at 230. This is most plausibly read to point toward the interest Colorado citizens had in the roads at issue.

85 See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205–06 (1987).

86 See, e.g., *New York v. United States*, 505 U.S. 144, 152–54 (1992); see also *Grove*, *supra* note 48, at 867 (discussing cases). The Court’s most recent commandeering case, however, involved a suit filed by private plaintiffs. *Murphy v. NCAA*, 138 S. Ct. 1461, 1472 (2018).

87 See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

88 *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006). The Supreme Court did not address standing, but the district court found that the Oregon had standing to sue. *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1087 (D. Or. 2002), *review granted*, 368 F.3d 1118 (9th Cir. 2004), *aff’d sub nom. Gonzales*, 546 U.S. 243; see also *Grove*, *supra* note 48, at 873–74 (discussing the case).

designated role.<sup>89</sup> These cases suggest that when state and federal law conflicts, the state can sometimes challenge the federal rule. But since that is precisely what the *Mellon* rule seems to rule out, we seem to have some ambiguity in the rule of decision.

### C. *Rationalizing Hard State Standing Cases*

State standing has generated both easy and hard questions of law. Easy cases can be found on either side of the Article III line. Meanwhile, the three lines of “hard” cases that I have described are not mutually exclusive of each other: state plaintiffs might invoke a *parens patriae* theory or a fiscal-effect theory to challenge a federal measure. But the latter theories of Article III standing can also be invoked to challenge other states’ regulatory decisions, or even the conduct of private actors. Hence, neither the first nor the second line of contested cases is completely subsumed within the final one. This incomplete and overlapping dissensus implies that there are multiple, and concurrent, normative divides at stake in current debates over state standing.

My aim here, to reiterate, is not to offer a general normative framework for making sense of these cases. It is worth noting here, however, that some of the most recent ambitious efforts at theorizing state standing encounter substantial difficulties. Two examples, both instances of exemplary clarity and scholarly scruple, illustrate this point.

First, in their pathmarking and important article, Woolhandler and Collins have urged the “nonlitigability of sovereignty interests” as a position with both a historical pedigree and present allure.<sup>90</sup> They give a slate of reasons for this position. But it is striking how many of these are deeply problematic. A number of their grounds, to begin with, are characterized by an internal circularity. For example, Woolhandler and Collins appeal to “the constitutional requirement, grounded in the separation of powers, that federal courts hear only cases and controversies” to explain what comprises a case or controversy in the first place.<sup>91</sup> Separately, their worry that state standing will lead courts “to equalize power and right” is inconsistent with their embrace of individual standing to press federalism interests: the latter is also a way in which rights claims and claims about power are blended and “equalized” in the sense of being proffered by the same litigant.<sup>92</sup> Their acceptance of individual standing to lodge federalism concerns raises additional concern, since it is articulated without any careful consideration of the perverse effects of that allocation of power to individual litigants.<sup>93</sup>

Finally, Woolhandler and Collins suggest that segregating state and federal law enforcement would “help[ ] to maintain the vitality of the states as

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89 *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2659, 2664–66 (2015) (describing the legislature as “an institutional plaintiff asserting an institutional injury”).

90 Woolhandler & Collins, *supra* note 15, 436.

91 *Id.* at 440.

92 *Id.* at 445–46.

93 See Huq, *Standing*, *supra* note 17, at 1508–14 (developing this concern).

distinct political communities.”<sup>94</sup> This empirical prediction is puzzling: it is not at all clear why periodic state involvement in federal law enforcement would imperil the sense of separate communities. Their argument here also fails to account for the powerful case for state enforcement of federal law in some (if not all) circumstances.<sup>95</sup> I have focused here on what seem to me the most powerful of Woolhandler and Collins’s rich set of arguments, although they have other strings to their bow. At least on my reading, however, their arguments ultimately fail to persuade.<sup>96</sup>

Second, Professor Tara Grove has recently argued that states should have “broad standing to challenge federal statutes and regulations that preempt, or otherwise undermine the continued enforceability of, state law,” but at the same time should have no special role in challenging the manner in which federal authorities comply with federal law.<sup>97</sup> I am not so sure. A threshold problem with Grove’s position, at least stated in this fashion, is already implicit in my analysis so far: because states determine the content of state law, they are in a position to promulgate measures—Texas’s driving license mandate or Virginia’s antimandate—that are preempted by federal law.<sup>98</sup> They hence have power to fabricate *ex nihilo* a basis for suit pursuant to Grove’s own formulation.<sup>99</sup>

Acknowledging that risk, Grove draws a distinction between state measures that regulate and measures that are declaratory in the sense that they assert that “private citizens are *not* subject to legal requirements.”<sup>100</sup> Grove explains this distinction by asserting that “the State does not have the same interest in a law that merely declares private parties to be exempt from legal requirements.”<sup>101</sup> But why not? Grove does not say, and I do not think that the distinction (so crucial to the limiting ambition of her theory) is persuasive on its own terms. When a state regulates, it does not only, or even most

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94 Woolhandler & Collins, *supra* note 15, 436.

95 See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 765 (2011) (arguing that “state enforcement can promote the goals of federalism by opening up new opportunities for decentralized decision making outside of the regulatory realm” absent a need for uniformity).

96 A doctrinal solution based on historical practice might also be unstable to the extent that the boundary cases and fiscal effects cases decided in the eighteenth century provided bases for states to circumvent the limits that Woolhandler and Collins would otherwise impose.

97 Grove, *supra* note 48, at 855. Note that Grove’s argument addresses only the third of the categories outlined above. See *supra* text accompanying notes 66–79. It does not fully address *parens patriae* cases or fiscal-effects cases, because both of the latter can be lodged by states against nonfederal defendants. In another recent article, Professor Shannon Roesler offers the even narrower bore assertion that “states should have ‘governance’ standing to challenge federal power and action when the federal law at issue contemplates an implementation role for state governments.” Roesler, *supra* note 39, at 641.

98 See sources cited *supra* notes 8–10.

99 The concern here is akin to the concern raised if Congress’s ability to define injuries-in-fact is unfettered. See *supra* text accompanying notes 30–35.

100 Grove, *supra* note 48, at 876–78.

101 *Id.* at 878.

importantly, seek to prohibit private action. Much ordinary and quite important state law is aimed at enabling private action. State corporate law and state contract law are large and important bodies of “enabling” state law that are primarily declaratory, rather than prohibitory.<sup>102</sup> It is not at all clear why state efforts to carve out zones of private autonomy—i.e., deregulation—through, for example, recognizing the autonomy of private associations or by enabling religious organizations, should be seen as a second-tier state activity. Nor is it clear why states have a distinctive interest in affirmative regulation.

In the end, therefore, Grove’s distinction between regulatory and declaratory measures lacks a plausible normative basis. One is left instead with the sense that it is an *ad hoc* solution to the prospect that her proposed constraint on state standing dissolves in the face of strategic state action.<sup>103</sup>

At least for now, therefore, the doctrine of state standing will likely remain a patchwork of partially theorized and inconsistent areas of stability and flux. Valiant and powerful efforts to knit together a theoretical superstructure, such as Grove’s or Woolhandler and Collins’s, are vulnerable to unraveling theoretical objections. It seems reasonable to expect, therefore, the persistence of doctrinal uncertainty or overt contestation about the metes and bounds of state standing alongside some islands of doctrinal stability.

## II. RECUPERATING THE STAKES OF STATE STANDING

I have suggested so far that there are three domains of state standing doctrine presently in live contestation. Rather than offering a theoretical framework for ascertaining how these uncertainties should be resolved, my aim in what follows is to account better for the implications of resolving those uncertainties one way or another. That is, I want to ask why these disputes might matter in practice.

This analysis of downstream consequences, to be sure, does not exhaust the legally or doctrinally relevant considerations that could motivate a judge faced with a state standing issue. More modestly, I hope to cast light on what follows from accepting either a narrow or a broad reading of state standing’s present controversies. As I have detailed already, these controversies are only partially overlapping in terms of subject matter. To simplify the analysis, I will focus on the third category of direct challenges to the validity of federal statutes or federal regulatory actions. This encompasses much of the first and second categories. As an ancillary matter, I will also explore the effects of eliminating or embracing *parens patriae* and fiscal-effect theories of standing beyond the context of suits against a federal actor.

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102 H.L.A. HART, *THE CONCEPT OF LAW* 26–28 (1961) (developing the concept of enabling rules).

103 Perhaps *ad hoc equilibria* are all that can be sustained in the state standing context; but then Grove needs an explanation of why it is so troubling that states might challenge federal action on federal law grounds. *Cf.* Lemos, *supra* note 95, at 717–36 (adumbrating advantages of a state role in federal law enforcement).

To begin with, it is useful to set out briefly the species of consequences that I perceive as being at stake, and so will explore in detail below. First, elimination (or embrace) of state standing might lead to an issue not being resolved judicially, or relatedly, it might conduce to a resolution at the behest of a private litigant rather than of a state actor. These might be called “different litigant” effects. Second, a resolution of state standing’s ambiguities might impinge on the extent to which structural constitutional values, most obviously federalism or separation of powers, are vindicated. These are “structural constitutional effects.” Finally, the whittling away of state standing might have “incentive effects.” Here, I will focus primarily on the role of states’ attorneys general (“AGs”), who are responsible for filing many of the relevant suits,<sup>104</sup> and secondarily on spillovers to private actors. Let us consider each of these vectors in turn.

### A. “Different Litigant” Effects

At a most basic level, state standing is self-evidently about *who* can bring a case. In the limit, the question of “who” also implicates the question of “whether” a specific legal issue will ever be pressed and passed on before a federal court. The availability of state standing might determine whether an issue is ever litigated in federal court, if there is no other litigant to press an issue. And even if there is such an alternative litigant, it may also influence how the issue is framed and resolved. I address first the risk that eliminating state standing will render a specific legal question nonjusticiable. Then, I will turn to potential ways in which such a reduction might change the manner in which an issue is litigated.

#### 1. The “Null Litigation Set” Risk

The possibility that a repudiation of state standing would vitiate all federal court review of a specific legal question can be called the “null litigation set” problem. In practice, this is often raised as a reason to allow such standing in suits against the federal government.<sup>105</sup> The argument has not been raised in suits against nonfederal actors on *parens patriae* or fiscal-effects grounds, presumably because it lacks traction there.<sup>106</sup> But there are reasons

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104 See Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 945 (2017) (“In most states, enforcement authority resides in the attorney general, who typically is elected independently.”).

105 See, e.g., Brief for State Respondents at 35–36, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (“It is aggressive enough to insist that States—which possess the dignity of sovereignty—are powerless to challenge DAPA’s legality. But defendants go further. At several points, they make clear that they believe *nobody* can challenge DAPA.”).

106 That said, there is a question as to whether certain mass tort suits would lose their reforming potential without state plaintiffs. Cf. Charles M. Yablon, *The Virtues of Complexity: Judge Marrero’s Systemic Account of Litigation Abuse*, 40 CARDOZO L. REV. 233, 244 n.29 (2018) (“Litigation against tobacco companies, for example, posed little threat to such defendants until the early 1990s, when increased involvement by state attorneys general and shifts in legal theories emphasizing nondisclosures regarding the addictive nature of smoking

for thinking this is either not a severe problem, or that it is not a persuasive ground for either enlarging or diminishing state standing.

Consider first how realistic the possibility of a null litigation set is when the defendant is the federal government. At a first approximation, it seems quite likely that many of the legal questions that states press in suits that they initiate against a federal defendant—or, indeed, on a *parens patriae* or a fiscal-interest theory—could also be raised by private litigants. Indeed, in recent years, when states have filed challenges to the federal healthcare reform, immigration prohibitions, and federal environmental policy,<sup>107</sup> there have been private litigants filing concurrently with state actors to vindicate the same points of federal statutory or constitutional law. Often, concurrent private actions obviated the need for judicial resolution of the state standing question.<sup>108</sup> Indeed, concurrent private and state suits are so common that it seems plausible at least to consider the possibility that the elimination of state standing would *never* place an issue beyond federal court purview.

Even if a legal question could only be raised by a state in a federal district court on the ground that state standing was found to be unavailable, moreover, that would not mean that the issue would be beyond judicial review. Even if a state cannot raise a legal question in federal court, it is possible that the same issue could be raised either in an enforcement action in the federal government, or, alternatively, in a state enforcement action filed first in state court, but eligible ultimately for review by certiorari in the Supreme Court. A sufficiently determined state might even catalyze an enforcement action by the federal government by, for example, announcing that it will not comply with a federal law directive.<sup>109</sup> Even when the federal government supplies a benefit to individuals (such as an immigration status), it is possible to imagine a plaintiff who in some fashion competes with those individuals, thereby establishing “competitor standing.”<sup>110</sup> For example,

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greatly increased plaintiffs’ likelihood of success in such cases.”). I bracket that possibility here and focus on federal defendant cases.

107 See *supra* text accompanying notes 8–10.

108 For instances in which private plaintiff standing was embraced as sufficient, obviating the need to address state standing, see *Trump v. Hawaii*, 138 S. Ct. 2392, 2415–16 (2018); *Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1243–44 (11th Cir. 2011), *aff’d in part and rev’d in part sub nom. NFIB v. Sebelius*, 567 U.S. 519 (2012).

109 This is not a hypothetical. See, e.g., Katie Benner & Jennifer Medina, *Trump Sues California over Immigration Laws*, N.Y. TIMES (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/politics/justice-department-california-sanctuary-cities.html>; see also David S. Rubenstein & Pratheepan Gulasekaram, *United States v. Texas: Ex Ante or Ex Post Judicial Review?*, YALE J. ON REG. (June 9, 2016), <http://yalejreg.com/nc/united-states-v-texas-ex-ante-or-ex-post-judicial-review-by-david-s-rubenstein-pratheepan-gulasekara/> (exploring this possibility in the DAPA case).

110 *La. Energy & Power Auth. v. Fed. Energy Regulatory Comm’n*, 141 F.3d 364, 367 (D.C. Cir. 1998) (articulating rules for establishing competitor standing). Another possibility is that “entities that compete with recipients of government funds would have standing to challenge the legality of those disbursements.” Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1707 n.131 (2017).

imagine a family law proceeding in which one parent's custody is challenged on the ground that her immigration status is *ultra vires*.<sup>111</sup> Perhaps the most likely null litigation set would arise when a state seeks to challenge the federal government's decision to assign a benefit to a third party who lacks any obvious competitor. But I am hard pressed to imagine that case at present.

Although it is difficult to compass all conceivable fact patterns, the sheer range of procedural pathways to challenge the policies of either the federal government or a coordinate state implies that the elimination of state standing would not materially alter the domain of legal questions cognizable in federal court for the simple reason that few legal questions fall outside those alternative pathways. The fluctuating nature of these different litigation forms would create uncertainty about when and how a legal issue was raised. It could bubble up, for example, as an element of a complaint, or as a defense. But this would not defeat the possibility of federal court review. At best, there may be a small set of cases in which null jurisdiction would result from a denial of state standing.

A second reason for skepticism of the null litigation set argument focuses on normative rather than empirical predicates. It turns upon the question of why the absence of an alternative plaintiff should ever be a dispositive consideration for standing doctrine. It is not simply that the Court has not identified this consideration as dispositive.<sup>112</sup> Its relevance rests on the assumption that a litigated resolution to a legal question is *ipso facto* desirable. But why should that be? There are many constitutional questions that never reach courts, and arguably never should. Many disputes arising from the interaction of states' interests and federal law are also "polycentric," and as such far from the ordinary subject matter of bilateral litigation.<sup>113</sup> To be fair, almost all major constitutional litigation has this character. But this simply suggests that constitutional review now extends far beyond the institutional competence of the federal courts. It is not an argument for making that overstretch worse.

Other strands of federal jurisdictional law, in any event, list against the presumptive virtue of justiciability. They instead suggest that the existence of federal law questions beyond a judicial purview is not necessarily a problem. The doctrine of qualified immunity, for example, at a minimum, delays, and in many instances wholly defeats, the possibility that a given specific constitu-

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111 If that sounds like a silly procedural vehicle for litigating the validity of an important federal program do not blame me: that kind of incongruity is the inevitable result of a model of constitutional review anchored in "ordinary" litigation toed to an apex court that engages in what is often in effect abstract constitutional adjudication. Silliness is hardwired into this arrangement.

112 See Roesler, *supra* note 39, at 656.

113 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978) (analogizing a polycentric situation to a spider web, in which "each crossing of strands is a distinct center for distributing tensions").



tional question will be litigated.<sup>114</sup> Often the issues insulated from judicial consideration concern what are normally thought of as important individual rights. But this has not deterred the Court from aggressively pressing outward the boundaries of immunity doctrines.

On the other side of the ledger, some theories of state standing might open the gates to the federal courthouse so wide that sheer volume concerns would follow.<sup>115</sup> In these cases, nonjusticiability might be desirable on quite pragmatic grounds of sound institutional functioning. Complaints about the absence of a federal forum for a specific legal question as a consequence of the elimination of state standing, in short, rest upon a highly contestable, and normatively unsupported, assumption that such a forum is always desirable.<sup>116</sup> Once that assumption is cast aside, the reasons for caring about the null litigation set risk seem pretty thin.

## 2. The Risk of Poorer Representation

Even if stand standing's availability rarely determines the sheer possibility of federal court litigation of a legal question, it may well determine the manner in which it is raised and litigated. It seems plausible to posit that narrowing the availability of state standing will lead to issues being raised more frequently by private litigants and later in the litigation process. It is hard to see, however, why these possibilities should generate much normative concern one way or another.

To begin with, delays are often framed as a positive good that enables "learning" on the part of apex courts.<sup>117</sup> Nor is there obvious significance in having an issue presented in either an affirmative or a defensive posture. The Declaratory Judgment Act,<sup>118</sup> indeed, is a procedural device that invites and enables litigants to alter the sequence and framing of litigation. In effect, they can flip the order in which issues are raised. Yet, the Act is not perceived as problematic as a result.<sup>119</sup>

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114 For a development of this point in respect to Fourth Amendment law, see Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, 2010 CATO SUP. CT. REV. 237, 244–45.

115 For the canonical articulation of this concern, see Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 89. For a persuasively skeptical view of such floodgates claims, see Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1043–49 (2013).

116 My own view is that one should be quite skeptical of the value of litigation over structural constitutional questions. See sources cited *supra* note 17.

117 Chad Westerland et al., *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891, 902–03 (2010).

118 28 U.S.C. §§ 2201–2202 (2012).

119 Indeed, the standard critique of the Declaratory Judgment Act is roughly the opposite: that "Congress approved the declaratory judgment device precisely because it expanded the scope of federal court power and the timing of its exercise." Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 549 (1989). For trenchant criticism of *Skelly Oil Co. v. Phillips Petroleum*

Given that, I think the more colorable risk to consider is whether changes to the availability of state standing will lead to changes in the manner in which an issue is litigated as it moves from state to private hands. It has been claimed in the literature that the “institutional design and political incentives of states’ attorneys general . . . make them well-suited to represent state interests,” and ipso facto more qualified in that regard than private litigants.<sup>120</sup> This claim assumes a differential between public and private counsel. I am skeptical this distinction is a material one in practice. As Professor Margaret Lemos and her coauthors have convincingly demonstrated in a series of insightful articles, the assumption does not necessarily hold up in practice. To begin with, state actors as much as private litigants are often moved primarily by “self-interested incentives to emphasize monetary penalties in enforcement actions.”<sup>121</sup> In other circumstances, state litigation decisions may be well explained by partisan motivations “rather than fealty to the abstract interests of the state qua state.”<sup>122</sup> There is no reason, given this evidence, to presume that state plaintiffs will be somehow more purely legalistic in motivation than private actors across the mine run of cases. (Case-by-case variation, however, is inevitable.)

Nor should we be optimistic about the democratic credentials of litigation helmed by a state actor. Focusing on *parens patriae* actions, Lemos rightly observes that “group members will typically lack the political clout to control their representative’s litigation conduct in any meaningful way.”<sup>123</sup> There is no reason to think the same will not hold when state standing is based on fiscal effects or another contested basis. Instead, government lawyers’ incentives are not easily modeled in a univariate way across the spectrum of state standing cases. Just like private litigants, they are a motley bunch.

A closer examination of the actual (as opposed to assumed) motivations of public and private litigators further undermines the assumption that the former will necessarily do a superior job. Contrary to the assumption that state-led litigation will be more vigorously pursued, the standard models of government officials emphasize the absence of powerful fiscal incentives, and

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*Co.*, 339 U.S. 667 (1950), the leading precedent, see Doernberg & Mushlin, *supra*, at 549–50.

120 Grove, *supra* note 48, at 856; see also Roesler, *supra* note 39, at 677 (arguing that states are well suited to vindicate an interest in “shared governance” (emphasis omitted)).

121 Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 887 (2014). Of course, this is not always true. Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1442 (1998) (observing that some government lawyers choose their employment “out of a devotion to public service”).

122 Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General As Amici*, 90 N.Y.U. L. REV. 1229, 1233 (2015).

123 Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 521 (2012).

the dominance of “low powered” motivational tools.<sup>124</sup> Even if these models are a simplification of a complex reality, I think they contain more than a grain of truth. Under plausible assumptions, a reliance on state-led litigation is likely to generate suboptimal enforcement strategies by government lawyers.<sup>125</sup> At the same time, there is some evidence that private lawyers entrusted with the same tasks as government lawyers perform better, at least in terms of standard metrics of litigation success rates.<sup>126</sup> This evidence suggests that it would be unwise to assume each time a state plaintiff is swapped out for a private litigant, the legal issue at stake will be less vigorously pursued.

Finally, the public/private binary is simply not as fixed in the first instance as is assumed in the state standing literature. As Lemos has explained, both state and federal entities have come to “rely on a mix of public and private litigation, though the balance has shifted over the years as private enforcement has gained prominence in some areas once dominated by government, and has given way to public authority in other contexts.”<sup>127</sup> As a result, even if a state is the nominal plaintiff, this does not mean that the litigation will be controlled by someone who is paid out of the state’s coffers.

The lesson to be drawn here from these theoretical and empirical findings is that it is hazardous to posit a binary dichotomy between private and public plaintiffs. In practice, these two categories are not distinct in motivational or personnel terms.<sup>128</sup> Not all the considerations point in the same direction. Perhaps a careful empirical study could disentangle effects, and identify purely private or public litigation as superior. In the absence of such a study, though, it is premature to assume that a move from public to private plaintiffs would change the manner in which legal issues are pressed in federal court.

### B. *Structural Constitutional Effects*

A second possible reason for concern about changes to the availability of state standing turns on the downstream effects of doctrinal recalibration upon structural constitutional values such as federalism and the separation of

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124 Jean Tirole, *The Internal Organization of Government*, 46 OXFORD ECON. PAPERS 1, 6 (1994).

125 See, e.g., Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 311 (1972) (modeling agency enforcement to show that “under plausible assumptions concerning the characteristics of the agency’s cases a perfectly rational, utility-maximizing administrative agency will devote a ‘disproportionate’ amount of its resources to relatively minor cases”).

126 See, e.g., David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1249 (2012) (finding that specialized private litigators under the False Claims Act do quite well).

127 Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 524 (2016) (footnote omitted).

128 *Id.* at 528 (rejecting the notion “that public litigation is superior to private litigation,” but insisting “that it is different”).

powers. Rather strikingly, commentators have diverged about exactly what these effects are, while supplying relatively little by way of theoretical or empirical foundation for their positions. On the one hand, Woolhandler and Collins insist that a narrow construction of state standing, which would exclude all three of the contested categories identified above, would vindicate the separation of powers and federalism. To substantiate this claim, they point to the putative intrinsic benefit of each government enforcing its own laws. They also posit a “preference for state-versus-individual actions over government-versus-government actions [to] enhance[] the status of the individual as a rights-holder against government.”<sup>129</sup> They finally suggest that the separation of powers benefits by mitigating the risk of “abstract decision[s] on the legality of a state or federal legislature’s exercise of power.”<sup>130</sup>

On the other hand, scholars such as Professors Tara Grove and Gillian Metzger have argued that federalism concerns “strongly support” recognition of state standing to vindicate their own sovereign prerogatives.<sup>131</sup> Yet other scholars have endorsed a broad view of state standing doctrine as a means to vindicate the separation of powers, at least when the federal government is the defendant.<sup>132</sup> By assumption, that justification would not extend to *parens patriae* or fiscal-interest cases in which a nonfederal actor was the defendant.

The diversity of views on how recalibrating state standing would realize (or retard) structural constitutional values suggests an ambiguity in terms such as “federalism” and the “separation of powers.” This ambiguity means that different commentators, as well as different judges, can use those terms to pick out divergent desirable end states. Claims about state standing’s consequences for either federalism or the separation of power therefore risk a certain vacuity in the absence of a robust specification of how various normative threads of the structural Constitution are to be knitted together.

This point can be illustrated using the separation of powers. As I have recently observed in another article, the latter term is used in American constitutional law to capture a range of different and mutually inconsistent mod-

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129 Woolhandler & Collins, *supra* note 15, at 439.

130 *Id.* at 440.

131 Grove, *supra* note 48, at 891; *see also* Metzger, *supra* note 75, at 40.

132 *See, e.g.*, Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and “The New Process Federalism,”* 105 CALIF. L. REV. 1739, 1749 (2017) (“Standing doctrine focused on state challenges to the executive branch makes good sense, then, not because Congress represents state interests, but rather because the President or federal agency officials must come to the table.”); F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 103 (2018) (arguing, with caveats, that “states are particularly well positioned to constrain expanding executive power”). *But see* Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 1998 (2001) (casting doubt on the relevance of either federalism or separation of powers lens in respect to coordinated multistate litigation pursued by state AGs).

els of interbranch interaction.<sup>133</sup> These models then tend to make quite divergent assumptions about the motivations of officials within each of the branches of government.<sup>134</sup> Further, they diverge as to whether to “predict institutional change or its inverse, a stable institutional equilibrium.”<sup>135</sup> As a result of these divergent assumptions, the term “separation of powers” can only be specified by selecting an underlying model of desirable interbranch interactions, making assumptions about officials’ motivations, and selecting between stable-state and dynamic predictions. Rather than specifying a precise concept, the term “separation of powers” in fact encompasses a loosely concatenated range of institutional possibilities. It is perhaps no wonder then that when the term is invoked in debates respecting state standing, it may well be in reference to different things: a constraint on the federal courts’ role; a check on presidential initiatives in tension with congressional preferences; or a check on federal action beyond constitutional bounds.<sup>136</sup>

A further difficulty with leaning upon structural constitutional logic to inform state standing is the abiding uncertainty over the empirical predicates of those theories’ predictions. A federalism-based argument for state standing of the kind that Grove and Metzger offer, for example, rests on the assumption that states will litigate in ways that preserve state prerogatives in the aggregate. But in many recent disputes in which states have sought to influence federal courts, states have lined up on both sides of the case such that their efforts alternatively support and press for limits on federal action.<sup>137</sup> In these cases, the expressed preferences of the states do not support the proposition that federalism values are solely on one side of the case or the other.

Indeed, just a moment’s contemplation of the manifold and complex ways in which immigration, national healthcare reform, and national environmental standards can impact the policymaking initiatives and the purses of states undercuts any simple idea that federalism is always only on one side of the balance. Instead, there is “no a priori reason” to expect that expanded state standing “will always yield less horizontal aggrandizement, less strategic

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133 Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1526 (2018) (book review) (identifying separation, balance, and exogenous models of the separation of powers).

134 *Id.* at 1553–54.

135 *Id.* at 1560.

136 In fact, the problem is a bit worse since other national apex courts have understood the term “separation of powers” in quite distinct ways. See Aziz Z. Huq, *A Tactical Separation of Powers?*, 14 CONST. CT. REV. (forthcoming 2019) (discussing South African Constitutional Court’s recent separation of powers jurisprudence).

137 This can most crisply be observed in the context of amici filings. See, e.g., Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 367 (2012) (discussing states lining up on both sides of Clean Water Act cases); see also Lemos & Quinn, *supra* note 122, at 1233 (“Nor is it unheard of for states to appear on both sides of cases before the Court.”).

state action, or a 'better' federal balance"—i.e., *more* federalism or *better* federalism, however those terms might be defined.<sup>138</sup>

A similar problem bubbles up in respect to separation of powers arguments for robust state standing turning on the claim that states can work to curtail presidential infidelity to congressional directives.<sup>139</sup> Depending on the case, federal legislative interests may align with the state plaintiff, or instead lie on the other side of the ledger. Often, it will not be clear whether the presidency or its opponents are being more faithful to the original legislative deal. Much depends on whether you see the state as defending an original legislative bargain or seeking its unraveling. In the immigration context, for example, states challenging DAPA might be viewed as seeking the enforcement of federal immigration statutory law against a delinquent presidency. Alternatively, these suits can instead be understood as reneging on a legislatively created status quo in which far more behavior is treated as illegal than can plausibly be punished using the resources appropriated for enforcement.<sup>140</sup> Whether state challenges to DAPA facilitate or undermine presidential fidelity to congressional directions, in short, turns out to be a normative judgment about the nature of the discretion generated by the inconsistent directives of immigration law. I suspect that a similar sort of ambiguity will arise in many such cases.

My argument in this Section, I should concede, has a heterodox and perhaps even heretical cast. Like judges, commentators *like* enlisting "federalism" or the "separation of powers" into their lists in a close policy or doctrinal dogfight. But such conscriptions run quickly up against the sheer complexity of these concepts. I fear that neglect of that complexity is too frequent. Such structural arguments are also hindered by the profound empirical challenges of ascertaining how discrete legal changes nudge or push large, complex institutional ecosystems onto new pathways. I am skeptical that those terms of structural constitutionalism should be awarded the clear normative heft they too often assume in legal discourse. They should, that is, be far less frequently employed as spirit levels by legal analysts. In the present context, they are sufficiently indeterminate in the absence of more careful theoretical specification and more robust empirics that I believe they should not be invoked to move state standing doctrine one way or another.

### C. *Incentive Effects*

The final dimension along which the effects of state standing's recalibration might be felt pertains to the incentives of the individuals involved in litigating the cases. The state is commonly (if not inevitably, as Lemos has

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138 Huq, *Collective Action*, *supra* note 17, at 297–98.

139 See *supra* note 132.

140 See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510–11 (2009) (describing the rise of "de facto delegation" in immigration law).

instructed us) represented by the state's AG. Many state AGs are elected.<sup>141</sup> Many have abiding ambition for higher state or federal office. Litigation, and in particular litigation against the federal government in the name of the state's prerogatives, can be pursued because it will "win favor with their constituents, [and] attorneys general [will] further their careers."<sup>142</sup> The former AG of Texas, subsequently its governor, hence characterized his job as, "I go into the office. I sue the federal government and I go home."<sup>143</sup> Empirical studies suggest that AGs who engage in multistate litigation are more likely to pursue higher office, presumably because participation in lawsuits is an effective means of obtaining ideologically charged name recognition with the voting public.<sup>144</sup>

Expanding state standing increases the opportunities for like officials to use the power to file suit on the state's behalf as an instrument for personal or partisan advancement. Correspondingly, narrowing opportunities for state suits lowers the stakes for AGs, pushing ambitious individuals either to find other ways to make their mark as an AG or else to pursue other pathways to political power. There is thus an unambiguous connection between their incentives and the permissible scope of state standing. The AG is likely not the only person affected by the recalibration for state standing. The shift in their roles, which appears to have begun in the 1980s,<sup>145</sup> also shapes the larger local political environment within a state, drawing in more national dollars and changing the nature of electoral contests. In recent years, campaign contributions in state AG races have ballooned.<sup>146</sup> Although it is far from clear that this change in the fiscal environment is caused by changes in the litigation activity discussed here, it seems reasonable to predict that (holding all else equal) many of the national donors now entangled in state AG races<sup>147</sup> would be less inclined to intervene in the absence of potential suits (say) against undesirable federal policies.

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141 Lynch, *supra* note 132, at 2002.

142 Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2143 (2015).

143 Sue Owen, *Greg Abbott Says He Has Sued Obama Administration 25 Times*, POLITIFACT (May 10, 2013), <http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration/>.

144 Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597, 610–12 (2009) (presenting empirical results to this effect).

145 Paul Nolette, *The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization*, 47 PUBLIUS 342, 343 (2017).

146 Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 86–87 (2018); accord Dan Levine & Lawrence Hurley, "These are Desperate Times": Big Money Is Pouring into State Attorney General Races, BUS. INSIDER (July 31, 2017), <https://www.businessinsider.com/r-trump-bump-court-fights-draw-big-money-into-attorney-general-races-2017-7>.

147 Ben Wieder, *Big Money Comes to State Attorney-General Races*, ATLANTIC (May 8, 2014), <https://www.theatlantic.com/politics/archive/2014/05/us-chamber-targets-dems-in-state-attorney-general-races/361874/>.

Paradoxically, the clearest and most direct variable affected by Article III state standing doctrine is the quality of intrastate political life. Whether this is a desirable spillover from a robust account of state standing, or a pernicious side effect, depends on one's view of the proper role of a state AG and the kind of elections for statewide office that are desirable. Some commentators have decried derogations from AGs' traditional role as "representatives of their states."<sup>148</sup> Others have acutely observed that many instances of state-led litigation concern vertical conflicts with the federal government and horizontal, distributional conflicts among various states.<sup>149</sup>

These different effects of state standing have different normative valences, but are they are also entangled in practice. They are hence hard to evaluate separately. Evaluating the effects of state-led litigation accordingly thus presents complex normative and empirical questions. Because views on these questions are unlikely to be uniform, and instead contested, I think it is reasonable to conclude that incentive effects, while more substantial than litigant effects or structural constitutional effects, do not necessitate counsel in favor of or against state standing. Or at least they do not without committing to further normative propositions and more extensive empirical investigation on the ground.

#### CONCLUSION

I have argued that a recalibration of state standing's open doctrinal questions would have important influence on the incentives of state AGs, with spillover consequences for the local political environment in states where AGs are elected. In contrast, it is at present speculative and uncertain whether such recalibration would alter the possibility that, or manner in which, federal law questions are presented in federal court. Certainly, the order of litigation presentation would in some instances change, but it is hard to draw any compelling normative inference from this prediction.

Similarly, reports of the salience of state standing for either the horizontal or the vertical elements of the structural Constitution are rather overstated. It is not at all obvious that more state-led litigation will tether the President more closely to legislative preferences, or instead enable executive-led defections from those preferences. (And it is also not clear that a complex conception such as the separation of powers should be conceptually boiled down to such effects.) Nor is the horizontal effect on the American federal system of states clear. Simply put, it is hard to predict whether the distributive consequences of such litigation will outweigh their positive effects on states' legal entitlements. These structural stakes of state standing, therefore, are characterized by considerable uncertainty in many ways.

I can imagine two responses to this uncertainty. The first is the retreat to formalism, and an insistence that precedent, constitutional text, or the like

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148 PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* 200 (2015).

149 See Lemos & Young, *supra* note 146, at 96–100.



alone provide a solution to the state standing problem. Of course, it is quite possible to plunder these sources in search of doctrinal fixes. At the same time, a formalist solution needs some sort of justification in the absence of compelling evidence of historical settlement. The instability of run-of-the-mill Article III doctrine, however, is ample proof that such settlement is sorely wanting, and that the choice between formalist solutions needs justification. I thus see no way here of avoiding the need to think through hard questions of consequences.

A second approach is to recognize the need for theoretical precision and empirical substantiation before reaching broad conclusions about the path of state standing law. So far as I can tell from my reading of the literature, this sort of modest and empirically informed approach seems to have largely fallen out of favor in federal courts scholarship of late.<sup>150</sup> I think that is disappointing, especially in an era of increasing partisan polarization that will surely not leave the legal academy unaffected. I suspect that in the coming years, law professors (who can already be often identified with a particular ideological position in the larger partisan spectrum) will come under greater and greater pressure to hew to a party line. For all sorts of reasons, I think this is very unfortunate but likely unavoidable. The result will be pressure for the legal academy to shift from what is clearly scholarly production to forms of ideological production, working as organic intellectuals of vying political formations.

With this in mind, I think a more cautious, incremental, and empirical-state-contingent analysis is warranted not just in this domain, but in respect to many questions of federal jurisdictional design more generally. This Essay has been a modest contribution to that epistemic enterprise.

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150 Margaret Lemos's work, cited throughout this Essay, is an important exception.