

# THE PRIVATE RIGHTS OF PUBLIC GOVERNMENTS

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## INTRODUCTION

Federal courts law is replete with hallowed dictums that are figuratively resonant but literally false. Among these is *Marbury v. Madison*'s admonition that "[t]he province of the court is, solely, to decide on the rights of individuals."<sup>1</sup> Taken literally, this dictum would close the courthouse doors to government plaintiffs, not to mention any plaintiff who sues to enforce the rights of the public. Perhaps federal courts should take *Marbury*'s dictum for all it literally says, but they do not, not really. Understood figuratively, however, *Marbury* might be read to enshrine a private rights model into the law of federal jurisdiction.<sup>2</sup>

Contemporary standing doctrine reflects the private rights model. Standing, the Supreme Court has held, is "an essential and unchanging part of the case-or-controversy requirement of Article III."<sup>3</sup> Under the private

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1 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

2 *Cf. Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result) (arguing that Article III requires harm to private rights before federal court may take jurisdiction, and citing *Marbury*'s dictum for that proposition); Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (but Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1384 (2014) ("By enforcing the private-rights model articulated by Chief Justice Marshall in *Marbury*, Article III standing can effectively prevent what Tocqueville called 'wanton assaults' on legislation resulting from 'the daily aggressions of party spirit.'" (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102 (P. Bradley ed., 1945))). *But cf.* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1370–71 (1973) (arguing that "*Marbury* itself provides the basis for a different model of judicial competence" under which the Supreme Court "has the 'special function' in our frame of government to declare authoritatively the meaning of the Constitution," even in cases that do not involve private rights).

3 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

rights model of standing, private litigants have standing to vindicate their own private rights in an Article III court. But a private litigant who seeks to vindicate a public right stands on unsure footing.<sup>4</sup> That, in rough outline, is the law of private standing today.<sup>5</sup>

How does the private rights model apply to the standing of states to sue in federal court? The answer may seem obvious: distinguish, as the Court did in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, between a state's "proprietary interests" on the one hand and its "sovereign" and "quasi-sovereign" interests on the other.<sup>6</sup> For purposes of standing doctrine, proprietary interests are like private rights. The *Snapp* Court suggested, while sovereign and quasi-sovereign interests are uniquely public rights.<sup>7</sup> The easy cases are those in which a state sues to vindicate proprietary interests.<sup>8</sup> The hard cases are those that involve a state's sovereign or quasi-sovereign interests,<sup>9</sup> particu-

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4 "Public rights" include rights that protect the public in common, such as rights to enforcement of the law, while "private rights" encompass individual claims under the common law, as well as some statutory and constitutional rights. For recent discussions, see *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550–51 (2016) (Thomas, J., concurring); William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197.

5 Much of the debate about Article III standing in general, and the injury-in-fact requirement in particular, concerns when, if ever, private citizens should have standing to vindicate public rights. See, e.g., Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 317 (2001) (discussing and criticizing doctrine that "restrict[s] the ability of private citizens to vindicate broad public rights"); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) (arguing that Congress should have authority to create public standing); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1381–82 (1988) (arguing for standing doctrine that permits "the adjudication of group rights at the behest of any member of the public"); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 733 (2004) (arguing that history reflects a premise that "the unique advantage of the courts lies in protecting private rights").

6 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601–02 (1982).

7 *Id.* (explaining that "like other associations and private parties, a State is bound to have a variety of proprietary interests. . . . And like other such proprietors it may at times need to pursue those interests in court"); see also *id.* at 601 (identifying interests that are "based on [the state's] sovereign character," including "the power to create and enforce a legal code" and "the maintenance and recognition of borders"); *id.* at 602 (defining quasi-sovereign interests as "a set of interests that the State has in the well-being of its populace").

8 See, e.g., Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 640 (2016) (arguing that "sovereignty and quasi-sovereign interests" raise "[d]octrinal puzzles" but "proprietary injuries" do not).

9 Recent commentary on government standing has focused on injuries to a government's sovereign or quasi-sovereign interests. See, e.g., Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 85–90 (arguing for restrictive doctrine when states seek to vindicate sovereign interests through federal litigation); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 854–55 (2016) (arguing that "States are entitled to 'special solitude' . . . when they seek to enforce or defend state law," a quintessential sovereign interest); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA.

larly because the Court suggested in *Massachusetts v. EPA* that such interests may be due “special solicitude in [the] standing analysis.”<sup>10</sup> In short, while a state’s sovereign or quasi-sovereign interests may not fit within the private rights model of standing, a state’s proprietary interests surely do.

This Essay’s aim is to think more carefully about the puzzle of a public government’s “private” rights. It is not apparent how the private rights model of standing maps onto state standing, particularly in suits against the federal government. Historically, “public rights” encompassed a government’s proprietary interests in property held on behalf of the public.<sup>11</sup> And today, state litigation against the federal government has put the distinctions among proprietary, sovereign, and quasi-sovereign interests under strain. States have brought politically controversial suits and requested nationwide injunctions based upon injuries that may look like typically private, judicially cognizable injuries, yet arguably raise the separation of powers concerns that Article III standing doctrine is designed to avoid.

Thus, the distinction between “proprietary” interests on the one hand and “sovereign” or “quasi-sovereign” interests on the other does not neatly track the private rights model of standing. Consider the following cases,

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L. REV. 1435, 1440 (2013) (arguing that governments should be preferred litigants in disputes about sovereign authority); Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1704–05 (2008) (proposing that “courts relax the immediacy and redressability prongs of the standing test when states bring *parens patriae* suits to protect their quasi-sovereign interest in the health, welfare, and natural resources of their citizens”); Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 252 (2009) (arguing that *Massachusetts v. EPA* permits states to vindicate quasi-sovereign interests “that would not be judicially cognizable if asserted by any individual citizen”); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201, 235 (2017) (arguing for “sovereign preemption state standing,” which would empower states to sue when “the Executive Branch has underenforced . . . federal law in a way that is inconsistent with a governing statute” and “the state [is] able to point to preemption of state law”); Stephen I. Vladeck, *States’ Rights and State Standing*, 46 U. RICH. L. REV. 845, 848–49 (2012) (arguing that states generally should not have standing to espouse claims on behalf of their citizens against federal government); Ann Woolhandler, *Governmental Sovereignty Actions*, 23 WM. & MARY BILL RTS. J. 209, 210–11 (2014) (arguing for restrictive standing doctrine when government seeks to litigate its sovereign interests). Some commentary has developed frameworks for understanding the varied interests that a state might seek to vindicate in federal court. See Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1 (2014) [hereinafter Davis, *Implied Public Rights of Action*]; Seth Davis, *Standing Doctrine’s State Action Problem*, 91 NOTRE DAME L. REV. 585 (2015) [hereinafter Davis, *State Action Problem*]; Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273 (2007); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995).

10 *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

11 See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566 (2007) (explaining that “public rights” in early American law included “proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury”).

which raise hard questions about how to parse a state's proprietary interests in suits against the federal government:

- A state with a substantial egg farming industry sues a federal agency, alleging that it has harmed the state's economy by promulgating new egg-related regulations.<sup>12</sup> The state argues that it has suffered a financial injury, the "paradigmatic"<sup>13</sup> basis for Article III standing. Such "Wallet Injury,"<sup>14</sup> the state argues, is a prototypical proprietary interest. Has the state alleged a proprietary interest that suffices for standing purposes?
- The President issues an executive order directing the construction of a border wall. A state with territory along the border sues.<sup>15</sup> It alleges that the wall will negatively impact land the state owns. Does the state's standing depend upon whether a similarly situated landowner would have standing?<sup>16</sup>
- A state that operates a business sues a federal official, alleging that the official has benefitted its competitors at the business's expense.<sup>17</sup> Under Article III, a private corporation may have standing to challenge federal agency action based upon a competitive injury.<sup>18</sup> Does a state have proprietary standing on the same grounds?
- A state sues to challenge a federal agency action that bars non-U.S. nationals from entering the United States to attend university.<sup>19</sup> The state claims standing as a proprietor of the public university where those individuals are enrolled. Under Article III and third-party standing doctrine, schools may have standing to assert the rights of their students when those rights are bound up with the school's interests.<sup>20</sup> Does the state have to satisfy the same test, or is it due special solicitude even when it sues to vindicate a proprietary interest?
- A federal agency threatens to strip all federal funding from a state because the state has adopted a policy that purportedly undermines

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12 Cf. *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 651 (9th Cir. 2017) (considering standing of six States to sue a seventh State to challenge its egg-related regulations).

13 *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005).

14 See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment) ("Wallet Injury is . . . [a] concrete and particularized injury . . .").

15 See *In re Border Infrastructure Emtl. Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018).

16 Cf. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 561, 626 (1852) (holding that State could bring public nuisance action against bridge obstructing public navigation "on the same ground and to the same extent as a corporation or individual may" because it had suffered "special damage" to its property).

17 See *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 725 (D. Md. 2018).

18 See *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151–52 (1970).

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

20 See *Runyon v. McCrary*, 427 U.S. 160, 175 & n.13 (1976).

federal immigration enforcement.<sup>21</sup> The state sues before the agency has carried out the threat. The United States argues that while preenforcement review may be available to protect private rights, the state has no proprietary interest at stake and therefore lacks standing to seek preenforcement review.<sup>22</sup> Is that right?

This Essay charts the analytical and doctrinal confusion arising from the category of “proprietary” interests in state standing law. This category might be taken literally to include only the ownership of property and interests that stem from it.<sup>23</sup> It might refer to interests that are analogous to those that a private corporation might litigate,<sup>24</sup> or instead to any type of financial injury a state might suffer.<sup>25</sup> Other possibilities would limit “proprietary” interests to those interests recognized under the common law,<sup>26</sup> or only those interests recognized under private law.<sup>27</sup> Perhaps the most that can be said is that “proprietary” interests should be understood to refer to any interests that are analogous to those of private parties.<sup>28</sup> In addition to this definitional puzzle, there is confusion among courts about how to treat “proprietary” interests in the standing analysis. In many recent cases, states have tried to clear the standing hurdle by combining “proprietary” interests with “sovereign”

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21 See *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 517 (N.D. Cal. 2017), *appeal dismissed as moot sub nom. City & County of San Francisco v. Trump*, No. 17-16886, No. 17-16887, 2018 WL 1401847 (9th Cir. Jan. 4, 2018).

22 *Id.* at 518 (considering such an argument).

23 See Kathryn A. Watts & Amy J. Wildermuth, Essay, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 Nw. U. L. REV. 1029, 1031–32 (2008) (“In the first category [of state standing doctrine] are proprietary interests such as ownership of land or participation in a business venture.”).

24 My earlier work on a state’s typically private interests referred to a state’s “corporate” interests, offering common-law rights of action in contract and property as examples. Davis, *Implied Public Rights of Action*, *supra* note 9, at 17–18. That work also referred more broadly to the typically private interests of states. See *id.* at 5. This Essay is an attempt to think through the relevant distinctions in a more nuanced way than prior scholarship, including my own, has done.

25 In recent work I have explored the emergence of financial injuries, which courts often treat as necessarily “proprietary,” as a basis for state suits against the federal government. I argue that financial injuries to states are often distinguishable from the injuries that private parties typically suffer. See Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1235–36 (2019).

26 See David A. Nagdeman, Comment, *Sovereign Ephemera: State Standing Against the Federal Government for Injuries to Quasi-Sovereign Interests*, 90 TEMP. L. REV. 53, 63 (2017) (defining “proprietary interests” as “[c]ommon law interests”).

27 See *infra* subsection II.A.5.

28 See, e.g., Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 109 (2018) (“States have many of the same interests that private parties do, and in many cases state litigation will have private analogs (or may be brought contemporaneously with private parties.)”; Woolhandler, *supra* note 9, at 213 (referring to proprietary category of state interests as “[i]nterests similar to those of private parties” (emphasis omitted)).

and “quasi-sovereign” interests.<sup>29</sup> In some cases, moreover, states have argued that they are due “special solicitude” under *Massachusetts v. EPA* even when they sue to vindicate a proprietary interest.<sup>30</sup>

Together, these analytical and doctrinal questions make up a complex puzzle involving Article III, separation of powers, federalism, and the enforcement of rights. But this puzzle need not and should not be solved in every case.

To bring greater analytical clarity, this Essay proposes a sequence of decisionmaking in state standing cases. Its thesis is that the starting point of analysis of state standing in any particular case should be whether the state has standing under the typical Article III and prudential rules. If a state would have standing under the typical rules applicable to private parties, then the only question is whether there is some reason to show special disfavor to the state. Courts should address questions about special solicitude only in those cases where a state would lack standing under the rules applicable to private parties. This standing analysis should look to the merits of the dispute and the relief the state seeks, and ask whether the state is seeking to enforce its own rights or the rights of a third party and whether the rights it is seeking to enforce are private rights or public rights.<sup>31</sup>

The Essay proceeds in three Parts. Part I parses the interests of states under the modern doctrine. Part II explores the puzzle that these doctrinal distinctions create. Part III lays out an order of battle to help clarify the grounds of debate about state standing in any particular case,<sup>32</sup> and considers the costs and benefits of this order of decisionmaking.

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29 See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 398–99 (2011) (arguing that “categorically distinct interests” of states may be aggregated for standing purposes).

30 *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 158 (E.D.N.Y. 2017) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)); see Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and “The New Process Federalism,”* 105 CALIF. L. REV. 1739, 1745 (2017) (“Even the basic question of what warrants special solicitude remains unclear: ‘proprietary’ interests, ‘sovereign’ interests, and ‘quasi-sovereign’ interests have traditionally been distinct bases for standing.”).

31 By focusing upon the underlying substantive law that the state seeks to enforce, Part III argues, we can cut through much of the confusion that arises from the *Snapp* Court’s distinctions among “proprietary,” “sovereign,” and “quasi-sovereign” interests. Thus, this Essay builds upon the work of scholars who have argued that standing determinations are inevitably bound up with the merits. See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1071 (2015) (“[W]hether a plaintiff has suffered a judicially cognizable injury . . . frequently turns on the provision of law under which a plaintiff seeks relief.”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) (arguing that standing analysis should ask, “[d]oes the plaintiff have a legal right to judicial enforcement of an asserted legal duty?”); cf. Davis, *Implied Public Rights of Action*, *supra* note 9, at 1 (looking to substantive law to determine when a government has an implied right to sue).

32 The most familiar “order of battle” problem in constitutional law concerns the sequence of decisionmaking for constitutional tort litigation involving qualified immunity. See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding, contrary to *Saucier v. Katz*, 533

## I. PARSING THE INTERESTS OF STATES

What exactly do we mean when we say that a state has some interests that mirror those of private parties for standing purposes? And how might the answer matter? This Part raises these questions.

A. *Private Standing and Private Rights*

Over the past four decades, the Court has developed a set of constitutional and prudential limits on private standing that are by now familiar. To have Article III standing to sue, a private plaintiff must point to an injury in fact that (i) is concrete and particularized, (ii) was caused by the defendant, and (iii) may be redressed through judicial relief.<sup>33</sup> The purpose of these constitutional standing requirements, the Court has explained, is to protect the separation of powers by limiting judicial authority to resolving cases and controversies.<sup>34</sup> In addition, the Court has developed prudential limits on private standing in an Article III court. Litigants may not, for example, sue to vindicate the rights of third parties unless one of the exceptions to the ban on third-party standing applies.<sup>35</sup>

Under this private rights model, private parties typically have constitutional and prudential standing to litigate their own private rights. Private rights include rights to bodily integrity, contract, liberty, and property. Common-law causes of action have long been available to protect such rights, though the metes and bounds of these causes have changed over time. American law also recognizes private rights under the Constitution and statutory law. And although Blackstone defined “private rights” as those “belonging to individuals, considered as individuals,”<sup>36</sup> we now define them to include rights belonging to private entities, such as private corporations, as well.

Justice Clarence Thomas’s concurring opinion in the Court’s recent standing decision in *Spokeo v. Robins* summarized the private rights model of standing.<sup>37</sup> In *Spokeo*, the Court held that an injury in fact must be not only particularized, but also concrete: concreteness and particularity, in other words, are independent requirements for an injury in fact.<sup>38</sup> In his concurring opinion, Thomas grounded contemporary standing doctrine in the

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U.S. 194 (2001), that courts need not resolve substantive constitutional issue of whether defendant violated a constitutional right, but may instead decide that qualified immunity is available because a right was not clearly established at the time of defendant’s misconduct); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115; Michael L. Wells, *The “Order-of-Battle” in Constitutional Litigation*, 60 SMU L. REV. 1539 (2007).

33 See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410–11 (2013). See generally *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

34 See *Allen v. Wright*, 468 U.S. 737, 752 (1984).

35 See *Singleton v. Wulff*, 428 U.S. 106, 114–16 (1976).

36 3 WILLIAM BLACKSTONE, COMMENTARIES \*2.

37 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (Thomas, J., concurring).

38 *Id.* at 1545 (majority opinion).

common-law distinction between private rights and public rights.<sup>39</sup> In private rights cases, such as, for example, those involving trespass to real property, courts traditionally have presumed that the violation of a personal, legal right is a “*de facto* injury.”<sup>40</sup> By contrast, when a private plaintiff sues to vindicate public rights, that is, “duties owed ‘to the whole community, considered as a community, in its social aggregate capacity,’” common-law courts typically required the plaintiff to allege facts showing that they had suffered a personal harm that distinguished them from the general public.<sup>41</sup>

This distinction, Thomas argued, has been carried forward into the Court’s Article III jurisprudence.<sup>42</sup> Where “private individuals sue to redress violations of their own private rights,” the “separation-of-powers concerns underlying our public-rights decisions are not implicated.”<sup>43</sup> A plaintiff suing to enforce a private right, in other words, need not “assert an actual injury beyond the violation” of the right itself.<sup>44</sup> By contrast, when a private plaintiff sues to enforce a public right, the Court has been concerned to “prevent[ ] the judiciary’s entanglement in disputes that are primarily political in nature.”<sup>45</sup> It has, therefore, required a private plaintiff to allege a “‘concrete’ injury particular to himself” in suits involving public rights, one that involves “individualized harm” rather than nothing more than harm to the general public.<sup>46</sup> While we may debate the details, as well as whether Article III mandates a private rights model,<sup>47</sup> Thomas’s concurring opinion nicely captures the centrality of that model to modern standing doctrine.

### B. *The Types of State Interests*

How does this private rights model apply to state standing? In some cases, states may have to satisfy the same constitutional and prudential

39 *Id.* at 1551–52 (Thomas, J., concurring).

40 *Id.* at 1551; *see also* *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).

41 *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*41).

42 *Id.* at 1552.

43 *Id.*

44 *Id.* As Professor Andrew Hessick has shown, however, the federal courts have not always granted standing in cases involving private rights. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 277 (2008) (“[A]lthough the Court has claimed that its standing requirements are necessary to preserve the traditional limits on the judiciary, those requirements have precluded claims that courts historically would have permitted.”).

45 *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

46 *Id.* at 1552, 1554.

47 *See* James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 212–13 (2018) (developing an approach to standing that begins with “Justice Thomas’s familiar distinction between public and private rights,” but parting company insofar as the Justice took “a too-narrow view of the historical ability of litigants to mount public or popular actions”); *see also* Baude, *supra* note 4, at 198 (“While Justice Thomas’s proposal is not yet fully developed, it may provide a theoretically satisfying way to make sense of the Court’s approach to statutory standing.”).

requirements as private litigants. In other cases, they may sue even when a private litigant would lack standing. Whether a state must meet the typical Article III and prudential requirements may turn upon the interest that the state seeks to vindicate. According to the Court, states may sue based upon any of several different interests: proprietary interests, sovereign interests, and quasi-sovereign interests.<sup>48</sup>

### 1. Proprietary Interests

Proprietary interests are not unique to states. When a state's standing rests upon proprietary interests, *Snapp* suggested, states may sue on the same terms as a private litigant: “[L]ike other associations and private parties, a State is bound to have a variety of proprietary interests. . . . And like other such proprietors it may at times need to pursue those interests in court.”<sup>49</sup>

### 2. Sovereign Interests

A state may also sue to vindicate its uniquely sovereign interests. It may, for example, have standing to vindicate its authority to make and enforce laws.<sup>50</sup> An uncontroversial example involves state standing to defend state laws on appeal.<sup>51</sup> A state may also sue to “demand . . . recognition from other sovereigns.”<sup>52</sup> Border disputes between states are one example.<sup>53</sup> So too are cases involving claims of intergovernmental immunity.<sup>54</sup> The Court has—without commenting on standing—permitted states to sue the federal government to enforce the Tenth Amendment ban on commandeering.<sup>55</sup>

### 3. Quasi-Sovereign Interests

The *Snapp* Court's standing analysis focused upon a third type of state interest: quasi-sovereign interests. A state has quasi-sovereign interests in the “well-being of its populace.”<sup>56</sup> Such interests support *parens patriae* suits designed to protect state residents.<sup>57</sup> *Snapp* itself involved the Common-

48 See Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592 (1982). For a comprehensive analysis of *Snapp*, see Seth Davis, *State Standing for Equality*, 79 LA. L. REV. 147, 155–67 (2018).

49 *Snapp*, 458 U.S. at 601–02.

50 *Id.* at 601.

51 See, e.g., Grove, *supra* note 9, at 858 (“One of [the] background principles [of government standing doctrine] is the concept that a sovereign government must have standing to enforce and defend its laws in court.”).

52 *Snapp*, 458 U.S. at 601.

53 See *id.*

54 See Davis, *Implied Public Rights of Action*, *supra* note 9, at 18.

55 E.g., *New York v. United States*, 505 U.S. 144 (1992).

56 *Snapp*, 458 U.S. at 602.

57 *Id.* Under English law, the Crown traditionally had a *parens patriae* authority to act “as guardian of persons under legal disabilities to act for themselves.” *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972). *Parens patriae* standing in American federal courts law is roughly analogous to this traditional concept insofar as it involves a state

wealth of Puerto Rico's quasi-sovereign interest in protecting its "residents from the harmful effects of discrimination," as Puerto Rico had standing to sue Virginia apple growers for discriminating against Puerto Rican migrant workers in violation of federal immigration and labor laws.<sup>58</sup>

### C. *The Doctrinal Significance of the Different Types of State Interests*

*Snapp* suggests that a state seeking to vindicate its proprietary interests must establish standing on the same terms as a private litigant. "[L]ike other . . . proprietors," the Court explained, a state "may at times need to pursue [its] interests in court."<sup>59</sup> Scholars have similarly concluded that a state must meet the typical Article III and prudential requirements when it premises standing upon proprietary interests.<sup>60</sup> "The doctrinal puzzles grow instead out of decisions regarding the other two categories: sovereign [ ] and quasi-sovereign interests."<sup>61</sup> Courts and commentators have had much to say about those puzzles, particularly in recent years.<sup>62</sup>

Particularly puzzling has been the Court's suggestion in *Massachusetts v. EPA* that states enjoy "special solicitude in [the] standing analysis."<sup>63</sup> In that case, Massachusetts sued the Environmental Protection Agency (EPA) for denying a petition for rulemaking to regulate greenhouse gas emissions from new motor vehicles.<sup>64</sup> The EPA argued that its denial of the petition did not inflict a concrete injury that would distinguish the State from any member of

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representing the interests of its residents when they cannot themselves bring suit. But "[t]he nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England." *Id.*

58 *Snapp*, 458 U.S. at 598 n.5, 609. The Court treated Puerto Rico as indistinguishable from a state for standing purposes. In holding that the Commonwealth had standing, the Court also pointed to Puerto Rico's direct participation in the "federal employment scheme" at issue on the merits. *See id.* at 610 (reasoning that "the fact that the Commonwealth participates directly in the operation of the federal employment scheme" afforded it a "compelling . . . *parens patriae* interest in assuring that the scheme operates to the full benefit of its residents").

59 *Id.* at 601–02.

60 *See, e.g.,* Lemos & Young, *supra* note 28, at 109 (analogizing state's proprietary interests to those of private parties for standing purposes); Woolhandler, *supra* note 9, at 213 (explaining that when government sues based upon proprietary interests, it "generally needs an injury in fact"); *cf.* Davis, *Implied Public Rights of Action*, *supra* note 9, at 6 (reaching similar conclusion with respect to implication of right of action to sue).

61 Roesler, *supra* note 8, at 640.

62 Some scholars argue that the federal courts should be wary of permitting the states to litigate public actions against the federal government. *See, e.g.,* Vladeck, *supra* note 9, at 848–49; Woolhandler, *supra* note 9, at 236. Others have argued that states have unique sovereign or quasi-sovereign interests that support standing, even in cases where a private party may lack standing. *See, e.g.,* Huq, *supra* note 9, at 1440 (sovereign interests); Mank, *supra* note 9, at 1704–05 (quasi-sovereign interests).

63 *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

64 *Id.* at 505. The EPA concluded that the Clean Air Act did not authorize it to promulgate regulations in order to address problems of climate change, a determination that the Court rejected on the merits. *See id.* at 511, 532.

the public.<sup>65</sup> Massachusetts argued that, to the contrary, it had several judicially cognizable interests, including its proprietary interest in its receding coast line, its sovereign interest in regulating emissions contributing to climate change, which federal law had preempted, and its quasi-sovereign interest in protecting its residents' well-being.<sup>66</sup> Reasoning that the State was "entitled to special solicitude in [the] standing analysis," the Court concluded Massachusetts had standing to sue.<sup>67</sup>

*Massachusetts v. EPA* portended a shift in public law litigation toward state standing. Today, states are leading public law litigants in politically controversial suits against the federal government. In recent litigation, for example, state attorneys general have brought controversial public law questions before federal district courts and requested preliminary nationwide relief, which the (sometimes carefully selected) district court judges have been willing to award.<sup>68</sup>

Perhaps unsurprisingly, states are claiming "proprietary interests" to ground many of these suits. *Snapp* suggests that proprietary interests suffice for standing as a matter of course.<sup>69</sup> And *Massachusetts v. EPA* can be read to afford special solicitude to a state's proprietary interests.<sup>70</sup> *Massachusetts v. Mellon*, moreover, held that a state lacked standing to challenge a federal statute as infringing on its sovereign interests under the Tenth Amendment.<sup>71</sup> The Court also held that a state may not sue the federal government as a *parens patriae* representative to vindicate its citizens' constitutional rights.<sup>72</sup> While it is unclear how much of *Mellon* has survived the Court's modern restatement of state standing doctrine,<sup>73</sup> a state that can rest its standing upon proprietary interests need not worry about the *Mellon* bar.

Some scholars, moreover, have questioned whether states should have sovereign or *parens patriae* standing to sue the federal government. As Professor Ann Woolhandler has argued, such suits may call for "abstract judicial determinations of the validity of governmental action," undermine "the fed-

65 See *id.* at 517 (summarizing EPA's argument).

66 See *id.* at 519–21.

67 *Id.* at 520.

68 See, e.g., Emma Platoff, *By Gutting Obamacare, Judge Reed O'Connor Handed Texas a Win. It Wasn't the First Time*, TEX. TRIB. (Dec. 19, 2018), <https://www.texastribune.org/2018/12/19/reed-oconnor-federal-judge-texas-obamacare-forum-shopping-ken-paxton/> ("The Texas Attorney General's Office has made a habit of filing lawsuits against the federal government that land in O'Connor's court.").

69 See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601–02 (1982) ("[L]ike other . . . proprietors [the state] may at times need to pursue those interests in court.").

70 See, e.g., *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 158 (E.D.N.Y. 2017).

71 *Massachusetts v. Mellon*, 262 U.S. 447, 484–85 (1923).

72 See *id.* at 485–86.

73 States may, for example, sue the federal government in anticommandeering and anticoercion cases to vindicate sovereign interests under the Tenth Amendment. *E.g.*, *New York v. United States*, 505 U.S. 144 (1992) (state successfully sued federal government on anticommandeering grounds).

eralism principle that state and federal governments should act primarily on the people rather than on each other,” and raise individual rights concerns by crowding out private enforcement of public law.<sup>74</sup> For these reasons, Woolhandler argues that federal courts should decline to hear “governmental sovereignty actions.”<sup>75</sup>

It is not clear, however, that limiting states to the litigation of proprietary interests would avoid the separation of powers, federalism, and individual rights concerns that governmental sovereignty actions may raise. It depends in part, of course, on how one defines a state’s “proprietary” interests. And as states increasingly base public law litigation on proprietary interests, that analytical challenge becomes more pressing and more difficult.

## II. THE PUZZLE OF A PUBLIC GOVERNMENT’S “PROPRIETARY” INTERESTS

In short, it is time to treat the category of a government’s “proprietary” interests as a puzzle in its own right. The possibility of sweeping state standing to sue the federal government based upon “proprietary” interests raises separation of powers concerns that the federal courts will become embroiled in resolving political disputes that are not amenable to judicial resolution, and, in the course of doing so, will undermine their legitimacy.<sup>76</sup> This Part discusses three of the most important analytical and doctrinal pieces of the puzzle: how should a government’s “proprietary” interests be defined, should they be afforded special solicitude, and should they be analyzed independently or instead added to sovereign and quasi-sovereign interests to support standing. Thus, this Part makes the first of this Essay’s contributions to our understanding of state standing, showing that we need to think more carefully about the puzzle of “proprietary” interests.

### A. *Five Ways of Defining “Proprietary” Interests*

*Snapp’s* discussion of typically “private,” “proprietary” interests can be read more than one way:

[L]ike other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court.<sup>77</sup>

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74 See Woolhandler, *supra* note 9, at 209–10.

75 See *id.* at 209, 236.

76 See Tara Leigh Grove, Essay, *Justice Scalia’s Other Standing Legacy*, 84 U. CHI. L. REV. 2243, 2245 (2017) (arguing that the “rise in ‘government versus government’ lawsuits . . . may not bode well for the long-term independence of ‘the Third Branch’”).

77 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601–02 (1982).

The Court apparently meant to define a class of cases in which a state's standing is like that of private parties.<sup>78</sup> But it remains unclear what comparison courts should draw between state and private litigation when defining that class of cases. The cases and commentary reveal not a single, clearly defined category, but rather a cluster of ideas about the types of interests that are typically private. Courts and commentators have defined these interests as involving "ownership of land or participation in a business venture,"<sup>79</sup> "corporate" interests,<sup>80</sup> financial interests,<sup>81</sup> "common law" interests,<sup>82</sup> or "private law" interests.<sup>83</sup>

## 1. Ownership and Contractual Interests

Perhaps *Snapp's* dicta concerning proprietary interests should be taken to refer to only those interests that stem from a state's ownership of property and its contractual agreements.<sup>84</sup> That may seem like a sensible comparison as far as it goes. States have some ownership interests that may not be meaningfully distinguishable from a private party's ownership interests.

The hard question is how far a state's ownership interests go. Pitched at the right level of generality, for example, a state's "ownership" interests include its interests over all the territory within its jurisdiction.<sup>85</sup> If, for example, a state sues the federal government to challenge the construction of a wall along its border, which the state alleges will be a nuisance, should it be treated as a private proprietor for standing purposes? Or does such a suit involve a state's uniquely sovereign interests in its borders or its quasi-sovereign interests in the health and well-being of its residents?<sup>86</sup> Without some

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78 See, e.g., Woolhandler, *supra* note 9, at 213 (noting that government "generally needs an injury in fact" when it "sues to vindicate interests that would give an individual a lawsuit in similar circumstances" (footnote omitted)); see also Davis, *Implied Public Rights of Action*, *supra* note 9, at 17 (offering similar account of black letter law).

79 Watts & Wildermuth, *supra* note 23, at 1031.

80 See Davis, *Implied Public Rights of Action*, *supra* note 9, at 17–18.

81 See Davis, *supra* note 25, at 1234.

82 See, e.g., Nagdeman, *supra* note 26, at 63 (referring to proprietary interests as "[c]ommon law interests"); Woolhandler, *supra* note 9, at 213 (explaining that "[c]ommentators have referred to [the] category [of typically private interests] as proprietary, common law, or corporate interests").

83 See Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 370 (2018) (arguing that states in recent public law litigation have "position[ed] themselves as being no different from private litigants and alleg[ed] private law harms when doing so").

84 See Watts & Wildermuth, *supra* note 23, at 1031–32.

85 Seth Davis, *The Private Law State*, 63 MCGILL L.J. (forthcoming 2018) (manuscript at 24) ("We might think of states as owners of territory . . .").

86 See Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601–02 (1982) (identifying "maintenance and recognition of borders" as sovereign interest of a state and interests in "well-being of its populace" as a quasi-sovereign interest); Robert A. Schapiro, *Judicial Federalism and the Challenges of State Constitutional Contestation*, 115 PENN ST. L. REV. 983, 995 (2011) (noting that harm to a state's coastline "implicate[s] a proprie-

reference to the specific legal claims that the state seeks to bring, it is not easy to determine how to categorize the state's interests.<sup>87</sup>

## 2. Corporate Interests

The same sort of question arises if the comparison is between a state and a private corporation. Private corporations have various interests that support standing to sue in the federal court. These interests are not limited to property rights or even the common-law causes of action. For example, a corporation may have Article III standing to sue the federal government when it suffers a competitive injury,<sup>88</sup> even though there is no common-law right to be free from competition.<sup>89</sup> May a state,<sup>90</sup> even though a state is not a for-profit corporation? To the extent, moreover, that a state seeks to sue to vindicate the sort of intangible public interests that nonprofits and private associations might seek to vindicate, it is not clear whether to classify the interest as a "corporate" interest.

Consider, for example, state litigation challenging the Trump administration's ban on travel from majority-Muslim countries. The States of Washington and Minnesota sued to enjoin the first iteration of this Muslim travel ban, alleging that it violated the First Amendment and equal protection rights of individuals.<sup>91</sup> The Ninth Circuit held that the States could sue as owners of their public universities and could invoke third-party standing on the same terms as a private university to assert the rights of students and scholars who were denied entry under the ban.<sup>92</sup> Thus, the States could be understood to have litigated based upon their typically private "corporate" interests, which, the Ninth Circuit implicitly held, were broader than those interests arising from property rights. But to the extent that the States sought to espouse the individual constitutional rights of their residents, the case arguably presented the sort of quasi-sovereign, *parens patriae* standing that *Mellon* denies to states when they sue the federal government.

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tary interest of the state as landowner, or conceivably a sovereign interest of the state in its territorial integrity").

87 A similar problem arises with respect to a state's contractual interests. The Court has characterized "legislation enacted pursuant to the spending power [as] much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Is a state's interest under such a "contract" a proprietary interest? See *Lemos & Young*, *supra* note 28, at 110 (classifying state's interest under contract with federal government as proprietary). Or is it a uniquely sovereign interest arising from the intergovernmental relationship between the states and the federal government?

88 *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 158 (1970).

89 See *Ala. Power Co. v. Ickes*, 302 U.S. 464, 483 (1938) ("The only injury of which [a plaintiff] can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition . . . damages him, the answer is, that it does not abridge or impair any such right.").

90 See *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 745–46 (D. Md. 2018).

91 See *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017) (per curiam).

92 *Id.* at 1159–61, 1161 n.5.

### 3. Financial Interests

Perhaps, however, what distinguished the typically private interests at stake in the travel ban litigation from the intangible quasi-sovereign interests in *Mellon* was the fact of a personal financial harm, which the States alleged resulted from the Muslim travel ban.<sup>93</sup> To allege a “concrete” injury, the Court explained in *Spokeo, Inc. v. Robins*, a plaintiff must allege a “*de facto*” injury that “actually exist[s],” one that is “‘real,’ and not ‘abstract.’”<sup>94</sup> Actual injuries may be tangible, such as economic injuries, or intangible, such as aesthetic injuries, but intangible injuries may be less likely to satisfy Article III requirements.<sup>95</sup>

We might think that some tangible injuries are characteristically private even when a state claims them as the basis for standing. In an important recent article, Professor Raymond Brescia has focused upon the “private character of [the] harm[ ]” that states are alleging to support suits against the federal government, arguing that these harms “are taking on a fairly private character.”<sup>96</sup> These characteristically private injuries, Brescia argues, “include injuries to economic interests” of the states.<sup>97</sup>

States indeed are bringing public law litigation against the federal government based upon economic interests. As I have argued elsewhere, “[s]tate standing to sue the federal government for financial injuries is the new public standing.”<sup>98</sup> In these cases, states characterize their financial injuries as “proprietary,” and for good strategic reason. A “Wallet Injury”<sup>99</sup> is the “paradigmatic” injury in fact.<sup>100</sup> This type of injury may seem like a necessarily private injury to the pocketbooks of states as proprietors.

Financial injuries to states underscore, however, the analytical mistake in attempting to define some types of tangible injuries as necessarily private. Whether states must meet the same Article III requirements as private litigants, or whether they may sue the federal government, should not be determined in this way. States may suffer financial injuries that are similar to those that private parties suffer. But they may also suffer financial injuries in their sovereign capacities.

93 See *id.* at 1160 (“The University of Washington has already incurred the costs of visa applications [for two] interns and will lose its investment if they are not admitted.”).

94 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (internal quotation marks omitted).

95 *Id.* at 1549. For intangible injuries, *Spokeo* concludes, a court should look to whether the alleged harm has a “close relationship” to harms recognized by the common law and to whether Congress has identified the harm as one for judicial cognizance. *Id.*

96 Brescia, *supra* note 83, at 366.

97 *Id.* at 367.

98 Davis, *supra* note 25, at 1229.

99 See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment) (“Wallet Injury is . . . [a] concrete and particularized injury . . .”).

100 See *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (explaining that an economic injury is the “paradigmatic” injury in fact).

In particular, there are multiple ways in which states have claimed financial injuries in recent suits against the federal government.<sup>101</sup> The first is similar to the sorts of wallet injuries that private litigants claim as a matter of course. A state may run a business that suffers a financial loss that would support standing to sue in federal court. In the recent emoluments litigation, for example, Maryland and the District of Columbia sued President Trump, alleging that his acceptance of unconstitutional emoluments has harmed the ability of their hotels to compete with Trump properties.<sup>102</sup> But the financial injury alleged by California in the ongoing sanctuary jurisdiction litigation,<sup>103</sup> as well as the financial injuries alleged by Texas in *Texas v. United States*<sup>104</sup> and *Brackeen v. Zinke*,<sup>105</sup> arise from the States' activities as sovereign governments. *Texas v. United States* involved a financial injury in the form of the costs of providing driver's licenses to undocumented immigrants, an injury inextricably bound up in the State's regulation of driving and its provision of government services.<sup>106</sup> And *Brackeen* involved the costs to the state court and child welfare systems of complying with preemptive federal law.<sup>107</sup>

Injuries to a state's regulatory budget or its general economy may be counted in dollars and cents. It does not follow, however, that these injuries are "proprietary" and therefore suffice for Article III standing as a matter of course. Perhaps a state should have standing to sue anyone, including the federal government, whenever it can allege a financial injury. If so, it is not because this type of injury is necessarily indistinguishable from the sort of "tangible" economic injury that a private corporation might suffer.

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101 For an extended discussion of state standing and financial injuries, which lays out the argument in detail, see Davis, *supra* note 25, at 1242–49.

102 See *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 748, 752–53 (D. Md. 2018).

103 See *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1019 (N.D. Cal. 2018). I have participated as an amicus in support of the State of California and counties in various sanctuary jurisdiction cases.

104 86 F. Supp. 3d 591, 620 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

105 338 F. Supp. 3d 514 (N.D. Tex. 2018), *appeal filed sub nom. Brackeen v. Bernhardt*, No. 18-11479 (5th Cir. Nov. 19, 2018). I participated as an amicus in support of the Defendants-Appellants at the court of appeals in this case.

106 See *Texas*, 86 F. Supp. 3d at 620 (concluding that state could challenge the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, a federal immigration enforcement policy, because DAPA would "directly injure the proprietary interests" of state).

107 See First Amended Complaint & Prayer for Declaratory & Injunctive Relief at 6–8, 13, 60, *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-868) [hereinafter First Amended Complaint] (alleging standing to raise constitutional challenges to Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (2012), based upon States' costs of complying with the Act).

#### 4. Common-Law Interests

Rather than focusing upon the tangibility of injury, a comparison of state standing with private standing might look to the type of law that the state invokes on the merits. The Court has stated that “Article III’s restriction of the judicial power to ‘Cases’ and ‘Controversies’ is properly understood to mean ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’”<sup>108</sup> As one court of appeals put it, “[i]njuries to rights recognized at common law—property, contracts, and torts—have always been sufficient for standing purposes.”<sup>109</sup> A state’s “proprietary interests” might be a shorthand reference to these common-law actions. On this view, a state has standing on the same terms as a private party whenever it brings a common-law action.

States have, however, long enjoyed common-law causes of action that private parties did not. Under the common law, private litigants did not generally have the right to sue to abate a public nuisance.<sup>110</sup> But attorneys general could bring equitable actions to abate public nuisances.<sup>111</sup> Indeed, “[t]he common-law duties of the attorney general, as chief law officer of the state, when not restricted or limited by statute, [were and] are very numerous and varied.”<sup>112</sup> To conflate a state’s “proprietary” interests with its “common law” interests is to obscure the common law’s distinctions between states and private proprietors.

#### 5. Private Law Interests

One way to avoid this confusion might be to define a state’s “proprietary” interests as only those involving “private law harms.”<sup>113</sup> Contract, property, and tort law—not to mention fiduciary law and the law of restitution<sup>114</sup>—provide causes of action to address harms that one private party inflicts on another. Perhaps the *Snapp* Court meant to suggest that a state has standing on the same terms as a private litigant only when it invokes private law.

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108 Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)).

109 *Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 800 (5th Cir. 2012).

110 Instead, a private litigant had to allege “special damage” that distinguished her from the general public in order to sue for public nuisance. *See City of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98 (1838) (emphasis omitted); Davis, *State Action Problem*, *supra* note 9, at 608–09 (discussing public nuisance law).

111 *See, e.g., State ex rel. Williams v. Karston*, 187 S.W.2d 327, 329 (Ark. 1945).

112 *Id.*

113 *Cf. Brescia, supra* note 83, at 370 (arguing that states in recent public law litigation have “position[ed] themselves as being no different from private litigants and alleg[ed] private law harms when doing so”).

114 *See, e.g., Seth Davis, The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1146 (2014); Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 TEX. L. REV. 1927, 1929 (2001).

The underlying law is important in defining the cases in which a state's standing is indistinguishable from that of a private party. But limiting that set of cases to those involving private law is underinclusive. States may have interests indistinguishable from private parties under public law,<sup>115</sup> not just under private law. Where that is the case, it is not clear why we would distinguish states from private parties in the standing analysis.

In defining which state interests are typically private for purposes of standing doctrine, the most promising approach would consider the type of interest the state claims in light of the law the state seeks to invoke on the merits. To label all such interests "proprietary," however, creates more confusion than it resolves.

### B. *Special Solitude (or Special Disfavor?) for "Proprietary" Interests*

Of course, the distinction between "proprietary" interests on the one hand and "sovereign" and "quasi-sovereign" interests on the other matters less to the extent that states must satisfy the same standing requirements for each. But in *Massachusetts v. EPA*, the Court stated that states are "not normal litigants for the purposes of invoking federal jurisdiction."<sup>116</sup> What the Court meant has also been a source of doctrinal confusion. Indeed, "[e]ven the basic question of what warrants special solicitude remains unclear: 'proprietary' interests, 'sovereign' interests, and 'quasi-sovereign' interests have traditionally been distinct bases for standing."<sup>117</sup>

While many commentators have assumed that a state must satisfy the same standing requirements as private parties when suing to vindicate a proprietary interest, courts have sometimes assumed precisely the opposite. As one federal district court recently summarized the black letter law, states "are entitled to 'special solicitude' when they seek to vindicate their 'proprietary' interests, which the court defined as "those that a state may have akin to a private party."<sup>118</sup> And, as some commentators have discussed, *Massachusetts v. EPA* might be read to support special solicitude, particularly in the Article III causation and redressability analyses, even where a state's standing turns upon proprietary interests.<sup>119</sup> In that case, the Court afforded special solicitude to the Commonwealth of Massachusetts while emphasizing that it "does in fact own a great deal of the 'territory alleged to be affected.'"<sup>120</sup> But the Court's discussion of the Commonwealth's standing based upon its interests as a landowner can be read as "independent of the 'special solicitude'

115 See Davis, *Implied Public Rights of Action*, *supra* note 9, at 36.

116 *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

117 Bulman-Pozen, *supra* note 30, at 1745.

118 *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 158 n.16 (E.D.N.Y. 2017).

119 See Ewing & Kysar, *supra* note 29, at 398 (considering possibility that Court in *Massachusetts v. EPA* "was finding ordinary proprietary standing, albeit partly because states' quasi-sovereign interests justify 'special solicitude' in the proprietary interest analysis"); cf. Lemos & Young, *supra* note 28, at 109 n.302 (arguing that special solicitude in *Massachusetts v. EPA* went more to causation than to injury-in-fact requirement of Article III).

120 *Massachusetts*, 549 U.S. at 519.

afforded to states.”<sup>121</sup> If the typical standing requirements apply to a state’s proprietary interests, but not to its sovereign or quasi-sovereign interests, then the distinctions among those interests are a matter of no small doctrinal significance.

The commentary on state standing has focused upon special solicitude for a state’s sovereign and quasi-sovereign interests, but it is conceivable that states might be due special *disfavor* in the standing analysis. Elsewhere I have explored arguments for and against special disfavor for states when they sue the federal government based upon financial injuries.<sup>122</sup> For example, federal courts have concluded that “[e]conomic harm to a business clearly constitutes an injury-in-fact,”<sup>123</sup> and have permitted businesses to sue federal agencies based upon so-called competitive injuries.<sup>124</sup> It is arguable, however, that the reasons for opening the courthouse doors to private competitors challenging agency action do not apply with the same force to states that are operating businesses. States, moreover, may have greater capacity to influence federal agency action through the political process.<sup>125</sup> Perhaps, therefore, when it comes to states, the federal courts should follow the traditional common-law rule that competitive injury “does not lay the foundation for an action.”<sup>126</sup> At least, courts might more closely assess whether the underlying law protects the state’s competitive interest and whether judicial relief would redress the alleged competitive injury.<sup>127</sup> Even if, as I have argued,<sup>128</sup> the case for special disfavor is not decisive, it does suggest that federal courts should be wary of granting special solicitude in cases in which a state claims the same sort of interest that a private party might claim as a basis for standing.<sup>129</sup>

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121 Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 70; see Vladeck, *supra* note 9, at 856–57 (arguing that *Massachusetts v. EPA* “turned to ordinary Article III analysis—relying on the conclusion that rising sea levels would directly injure Massachusetts’s proprietary interests as a coastal property owner”).

122 Davis, *The New Public Standing*, *supra* note 25, at 1269–82.

123 *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017).

124 See, e.g., *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 158 (1970).

125 Davis, *The New Public Standing*, *supra* note 25, at 1280.

126 *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479 (1938).

127 See generally Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1346–47 (2000) (explaining that courts tend to presume that private competitors’ interests are protected by underlying law and that judicial relief would redress the alleged competitive injury).

128 See Davis, *The New Public Standing*, *supra* note 25, at 1283.

129 In other work I have argued that there is no good reason for special solicitude when a state sues to vindicate a typically private interest. See Davis, *Implied Public Rights of Action*, *supra* note 9, at 34–35. As a matter of remedial justice, states have no special claim on federal judicial action. If anything, their claims of a personal right to a remedy are weaker than those of individual victims of legal wrongs. See *id.* at 14–15 (arguing, as a matter of both corrective justice and civil recourse theory, that neither the United States nor states are due special solicitude in the provision of remedies in federal courts). And, as I have

C. Adding “Proprietary” to “Sovereign” and “Quasi-Sovereign” Interests

In most cases, however, states do not rest their standing arguments solely upon typically private interests. That is particularly true in state suits against the federal government. Instead, they point not only to “proprietary,” but also to “sovereign” and “quasi-sovereign” interests to support standing to sue. Yet another puzzle arises when states seek to combine proprietary, sovereign, and quasi-sovereign interests to clear the standing hurdle.

A recent example of this piece of the puzzle is *Texas v. United States*.<sup>130</sup> In that case, Texas sued to enjoin implementation of the Deferred Action for Parents of Americans (“DAPA”) program.<sup>131</sup> DAPA directed the Department of Homeland Security to defer immigration enforcement for undocumented parents of American citizens and lawful permanent residents. Among other things, DAPA-eligible individuals would be entitled to state driver’s licenses under Texas law. Issuing a driver’s license to DAPA beneficiaries would have cost Texas \$130.89 per person, or millions of dollars for the approximately 500,000 beneficiaries then residing in the State.<sup>132</sup> The district court held that DAPA thus would “directly injure the proprietary interests” of Texas.<sup>133</sup> The court of appeals affirmed but did not premise its standing determination squarely upon these so-called proprietary interests. Instead, citing the “direct, substantial pressure directed” at Texas to alter its drivers’ license regime in light of its financial injuries,<sup>134</sup> the court of appeals afforded “special solicitude” to the State’s sovereign interest in enacting and enforcing its own laws.<sup>135</sup>

Just as it was not clear in *Massachusetts v. EPA* whether special solicitude applied to the State’s proprietary injury or to its sovereign (or quasi-sovereign) injuries, so too in *Texas v. United States* it was not clear which interest warranted special solicitude. Both cases suggest that states may sometimes combine proprietary interests with sovereign and quasi-sovereign interests in order to establish standing. When states do so, it is far from clear how the traditional Article III standing analysis should apply.

One possibility is that the analysis should proceed by addition. Where, for example, states cannot clear the standing hurdle based upon sovereign or

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argued, *Massachusetts v. EPA* should not be read to the contrary, because the special solicitude it afforded states turned upon uniquely public interests in regulating to combat climate change. *See id.* at 52.

130 809 F.3d 134 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

131 *See id.* at 146.

132 *Id.* at 155.

133 *Texas v. United States*, 86 F. Supp. 3d 591, 620 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

134 *Texas*, 809 F.3d at 154.

135 *Id.* (internal quotation marks omitted). Because the “causal link” between Texas’s proprietary injury and DAPA was “even closer” than the link between Massachusetts’s loss of coastline and the EPA’s inaction in *Massachusetts v. EPA*, the State had demonstrated a financial injury caused by federal agency action. *Id.* at 159 (“Texas is entitled to the same ‘special solicitude’ as was Massachusetts, and the causal link is even closer here.”).

quasi-sovereign interests alone, perhaps proprietary interests can “push them over the standing barrier, even if those proprietary interests are insufficient on their own.”<sup>136</sup> After all, if the whole point of standing analysis is to ensure concrete adversity, then “what sense could it make to say that categorically distinct interests cannot be additive”?<sup>137</sup>

Another possibility, however, is that standing analysis is and should be about more than concrete adversity. In particular, as Professor Richard Fallon has argued, “the Justices should recognize that disputed standing questions are frequently enmeshed with concerns about the propriety of particular kinds of remedies.”<sup>138</sup> Much of the separation of powers and legitimacy concerns about state standing to sue the federal government arise from the availability of nationwide relief at preliminary stages of the litigation. Critics of nationwide injunctions have pointed to state litigation as a primary example of the problem: states may shop for favorable forums and obtain nationwide preliminary relief in politically controversial cases based upon a limited factual record.<sup>139</sup> The scope of state standing may be bound up with the nature of the relief the state seeks.

The recent Emoluments Clause litigation nicely illustrates these pieces of the puzzle of state standing. In *District of Columbia v. Trump*, Maryland and the District of Columbia sued President Trump for alleged violations of the Domestic and Foreign Emoluments Clauses.<sup>140</sup> As is typical in modern state standing cases, the plaintiffs alleged not only proprietary, but also sovereign and quasi-sovereign interests as the bases for standing. Their proprietary injuries arose from their financial interests in hotels that compete with the Trump International Hotel in Washington, D.C.<sup>141</sup> Their sovereign and quasi-sovereign interests, by contrast, encompassed harms to their opportunity to participate in national political processes, which had been diluted by the President’s alleged acceptance of prohibited emoluments.<sup>142</sup> The district court distinguished among the plaintiffs’ interests because their proprietary interests concerned the acceptance of prohibited emoluments through the operations of the Trump International Hotel while their sovereign and quasi-sovereign interests were not so limited.<sup>143</sup> For instance, the plaintiffs’ proprietary interests, which the Court held sufficed for standing purposes

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136 Ewing & Kysar, *supra* note 29, at 398 (“[P]roprietary interests can top off quasi-sovereign interests or push them over the standing barrier, even if those proprietary interests are insufficient on their own to support standing.”); see *Massachusetts v. EPA*, 549 U.S. 497 (2007).

137 Ewing & Kysar, *supra* note 29, at 399.

138 Fallon, *supra* note 31, at 1110.

139 See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418–19 (2017).

140 *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018). I participated as an amicus in support of the plaintiffs in this litigation.

141 See *id.* at 735.

142 See *id.* at 741.

143 See *id.* at 738.

under the traditional Article III analysis, did not support standing to challenge the operations of the Trump Organization outside D.C.<sup>144</sup>

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Each of the pieces of the puzzle of state standing—how to define proprietary interests, whether they are due special solicitude (or special disfavor), and whether to add them to other state interests in order to find standing—arose in *Texas v. United States* and in *District of Columbia v. Trump*, as they do in many other cases of state litigation against the federal government. This puzzle can present difficult and contested questions about Article III, the separation of powers, federalism, and the appropriate scope of judicial remedies. These hard questions about state standing need not and should not be addressed in every case that raises them, as Part III argues.

### III. AN ORDER OF BATTLE FOR STATE STANDING

This Part offers this Essay's second contribution to state standing analysis. It prescribes an order of battle for resolution of disputes about state standing. The starting point of analysis should be whether the state has standing under the typical Article III and prudential rules that apply to private parties. If a state would have standing under the typical rules applicable to private parties, then the only question is whether there is some reason to show special disfavor to the state. Courts should address questions about special solicitude only in those cases where a state would lack standing under the rules applicable to private parties.

How should courts apply the typical standing rules, given the difficulties of applying the private rights model to states? The framework in this Part does not eliminate every hard question. But it clarifies the analytical and doctrinal choices that courts must make. To bring greater analytical clarity, this Part proposes that courts look to the merits of the dispute and the relief the state seeks and ask whether a state is seeking to enforce its own rights or the rights of a third party and whether the rights it is seeking to enforce are private rights or public rights. This Part first argues that considering the underlying merits and claims for relief can clarify state standing analysis. It then distinguishes among four types of rights claims that states might bring. Against this backdrop, this Part describes the order of battle it proposes, and concludes by considering objections to this proposal.

#### A. *Private Rights and Public Rights in State Standing Cases*

My proposal takes as a premise that standing determinations are inevitably bound up with the merits. Whether a plaintiff has standing should be determined by reference to the underlying law the plaintiff seeks to enforce. In the most influential statement of this view, then-Professor William Fletcher argued that the standing analysis should ask, “[d]oes the plaintiff have a legal

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144 See *id.* at 753.

right to judicial enforcement of an asserted legal duty?”<sup>145</sup> While the Court has not adopted this approach to standing, standing is nevertheless inextricably linked to the merits, as Fallon has explained: “Try as the Supreme Court might to conceptualize standing as injury in fact, its decisions reveal that whether a plaintiff has suffered a judicially cognizable injury . . . frequently turns on the provision of law under which a plaintiff seeks relief.”<sup>146</sup> Professors Ann Woolhandler and Michael Collins have argued that federal courts would do well to acknowledge as much when it comes to state standing.<sup>147</sup>

This premise helps address the analytical challenge of applying the private rights model of standing to states. In particular, by looking to the underlying substantive law we may determine whether the state is seeking to enforce its own rights or the rights of a third party and whether the rights it is seeking to enforce are private rights or public rights.<sup>148</sup>

My proposal also takes as a premise that standing analysis bears upon, and is often bound up with, remedial questions. As Fallon has noted, while “[s]tanding issues rarely emerge in suits for damages,” they occur often “in suits for injunctive or declaratory relief.”<sup>149</sup> The Court has sometimes made this link between justiciability and remedies explicit.<sup>150</sup> And, as Part II’s discussion of *District of Columbia v. Trump* highlighted, questions of the scope of state standing are linked to the scope of available relief.<sup>151</sup>

The *Snapp* Court’s distinctions among “proprietary,” “sovereign,” and “quasi-sovereign” interests sometimes muddle different sorts of claims for relief. Consider, for example, the category of quasi-sovereign interests, which, as *Snapp* and its progeny have defined it, conflate public rights claims for injunctive relief to abate a public nuisance with private rights claims for compensatory damages. For instance, in *Missouri v. Illinois*, one State sought to enjoin another from polluting interstate waters not based upon “direct property rights belonging to the complainant State,” but instead based upon the threat to the public health and welfare, which is a classic public rights claim.<sup>152</sup> By contrast, in *New York ex rel. Vacco v. Mid Hudson Medical Group, P.C.*, a federal court held that a state had quasi-sovereign standing to sue a

145 Fletcher, *supra* note 31, at 229.

146 Fallon, *supra* note 31, at 1071.

147 See Woolhandler & Collins, *supra* note 9, at 505–07 (noting that “[m]any thoughtful proposals in the area of individual standing have suggested a revival of the legally-protected-interest inquiry” and arguing that this inquiry would help rationalize state standing law).

148 This Section draws upon the framework developed in my prior work on state standing, particularly the arguments in Davis, *Implied Public Rights of Action*, *supra* note 9, at 17–22, and Davis, *State Action Problem*, *supra* note 9, at 595–96, 625–37.

149 Fallon, *supra* note 31, at 1110.

150 See *id.* at 1111 n.282 (citing *O’Shea v. Littleton*, 414 U.S. 488, 499 (1974)) (noting that questions about whether plaintiff has alleged judicially cognizable injury “obviously shade into those determining whether the complaint states a sound basis for equitable relief”).

151 See *supra* notes 140–44 and accompanying text.

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

professional corporation for compensatory damages for allegedly discriminating against an individual in violation of federal laws protecting individuals with disabilities.<sup>153</sup> Attending to the rights at stake and the forms of relief involved helps distinguish these two cases and, in turn, clarifies the comparisons between state standing and private standing we should draw in the standing analysis.

Confusion among different types of rights and claims for relief can also arise within the “proprietary” category of cases under the *Snapp* framework. Consider again *Brackeen v. Zinke*, in which several States sued to enjoin implementation of the Indian Child Welfare Act (ICWA).<sup>154</sup> ICWA provides minimum federal standards to protect the best interests of Indian children in child custody proceedings in state court.<sup>155</sup> The States alleged that compliance with ICWA, which creates preemptive federal law applicable in state courts, would impose financial costs on them.<sup>156</sup> Are such costs “proprietary” injuries that suffice for state standing to sue the federal government? There is lower court authority that suggests states may premise Article III standing upon this basis, as long as the state specifically alleges that the challenged federal action directly caused a particular amount of financial cost.<sup>157</sup> Yet attention to the underlying rights claims in *Brackeen* suggests that if the category of “proprietary” standing stretches this far, there is little need for states to point to “sovereign” or “quasi-sovereign” interests when suing the federal government. The States sought to litigate a claim arising under the equal protection component of the Fifth Amendment Due Process Clause, which was a private rights claim; an anticommandeering claim based upon the Tenth Amendment, which involved a public right held by states; and a claim under the nondelegation doctrine, which, at least on the facts of *Brackeen*, did not involve a right held by states.<sup>158</sup> The possibility of state standing to

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153 See *New York ex rel. Vacco v. Mid Hudson Med. Grp., P.C.*, 877 F. Supp. 143, 149 (1995). The State also sought injunctive relief to benefit “all current and future deaf patients and their families,” and thus its suit had a “broader scope than the denial” of one individual’s private rights. *Id.* The court’s failure to distinguish among the rights at stake and the forms of relief underscores this Essay’s point that more careful attention is needed to the ways in which state standing relates to the underlying merits and the relief the state requests.

154 See *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018). See generally Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

155 See 25 U.S.C. § 1902; Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524, 90,527 (Dec. 14, 2016) (to be codified at 45 C.F.R. § 1355) (“[S]ome states, tribes, national organizations and federal agencies have stated that ICWA is the ‘gold standard’ of child welfare practice . . .”).

156 See First Amended Complaint, *supra* note 107, at 6–8, 13, 60; *Brackeen*, 338 F. Supp. 3d at 527.

157 See *Crane v. Napolitano*, 920 F. Supp. 2d 724, 743 (N.D. Tex. 2013) (“[T]he expenditure of state funds may qualify as an invasion of a legally protected interest sufficient to establish standing under the proper circumstances.”), *aff’d sub nom.* *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

158 *Brackeen*, 338 F. Supp. 3d at 520.

sue the federal government for any and all of these types of claims raises Article III and separation of powers questions that are more complex than the “proprietary” label might suggest.

### B. *Four Categories of Cases*

Drawing distinctions among the underlying rights and claims for relief clarifies the ways in which we might compare the standing of states to the standing of private parties. In particular, we might distinguish between private rights and public rights and between cases in which a state seeks to enforce its own rights and those in which it seeks to enforce the rights of a third party.

Doing so yields four categories of cases. First, a state may sue to vindicate its own private rights. Second, a state may sue to vindicate its own public rights. Third, a state may sue to vindicate a third party’s private rights. Fourth, and finally, a state may sue to vindicate public rights that are not its own.

#### 1. A State’s Private Rights

The idea that public governments have “private” rights may seem oxymoronic. In an important sense, of course, everything that a public government does is—or at least should be—public regarding. And we might sensibly refer to all rights held by states as “public” rights. Indeed, while we might today think of a government’s “proprietary” rights as indistinguishable from a private owner’s rights,<sup>159</sup> historically the category of public rights included “proprietary rights held by government on behalf of the people.”<sup>160</sup> But the sense in which I use “private rights” here is not oxymoronic.<sup>161</sup>

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159 See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601–02 (1982) (comparing a state’s “proprietary interests” to those of “other associations and private parties” and reasoning that “like other such proprietors it may at times need to pursue those interests in court”).

160 Nelson, *supra* note 11, at 566.

161 There is an extensive literature on the distinction between “private rights” and “public rights” in Article III jurisprudence generally and in standing law in particular. See, e.g., Baude, *supra* note 4, at 198 (discussing distinction between public rights and private rights in standing doctrine); Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 SUP. CT. REV. 183, 195 (arguing that rationales for public rights exception to requirement of Article III adjudication “are open to question”); Nelson, *supra* note 11, at 566 (arguing that any understanding of the requirement of Article III adjudication must take into account “traditional taxonomy” of private rights versus public rights); Woolhandler & Nelson, *supra* note 5, at 694 (referring to “the ubiquity of the twin ideas of public control over public rights and private control over private rights”). And, of course, there are reasonable debates about the proper definition of this distinction in terms of doctrine and history. My aim is to bracket those debates, as well as the debates about whether Article III mandates a private rights model of standing, and instead to clarify the comparison between private standing and state standing under the current doctrines that apply when private parties sue in federal court.

Instead, I mean to refine the cluster of ideas that courts and commentators have invoked to define a state's "proprietary" interests. As we have seen, the idea of "ownership" may, if pitched at the right level of generality, encompass state interests that private parties do not share under substantive law. Under the common law, a state shares some causes of action with private parties, but also has uniquely public rights as well. To be sure, a state may have "private law" interests that are indistinguishable from those of private parties. But public law may also afford a state rights on the same terms as it affords them to private parties. Like private parties, states may have financial interests, but such interests may arise from legal rights (and powers) that states alone enjoy. The distinction between a state's "corporate" interests and its "governmental" interests helps make this last point, and may be clarified by looking to the underlying substantive law the states seek to enforce.

A state seeks to litigate its own "private" rights when it invokes a personal right that it shares with private parties under a law that benefits both on the same terms. Personal rights held by individuals are private rights.<sup>162</sup> They may be held under the common law, statutes, or the Constitution.<sup>163</sup> And they may be held against private parties or government actors. As legal persons, states may also enjoy personal rights. In some cases, they will enjoy these rights under generally applicable laws that also benefit private parties.

It is a familiar feature of our federalism that generally applicable laws may reach states and private parties. In some cases, such laws may impose duties on states and private parties alike. The Court's Tenth Amendment jurisprudence has grappled with the constitutionality of such generally applicable duties.<sup>164</sup> Substantive law may also recognize generally applicable rights. The common law, for example, provides personal causes of action that protect any legal person that holds title to property. But there is no *a priori* reason to define a state's private rights to include only common-law causes of action. Where a state is "one of the class for whose especial benefit [a] statute was enacted,"<sup>165</sup> the state may have standing on the same terms as a private member of that class would.<sup>166</sup>

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162 See Hessick, *supra* note 44, at 280 ("[P]rivate rights are those rights held by individuals.").

163 See *id.* at 287–88.

164 See, e.g., *New York v. United States*, 505 U.S. 144, 160 (1992) (citing, among others, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)) (noting that many "recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws").

165 *Cort v. Ash*, 422 U.S. 66, 78 (1975) (emphasis omitted) (internal quotation marks omitted) (quoting *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

166 In such a case, the Court's elimination of the "zone-of-interests" test for prudential standing points toward a careful analysis to determine if the provision of law the state seeks to enforce "encompasses" its claim. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014).

## 2. A State's Public Rights

Of course, states and private parties might enjoy different rights under the same substantive body of law. In public rights cases, a state may allege a violation of rights it holds, but which are not enjoyed by a class of beneficiaries that includes private parties, or which do not benefit the state on the same terms as private parties. A state seeks to invoke its own public rights when it sues to vindicate a right that benefits states as states.

For example, the rights, if any, that states enjoy under the Constitution may not be shared with private parties and may differ from constitutional rights that private parties enjoy. Consider the Tenth Amendment's structural protections for states. A private party may invoke these structural protections, at least as a defense to criminal prosecution under a federal statute, in order to protect her individual liberty.<sup>167</sup> The potential analogy between the private rights of an individual and the Tenth Amendment rights of a state may help explain why standing has not seemed controversial when a state brings a Tenth Amendment anticommandeering or anticoercion claim. When New York sued the United States on an anticommandeering theory, for example, the Court did not so much as glance at standing,<sup>168</sup> even though it had reasoned seven years earlier that federalism claims presented questions better addressed to Congress.<sup>169</sup> Perhaps we should see a state's anticommandeering claim no differently than we see a private litigant's challenge to government action that infringes her liberty.

This analogy breaks down upon inspection, however.<sup>170</sup> To be sure, "[t]he States of the Union 'derive important benefits' from the Constitution[,] [ ]such as protection against invasion, U.S. CONST. art. IV, § 4,"<sup>171</sup> the Tenth Amendment protections against commandeering and coercion,<sup>172</sup> and the principle of equal sovereignty,<sup>173</sup> to name three that the courts have recognized. These public rights do not, however, benefit states on the same terms as private parties, who, for instance, may invoke the Tenth Amendment as a defense to criminal prosecution because due process prohibits a criminal conviction premised upon an invalid law.<sup>174</sup> To the extent it affords

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167 See *Bond v. United States*, 564 U.S. 211, 220 (2011) ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines.").

168 See *New York*, 505 U.S. 144.

169 See *Garcia*, 469 U.S. at 556 ("The political process ensures that laws that unduly burden the States will not be promulgated.").

170 See Davis, *Implied Public Rights of Action*, *supra* note 9, at 77 (arguing that analogy between anticommandeering right and individual liberty breaks down).

171 *Livnat v. Palestinian Auth.*, 851 F.3d 45, 49 (D.C. Cir. 2017) (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002)).

172 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *New York*, 505 U.S. 144.

173 See *Shelby County v. Holder*, 570 U.S. 529 (2013).

174 See *Bond v. United States*, 564 U.S. 211, 226 (2011) (Ginsburg, J., concurring) (explaining that criminal defendant "has a personal right not to be convicted under a constitutionally invalid law").

states any judicially enforceable rights, the Tenth Amendment does not do so on the same terms as it protects criminal defendants.<sup>175</sup>

### 3. A Third Party's Private Rights

The third category of cases has been obscured in cases and commentary on “quasi-sovereign” interests. Some such cases, as *Snapp* defined the category, involve a state’s public rights. For example, *Snapp* stated, “a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”<sup>176</sup> When a state seeks to vindicate its “equal sovereignty” under the Constitution,<sup>177</sup> it brings this sort of public rights claim.

Other cases, however, involve enforcement of a third party’s private rights.<sup>178</sup> One example arises from the recent travel ban litigation.<sup>179</sup> When two states challenged the Trump Administration’s first ban on travel from majority-Muslim countries, the Ninth Circuit held that they had third-party standing to litigate individual constitutional rights claims under the rules applicable to private parties, but did not premise state standing on quasi-sovereign interests.<sup>180</sup>

### 4. Public Rights Not Held by States

Finally, there are some cases in which a state sues to vindicate a public right, but not one that it holds as a state. A “public right,” recall, involves “duties owed ‘to the whole community, considered as a community, in its social aggregate capacity.’”<sup>181</sup> The public interest in compliance with the law is one example.

There are public rights under federal law that are not held by states. In general, states do not hold the public right to sue to ensure compliance with federal law—they are not empowered, in Judge Diana Motz’s felicitous

175 There are reasonable debates to be had about whether, and if so, to what extent the Constitution affords states judicially enforceable rights. Compare Woolhandler, *supra* note 9, at 224–25 (questioning whether “governments have the primary interests in litigating structural claims”), with Huq, *supra* note 9, at 1515 (arguing that governments, such as states, should have primary authority to vindicate structural claims). When it comes to due process, however, the Supreme Court has explained that “[t]he word ‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union.” *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966).

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

177 See *Shelby County*, 570 U.S. at 544 (holding that section 4 of the Voting Rights Act violated “equal sovereignty” of states).

178 For further discussion of the “quasi-sovereign” category of cases and the distinction between private rights and public rights, see Davis, *Implied Public Rights of Action*, *supra* note 9, at 23–24, and Davis, *State Action Problem*, *supra* note 10, at 631–32 & n.294.

179 See *supra* notes 91–92 and accompanying text.

180 See *Washington v. Trump*, 847 F.3d 1151, 1159–61 (9th Cir. 2017) (per curiam).

181 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*41).

phrase, to roam as a “roving constitutional watchdog.”<sup>182</sup> More specifically, *Mellon* rejected the claim that a state has a public right to enforce the federal government’s duties to individual citizens.<sup>183</sup> The Court has also questioned whether the federal separation of powers creates rights for states as states.<sup>184</sup> Public rights held by (or on behalf of) American Indian Nations are yet another example of public rights held under federal law, but not by states.<sup>185</sup>

### C. *The Order of Battle*

Of course, there are reasonable debates about how to define private rights versus public rights, and the distinction between private rights and public rights cannot itself determine the answers to difficult questions of state standing. The previous Sections have argued simply that the distinction between private rights and public rights, and between first-party claims and third-party claims, is more precise than the *Snapp* Court’s distinctions among “proprietary,” “sovereign,” and “quasi-sovereign” interests. Focusing upon the rights the state invokes in its claims for relief helps clarify the analytical and doctrinal stakes. In particular, it helps clarify the comparisons we might draw between the standing of states and the standing of private parties.

This Section offers an order of battle for making these comparisons. The starting point of analysis should be whether the state has standing under the Article III and prudential rules applicable to private parties. If it would, then the only question is whether there is some reason to show special disfavor to the state. If the state would lack standing under the typical rules, then courts should address whether the state is due special solicitude.

This approach was not the approach that the Supreme Court took in *Massachusetts v. EPA*.<sup>186</sup> Nor is it the approach that many lower federal courts have taken since that case,<sup>187</sup> with important exceptions.<sup>188</sup> This Section sketches how the proposed order of battle would clarify comparisons between states and private parties in the standing analysis.

182 *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011).

183 *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923) (concluding that “it is no part of [a state’s] duty or power to enforce [the] rights [of its citizens] in respect of their relations with the federal government”).

184 See *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966) (“[C]ourts have consistently regarded . . . the principle of the separation of powers only as protection [ ] for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt.”). *But cf.* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (“[F]ederal action that violates the Constitution’s separation of powers may also ‘invade[ ] rights which . . . are reserved by the Constitution to the several states.’” (second and third alteration in original) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938))).

185 See generally Davis, *State Action Problem*, *supra* note 9, at 634–35.

186 549 U.S. 497, 518–20 (2007).

187 See *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 158 (E.D.N.Y. 2017).

188 See *Washington v. Trump*, 847 F.3d 1151, 1159–61 & n.5 (9th Cir. 2017) (*per curiam*).

## 1. Does the State Have Standing Under the Article III and Prudential Rules Applicable to Private Parties?

Insofar as private litigants typically have standing to litigate their own private rights, the first question in state standing cases typically should be whether the state has standing to obtain the relief it seeks based upon its private rights. Application of the typical Article III and prudential rules should be most straightforward in cases where states sue to vindicate a personal right that private parties also may sue to vindicate. If the state has standing to seek redress for its private rights, then there is no need for a federal court to consider whether it is due special solicitude based upon a unique “sovereign” or “quasi-sovereign” interest. The only question would be whether the state is due special disfavor in the standing analysis.

Assessment of a state’s public rights under the typical rules is a slightly harder question, at least conceptually. The typical standing rules limit a private litigant’s standing to vindicate public rights. For instance, a private litigant cannot sue to enforce the Tenth Amendment based upon nothing more than an ideological interest in federalism. Such a litigant lacks an injury in fact. There has not been, however, any controversy when a state sues in anticommandeering and anticoercion cases to enforce its public right under the Tenth Amendment. We might see a state’s standing to sue to vindicate this public right as a case of special solicitude with respect to the injury-in-fact requirement of Article III. Conversely, such a case might be better conceptualized as an application of the typical Article III injury-in-fact requirement to a state’s claim of a public right.

Either way, there are a class of public rights cases brought by states where the typical rules apply straightforwardly. In these cases, such as *New York v. United States*,<sup>189</sup> a state will be able to fulfill the typical causation and redressability requirements, as well as the typical prudential requirements, and, at most, will be due a kind of “special solicitude” in the injury-in-fact analysis, but only insofar as private parties do not have standing to vindicate public rights as a matter of course. Where a state raises such a claim of public right, the most straightforward course may be for courts to analyze standing on this basis first.

The analysis of third-party standing will typically be more difficult than the analysis of first-party standing. In recent work, I have argued that states should have standing to litigate a third party’s private rights when they can demonstrate an Article III injury in fact and satisfy the typical prudential requirements for third-party standing.<sup>190</sup> Where a state has standing under these typical rules, the only question should be whether the state is due special disfavor.

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189 505 U.S. 144 (1992).

190 See Davis, *supra* note 48, at 171. The Ninth Circuit’s analysis in *Washington v. Trump* is a model of analysis where a state premises standing upon a third party’s private rights. See *Trump*, 847 F.3d at 1159–61 & n.5.

Where a state sues to vindicate a public right not its own, it may have standing on the same basis as a private party would. A state might sue under the Administrative Procedure Act (APA), for example, to enforce the constitutional separation of powers, the APA's procedural requirements, or some statutory limit on the agency's discretion.<sup>191</sup> Such claims may involve public rights that are not the state's own. When a state brings such a suit, the first question is whether a private party raising the same claims would have standing to sue.

## 2. If So, Then Is There a Reason to Show the States Special Disfavor in the Standing Analysis?

The cases and commentary have focused upon whether states are due special solicitude in the standing analysis. But, as I have explored in recent work, there is also the possibility that states should be due special disfavor in the standing analysis.<sup>192</sup> Here, I want to highlight how the proposed order of battle sheds light on a doctrinal problem that usually is ignored in the cases on a state's *parens patriae* standing.

It is not clear how to compare the third-party standing of private litigants with the standing of states to vindicate a third party's private rights. The Court's third-party standing jurisprudence suggests reasons for concern about state standing to vindicate another's private rights. For one, "third parties themselves usually will be the best proponents of their own rights."<sup>193</sup> For another, "it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not."<sup>194</sup> Moreover, *Snapp* stated that a state "must articulate an interest apart from the interests of particular private parties" in order to maintain a *parens patriae* action.<sup>195</sup> And, finally, *Mellon* held that a state lacks *parens patriae* standing to espouse its citizens' individual constitutional rights against the federal government.<sup>196</sup>

Perhaps a state is due special disfavor when it seeks to vindicate a third party's private rights. For instance, perhaps a state should not be able to avail itself of the typical standing rules that allow a private party sometimes to sue based upon a third party's private rights. Instead, a state might be required to fulfill the unique rules that apply to *parens patriae* standing whenever it

191 See, e.g., *Massachusetts*, 549 U.S. at 518; *Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

192 In his dissenting opinion in *Massachusetts v. EPA*, Chief Justice John Roberts raised this possibility when it came to the "quasi-sovereign" standing of states. See *Massachusetts*, 549 U.S. at 539 (Roberts, C.J., dissenting). I will not rehearse here the arguments for and against special disfavor for states, which I explore at length in *Davis*, *supra* note 25, at 1269–82, and which I have noted in *Davis*, *supra* note 48, at 183.

193 *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

194 See *id.* at 113–14.

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

196 See *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). *But cf.* *Davis*, *supra* note 25, at 1300–01 (arguing that *Mellon* is a prudential, not a constitutional, bar).

seeks to bring such a claim. And, in turn, those rules that might be understood to create “an *additional* hurdle for a state litigant” in the Article III analysis.<sup>197</sup>

The important point for this Essay is that the proposed order of battle would require courts to confront this sort of question. Too much attention has been paid to the problem of special solicitude when some cases instead are best understood to raise the possibility of special disfavor.

### 3. If No, Then Is There a Reason to Show the States Special Solicitude in the Standing Analysis?

Although federal courts raise the question of special solicitude more often than they should, there are cases in which it cannot be avoided. Both *Massachusetts v. EPA*<sup>198</sup> and *Texas v. United States*<sup>199</sup> were cases in which the question of special solicitude necessarily arose with respect to the causation and redressability requirements of Article III. If courts were to employ the order of battle proposed here, I suspect that it might focus greater attention on how (and why) special solicitude might be afforded to states with respect to causation and redressability.

Courts might, of course, afford special solicitude to states with respect to the constitutional injury in fact requirement. Permitting states to litigate their own public rights, without any further showing of an injury in fact, might be understood as a form of special solicitude for states, insofar as private parties may not be able to show an injury in fact when they seek to litigate a public right. But permitting such suits might instead be seen as an application of the typical requirements for standing: Just as the violation of a private party’s own rights typically suffices to make out an injury in fact, so too does the violation of a state’s own rights.<sup>200</sup>

Courts might, however, afford states special solicitude with respect to the injury in fact requirement by allowing states to aggregate their injuries in order to make out standing to sue. As Part II argued, to the extent that standing and remedial questions are intertwined, this sort of aggregation muddles the analysis. But there are cases in which a kind of aggregation

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197 See *Massachusetts v. EPA*, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting) (emphasis added). A complete analysis of the comparison between a state and private parties in third-party cases would also look to the rules concerning the standing of private organizations as a potential point of comparison. For further discussion of this comparison, see Davis, *State Action Problem*, *supra* note 9, at 602 (discussing “a perplexing series of cases involving state actors as private organizations”).

198 See *Massachusetts*, 549 U.S. at 524–25.

199 See *Texas v. United States*, 809 F.3d 134, 160 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016); Davis, *supra* note 25, at 1248–49 (discussing appropriate role that special solicitude played in standing analysis in *Texas v. United States*).

200 Cf. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (Thomas, J., concurring) (“Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the ‘injury-in-fact’ requirement.”).

makes sense. In *Texas v. United States*, for example, the Fifth Circuit reasoned that the State of Texas had standing based upon the financial costs of providing driver's licenses to DAPA recipients, even though the United States argued that any such injury was self-inflicted because the State could simply alter its driver's license regime.<sup>201</sup> The Fifth Circuit rejected this argument, and rightly so: a state has an interest in its "power to create and enforce a legal code."<sup>202</sup> Given the "direct, substantial pressure directed" at Texas to alter its driver's license rules,<sup>203</sup> the court of appeals afforded "special solicitude" to the State.<sup>204</sup>

Courts might also afford special solicitude with respect to prudential standing requirements, particularly the limits on third-party standing. For example, current law permitting states to sue as *parens patriae* representatives allows for suits that a private party invoking third-party standing almost certainly could not have brought.<sup>205</sup>

Special solicitude, whether of the constitutional or prudential variety, raises difficult questions that courts need not address where a state has standing to obtain the relief it seeks on the same terms as a private party might. Not every puzzle of state standing needs to be solved in every case.

#### D. Objections

The primary benefit of this proposal is the way in which it clarifies analytical and doctrinal questions in state standing cases. In addition, the proposal may serve as a soft limit on the expansion of state standing and the fragmentation of standing doctrine. Critics of expansive state standing have argued that state litigation, particularly against the federal government, raises separation of powers concerns and threatens to crowd out private enforcement.<sup>206</sup> Scholars have also pointed to the decision costs of complexity that arise from the fragmentation of standing doctrine, including the fragmentation between state standing and private standing.<sup>207</sup> By directing courts first to consider whether a state has standing under the rules applicable to private

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201 See *Texas*, 809 F.3d at 157.

202 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).

203 *Texas*, 809 F.3d at 154.

204 See *id.* Under the framework here, which ties standing and remedial questions together, if standing was based upon this aggregation of financial injuries and sovereign interests, the injunction in *Texas v. United States* should not have been a nationwide injunction. Instead, it should have been limited to ensuring that Texas did not suffer the financial loss of subsidizing driver's licenses for DAPA recipients. See *Davis*, *supra* note 25, at 1302.

205 *Snapp* itself, in which Puerto Rico sued on behalf of hundreds of Puerto Rican workers under statutes that did not clearly create private rights of action, may have been such a suit. See *Snapp*, 458 U.S. at 368; *Davis*, *Implied Public Rights of Action*, *supra* note 9, at 44 ("The [*Snapp*] Court held that Puerto Rico could sue to enforce federal labor and immigration laws on behalf of its citizens without asking whether Congress intended private enforcement . . .").

206 See *supra* Section I.C.

207 See, e.g., *Fallon*, *supra* note 31, at 1092.

parties, the proposal mitigates the potential problems of expansion and fragmentation.

There are, however, several objections to the proposal, which this final Section outlines.

### 1. Loss of Legal Development

One objection is that the proposed order of battle will lead to an unacceptable loss of development of the law of state standing. In particular, the concern may be that the law of “sovereign” and “quasi-sovereign” interests, which is already uncertain, will tend to remain uncertain as a result of the proposal that courts first ask if the state has raised a private right that suffices for standing under the typical rules. My proposal, in short, disrupts the development of a body of law that needs more developing.

A similar concern has arisen in the qualified immunity context. There, the Supreme Court has counseled that merits-first adjudication “promotes the development of constitutional precedent,” while still concluding that federal courts should have discretion to decide that a defendant enjoys qualified immunity without deciding whether a constitutional right has been violated.<sup>208</sup> While concerns about the loss of legal development may be decisive in debates about qualified immunity, where the development of substantive constitutional law is at stake, that type of concern is not decisive here, where the development of threshold jurisdictional law is at issue.

### 2. The Simplicity of Special Solitude (in Some Cases)

A second objection is that the proposed order of battle would not simplify state standing analysis. This Part has already addressed the strong version of this objection, which is that looking to the merits and the state’s claims for relief to ground the comparison between states and private parties does not clarify the problem.

A weaker version of this objection is that in some cases it may be simpler to decide that the state has standing by invoking special solitude. In some cases, the law concerning state standing may be settled where the law concerning private standing is not. The Tenth Amendment provides a ready example: long before the Court decided in 2011 that private parties may sue under the Tenth Amendment in some cases, it was clear that states had some legally cognizable claims under the Tenth Amendment.<sup>209</sup>

The proposed order of battle is not meant as an absolute mandate, however. Where the law of state standing is settled, a comparison with the law concerning private standing may be unnecessary. In particular, this sort of concern is likely to arise with respect to the injury-in-fact requirement. Some injuries to states’ public rights are clearly cognizable under current standing law. As discussed above, recognizing state standing to vindicate a state’s own

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208 *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

209 *Compare* *Bond v. United States*, 564 U.S. 211, 221 (2011), *with* *New York v. United States*, 505 U.S. 144, 188 (1992).

public rights, as in the anticommandeering cases, might be seen as “special solicitude” for the states. Insofar as that is true, my proposal would not mandate that a federal court conduct an extensive comparison of private injuries with those suffered by states.

### 3. The Virtues of Fragmentation

A third objection is more troubling, but not decisive. This objection is that fragmentation in standing analysis is to be welcomed. The concern that is most relevant here is that federal courts might manipulate the typical rules of standing when applying them to state litigation in ways that will warp the law of private standing. In *Massachusetts v. EPA*, for instance, Chief Justice John Roberts’s dissenting opinion criticized the Court’s “relaxation” of the typical Article III requirements while taking solace in the fact that the Court seemed to limit this relaxed approach to states.<sup>210</sup>

The aim of the proposal is not to invite manipulation of the typical standing rules. To the contrary, the proposal aims to avoid the sort of ambiguity on display in the majority’s opinion in *Massachusetts v. EPA*, where it was unclear to what extent the Court was fragmenting the doctrine of state standing from the doctrine of private standing. If manipulation of the typical rules is required to find that the state has standing, then a court should instead turn to consider whether special solicitude is warranted.

In addition, because the proposed order of battle is presumptive only, a court that is concerned about resolving an untested question of private standing can avoid the question by invoking special rules applicable to states. Application of the proposed order of battle might create a risk that courts would systematically tend to hold that (i) a private litigant in the state’s position would not have standing, but, nevertheless, (ii) the state has standing based upon special solicitude. In other words, perhaps courts would shrink the scope of private standing in the course of deciding whether states have standing. To the extent that the concern is that courts would intentionally manipulate the order of battle to shrink private standing, the simple response is that there are far more private standing cases than state standing cases out there, and therefore the proposal would not significantly increase the opportunity for intentional, bad-faith judging. Another concern would be that the proposal would systematically bias courts against private standing and in favor of state standing. But because the proposal treats private standing as the baseline for standing analysis, there seems little reason to assume that it would result in a bias against private litigation. While my proposal may lead courts to explain more often why special solicitude for states was necessary to the standing holding, it does not necessarily follow that their opinions will reduce the existing availability of private standing to sue in federal court.

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210 See *Massachusetts v. EPA*, 549 U.S. 497, 548 (2007).

## CONCLUSION

This Essay has aimed to bring greater clarity to state standing law's comparison of state standing with private standing. It has argued that the starting point of analysis for state standing in any particular case should be whether the state would have standing under the rules applicable to private parties. And insofar as current private standing doctrine starts with the private rights of private litigants, so too should state standing doctrine start with the private rights of public governments.