STATE STANDING AFTER *UNITED STATES v. TEXAS*

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Abstract: Over the past decade, state attorneys general have become emboldened to file lawsuits asking federal courts to invalidate executive actions on immigration. As a result, lower courts have grappled with complex questions of when states have Article III standing to sue the federal government. In its 2023 decision in *United States v. Texas*, the Supreme Court addressed these issues directly for the first time, holding that Texas lacked standing to challenge the Biden administration's civil immigration enforcement guidelines. But the Court reached this conclusion on narrow grounds, failing to provide a clear indication of when states might have standing in other immigration disputes. Crucially, although the Court arguably rejected applying "special solicitude" in the immigration context, it said nothing about when—if ever—states can assert sovereign interests related to immigration. As a result, it remains uncertain how the *Texas* case will affect ongoing and future state-led immigration litigation.

This Article provides a framework for state standing grounded in an analysis of immigration federalism. The Court was correct to distance itself from the view articulated in *Massachusetts v. EPA* that state standing should be favored when states lack power to act within the federal system. Instead, this Article argues that states have sovereign interests for standing purposes where the federal system grants them authority over the enforcement or regulation of immigration. This framework recognizes that states have a stake in various aspects of the immigration system where they are empowered to act, but also limits states' access to federal courts where they are not. By adopting a federalism-informed approach to standing, this Article seeks to promote state accountability and avoid undermining working relationships between state and federal governments on immigration issues.

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INTRODUCTION

States in the past decade have become emboldened to file suits asking federal courts to invalidate immigration agency actions. Near the end of Barack Obama's presidency, the Fifth Circuit granted Texas's request to enjoin the Deferred Action for Parents of Americans (DAPA) program, which would have granted work authorization and protection against deportation for undocumented parents of U.S. citizens.[1] Since then, state-led litigation has become a regular response to major immigration actions, with state attorneys general acting on strong political incentives to challenge federal immigration policies when the White House is controlled by the opposite party.[2] As a result, states led by both parties have adopted novel theories of Article III standing to convince federal courts to hear these challenges.[3]

In 2023, in *United States v. Texas* (*Texas Enforcement*),[4] the Supreme Court took its first opportunity to weigh in on this evolution of state standing doctrine in the immigration context.[5] Eight Justices agreed that Texas did not have standing to challenge the Biden administration's prosecutorial discretion guidelines for civil immigration enforcement.[6] Justice Kavanaugh's majority opinion and the concurrences by Justices Gorsuch and Barrett each gave some indications that the Court may be hostile to pending and future state lawsuits against federal immigration agencies—or even perhaps against federal agencies more broadly.[7]

The *Texas Enforcement* decision nonetheless left unanswered the most important questions these immigration cases raise about when states may

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[1] Texas v. United States (*Texas DAPA*), 809 F.3d 134, 146–49 (5th Cir. 2015), *aff'd by an equally divided court*, United States v. Texas, 579 U.S. 547 (2016) (per curiam). This Article discusses numerous lawsuits brought by Texas against the federal government, resulting in many cases named *Texas v. United States* or *United States v. Texas*. I have attempted to style each in a relatively succinct format.

[2] *See infra* note 37 and accompanying text.

[3] *See* Part I, *infra* notes 37–114 and accompanying text.

[4] United States v. Texas (*Texas Enforcement*), 143 S. Ct. 1964, 1968 (2023).

[5] In *Texas DAPA*, an equally divided Supreme Court affirmed without issuing an opinion the Fifth Circuit's holding, which had recognized plaintiff states' standing to challenge the Deferred Action for Parents of Americans program. *Texas DAPA*, 579 U.S. at 548. The only other prior case in which the Court directly addressed state standing in the immigration context, though not a challenge to an immigration agency action, is *Department of Commerce v. New York*. *See* 139 S. Ct. 2551, 2565 (2019) (holding that New York had Article III standing to sue the Trump administration over its decision to include a question regarding citizenship status on the United States Census).

[6] *Texas Enforcement*, 143 S. Ct. at 1967–68. The guidelines at issue in *Texas Enforcement* were outlined in a memorandum issued by the Department of Homeland Security in September 2021. U.S. DEP'T OF HOMELAND SEC., GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAW (2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/2ARY-G33D].

[7] *See* Part II.B, *infra* notes 152–159 and accompanying text.

sue the federal government. The majority dispensed with Texas's lawsuit by citing the principle that no one—whether a state or private plaintiff—has standing to challenge a prosecutorial decision concerning another party.[8] This is sensible enough. But by framing the case narrowly around prosecutorial discretion, the Court avoided addressing the theories Texas raised as to why, as a state, it has a stake in the legality of President Biden's civil immigration enforcement policies. The Fifth Circuit in the *Texas Enforcement* litigation found that Texas had standing because federal immigration policies increased the state's law enforcement, healthcare, and education costs.[9] Numerous federal district and circuit courts have accepted similar state theories of injury over the past decade.[10] The impact of the Supreme Court's *Texas Enforcement* decision on these arguments in pending and future challenges to executive actions in immigration is therefore far from clear.

Whether these state standing theories succeed is highly consequential, and not just in the immigration context. In claiming standing to bring these lawsuits, state litigants are both seeking to determine the substance of immigration policymaking and asserting a theory of their role in the federal system more broadly. To that end, states in many of these cases have asked the federal courts to grant their standing arguments "special solicitude."[11] The notion that state standing claims deserve special solicitude is drawn from the Supreme Court's 2007 decision in *Massachusetts v. EPA*, a state challenge to federal environmental policy.[12] Scholars have disagreed over the impact of *Massachusetts*'s notion of special solicitude—some attributing a marked rise in state litigation against the federal government to this phrase, others downplaying the degree to which lower courts have relied on it.[13]

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[8] *Texas Enforcement*, 143 S. Ct. at 1970 (citing Linda R.S. v. Richard D., 410 U.S. 614 (1973)).

[9] *See* Texas v. United States (*Texas Enforcement*), 40 F.4th 205, 216–18 (5th Cir. 2022) (discussing Texas's injuries); *see also* Brief for Respondents at 14, *Texas Enforcement*, 143 S. Ct. 1964 (2023) (No. 22-58) (same).

[10] *See* Part I.C, *infra* notes 81–114.

[11] *See, e.g.*, Brief for Respondents, *supra* note 9, at 11 (contending that plaintiff states should be granted "special solicitude under certain circumstances owing to their unique place in the federal system" (citing Massachusetts v. EPA, 549 U.S. 497, 520 (2007))).

[12] *See Massachusetts*, 549 U.S. at 505, 520 (finding that plaintiff state was "entitled to special solicitude in [the Court's] standing analysis").

[13] *Compare* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 154 (2023) ("In just the last decade and a half [since *Massachusetts*], states have come to dominate the public law scene. States—often large coalitions of states, all represented by attorneys general from the opposite political party of the President—now file suits challenging any important action taken by the executive branch."), *with* Katherine Mims Crocker, *Not-So-Special Solicitude*, 109 MINN. L. REV. 815, 823 (2024) ("[S]pecial solicitude does not appear to be a consequential contributor to the legal architecture that allows [states to act as plaintiffs in politically consequential litigation]."). *See generally* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 168–97 (2015) (charting the rise of conservative state litigation coalitions starting during Barack Obama's

Whether *Massachusetts*'s impact has been as profound as some scholars suggest as a general matter, it has undoubtedly played a major role in catalyzing state litigation over immigration. As a result, immigration policy disputes have become a major forum for courts to attempt to determine the meaning of special solicitude. These immigration cases carry important implications for states' ability to sue the federal government in virtually any area of law. Some courts—under what I term below the "strong" theory of special solicitude—have interpreted this phrase to mean that courts should hear virtually any claim that federal immigration policies harm state interests.[14] The majority in *Texas Enforcement* appeared to distance itself from *Massachusetts* and this expansive reading thereof, but only in passing and without indicating any view on when states can invoke unique interests for standing purposes.[15]

This Article calls for rejecting this "strong" special solicitude in immigration litigation and proposes an alternative approach to state standing—one grounded in a robust understanding of immigration federalism. The rationale for special solicitude relies on an anachronistic theory of federalism, under which a state needs access to the federal courts to make up for the fact that it "surrenders certain sovereign prerogatives" by joining the federal union.[16] Because states sacrifice powers that they would otherwise have as sovereign governments to promote the welfare of their residents, the *Massachusetts* Court suggested, the ordinary requirements for Article III standing—namely the requirements of traceability (i.e., causation) and redressability—should not always apply to them.[17]

This "sovereignty-ceding" theory is largely out of step with modern relationships between state governments, the federal government, and the federal courts.[18] States do not have separate spheres of authority that they must guard

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presidency); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1096–100 (2014) (describing litigation as a tool of state resistance against opposing partisan agendas at the federal level).

[14] *See infra* Part I.C.

[15] *See Texas Enforcement*, 143 S. Ct. at 1975 n.6 (acknowledging plaintiff states' standing argument based on *Massachusetts*, but distinguishing the facts instead of expressly applying—or declining to apply—the theory of special solicitude). In response to the majority's failure to grapple with *Massachusetts*, Justice Gorsuch remarked in his concurrence that "it's hard not to wonder why the Court says nothing about 'special solicitude' in this case." *Id.* at 1977 (Gorsuch, J., concurring).

[16] *Massachusetts*, 549 U.S. at 519.

[17] *Id.* at 519–20. On the development of the ordinary requirements for standing, see *infra* notes 45–48.

[18] *See* Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 803–04 (2009) (describing the origins of this "sovereignty-ceding rationale" in early twentieth-century case law).

against federal intrusion through litigation.[19] Instead, state and federal governments share authority over most areas of law. Against this background, various legal regimes of cooperation and co-regulation are possible between state and federal governments.[20] Despite a long tradition of courts proclaiming the federal government's "plenary power" over immigration, in reality immigration law is no different.[21] Modern immigration federalism includes frequent "cooperative" partnerships between state and federal governments, as well as important areas of the law where Congress explicitly and implicitly delegates regulatory power to the states.[22] Without accounting for the specifics of these relationships, granting special solicitude for states to challenge executive actions in federal court threatens to undermine them.

This Article proposes a framework for state standing that incorporates and reinforces states' governance roles in the national system of immigration enforcement and regulation.[23] Other scholars have explored the specific standing issues raised by immigration cases, though none with a sustained focus on how federalism should inform standing doctrine.[24] States have a

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[19] The legal scholarship describing the death of "dual" federalism and the rise of modern federal-state relations—employing various descriptions of "cooperative" (and "uncooperative") federalism as well as more evocative terms such as "polyphonic" federalism—is quite extensive and dates at least as far back as the 1950s. *See, e.g.*, Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (discussing how dual federalism has been replaced by more complex intergovernmental structures); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815 (1998) (describing modern cooperative federalism); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 248–49 (2005) (introducing and defining the theory of polyphonic federalism); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1263 (2009) (describing and theorizing the possibilities of "uncooperative" behavior within modern structures of cooperative federalism).

[20] On cooperative federalism as a joint law and rulemaking process, see generally Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L.J. 1320 (2023).

[21] For an overview of the plenary power doctrine as a theory of the federal government's exclusive power over immigration, see Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 612–29 (2013).

[22] *See infra* Parts III.C, IV.

[23] My references to states' "governance roles" or interests in "shared governance" are largely inspired by Professor Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 641 (2016).

[24] Professor Jennifer Lee Koh's article *The Rise of the 'Immigrant-as-Injury' Theory of State Standing*, 72 AM. U. L. REV. 885 (2023), is the most informed and rigorous study of the issue to date. Although Koh devotes some space in her article to pointing out the superficial gloss on federalism in these cases, her most important contribution is to highlight the ways in which certain immigration state standing arguments reinforce and give legal significance to the perception that immigrants are less than fully human. *Id.* at 935–46. In a brief response to Koh, Professor Alina Das has also emphasized how standing arguments can enable states to work around equal protection constraints. Alina Das, *Standing on Immigrant Subordination*, 72 AM. U. L. REV. 147, 147–55 (2023). Part V engages with some of the implications of Professors Koh and Das's arguments. *See infra* notes 318–347 and accompanying text; *see also* Bradford C. Mank, *State Standing in*

stake in the legality of federal immigration actions where these actions implicate one of two basic kinds of governance interests. First, states have a cognizable legal interest in negotiating the terms of cooperative arrangements, notably involving immigration enforcement. Where federal law and agency action seeks state participation in specific programs, states may have standing to challenge these programs as unlawful. Second, states also have an interest in exercising delegated authority to determine the scope of immigrant membership rights. Federal law both explicitly and implicitly grants states significant autonomy in creating a legal regime that either facilitates or hinders noncitizens' integration into the local community. Standing should be available where a statute or executive action either preempts or significantly interferes with such state laws.

Legal scholars have long criticized the law of standing—particularly the Supreme Court's approach since the 1970s—as incoherent at best, mere cover for outcome-driven manipulation at worst.[25] In theory, standing doctrine is supposed to be a constitutional mandate for judicial restraint, preventing courts from deciding "generalized grievance[s]" or mere ideological disputes about the law.[26] In reality, it may do little more than shift these disputes from the merits to an even more malleable discussion of the parties' "interests."[27] Here, there is no need to ignore the elephant in the room: that standing in high-profile cases often turns on outcome-driven concerns.[28]

United States v. Texas*: Opening the Floodgates to States Challenging the Federal Government or Proper Federalism?*, 2018 U. ILL. L. REV. 211, 214 (arguing in favor of standing in *Texas DAPA*); Lexi Zerrillo, Note, *Who's Your Sovereign?: The Standing Doctrine of Parens Patriae & State Lawsuits Defending Sanctuary Policies*, 27 WM. & MARY BILL RTS. J. 573, 575 (2018) (advocating for parens patriae standing for states to defend sanctuary policies). At the same time, the wider scholarship on federalism and state standing in recent years has frequently looked to immigration cases like *Texas DAPA* as examples of emerging trends in the doctrine. 579 U.S. 547 (2016) (per curiam); *see, e.g.*, Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1900–01 (2019) (using *Texas DAPA* to illustrate various features of standing controversies); Aziz Z. Huq, *State Standing's Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2141–42 (2019) (similar); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1233–34 (2019) (listing litigation against DAPA and Trump's travel bans as instances of "the new public standing"); Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 421–29 (2018) (similar); Roesler, *supra* note 23, at 699–702 (arguing that standing was improper in *Texas DAPA*).

[25] *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1062 (2015) (summarizing scholarly critiques of standing doctrine since the 1970s).

[26] *See* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 861–62 (2016) (describing the Court's view that parties do not have standing to litigate "generalized grievance[s]" about the law).

[27] *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 185 (1992) (criticizing standing case law that replaced "a careful examination of the governing law to see if Congress had created a legal interest" with "a simple [inquiry] barely related to the underlying law").

[28] As Professor Mark Tushnet put it nearly fifty years ago: "[t]he Court finds standing when it wishes to sustain a claim on the merits and denies standing when the claim would be rejected were

State challenges to federal immigration actions over the past decade—which have seen partisan officials seeking to overturn nationwide policies on a highly polarized issue—are certainly no different. A healthy dose of realism might suggest that although the Court may have gone in the "right" direction by rejecting standing in *Texas Enforcement*, where this meant upholding the discretionary authority of the Department of Homeland Security, this does not mean it will apply the law consistently in other cases, such as the pending litigation against the DACA program.[29] And even if courts adopt a more consistent approach to standing, creative state attorneys general would undoubtedly find ways to work around it, particularly if they also have the option of choosing ideologically sympathetic trial judges.[30]

It is still worthwhile to articulate a coherent theory of standing, even if one suspects that courts might not be inclined to adopt it. The law of standing rests on a vision of both intergovernmental relations between state and federal actors, and the balance of powers between Congress, the Executive Branch, and the judiciary. Through standing doctrine, courts provide their interpretation of these relationships, but they are certainly not the only institution empowered to do so.[31] This discussion of standing—the question of who should have access to federal courts to litigate matters of major public policy—is not simply a narrow technical matter for judges, but rather implicates the design of intergovernmental relations and legislative programs more broadly.

Part I begins by tracing the evolution of state standing arguments in immigration litigation over the past decade, culminating in a "strong" view

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the merits reached." Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977).

[29] *See* Texas v. United States (*Texas DACA*), 50 F.4th 498, 513–20 (5th Cir. 2022) (remanding the states' challenge against Deferred Action for Childhood Arrivals (DACA) to the district court for consideration of an updated version of the challenged rule, which the DHS had promulgated during the litigation period). As of this writing, the *Texas DACA* litigation is once again on appeal in the Fifth Circuit following the decision issued by the district court on remand. Texas v. United States (*Texas DACA*), 691 F. Supp. 3d 763 (S.D. Tex. 2023), *appeal docketed*, No. 23-40653 (5th Cir. argued Oct. 10, 2024). *Texas Enforcement* was also hardly the only case the Supreme Court decided in 2023 where standing played a key role in deciding politically salient questions. 143 S. Ct. 1964, 1968 (2023); *see, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2365–68 (2023) (holding that Missouri had standing to challenge the Department of Education's student debt cancelation plan); Haaland v. Brackeen, 143 S. Ct. 1609, 1638–41 (2023) (holding that Texas lacked standing to challenge child placement preferences under the Indian Child Welfare Act).

[30] *See* Brief of Professor Stephen I. Vladeck as Amicus Curiae in Support of Petitioners at 2–3, *Texas Enforcement*, 143 S. Ct. 1964 (2023) (No. 22-58) (calling attention to Texas's practice of filing lawsuits in single-judge federal districts where it is likely to draw a Republican-appointed judge).

[31] *See* Ryan D. Doerfler & Samuel Moyn, After Courts: Democratizing Statutory Law 13 (Apr. 18, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4787041 [https://perma.cc/J74L-GR6M] ("To say the law should sometimes be developed case-by-case . . . is not the same as saying it should be developed by courts.").

of special solicitude that would allow states to litigate virtually any conceivable interest related to immigration.[32] Part II examines what the Court did and did not say about standing in *Texas Enforcement*, identifying the questions about standing and special solicitude that remain unanswered in pending and future immigration cases.[33] Part III argues that courts should abandon this strong view of special solicitude in the immigration context, as it is grounded in an anachronistic "dual federalism" framework.[34] Instead, Part IV proposes a framework for standing by identifying what immigration-related interests states may legitimately claim.[35] Finally, Part V explains why this approach to standing promotes state accountability, anticipating potential objections.[36]

I. SPECIAL SOLICITUDE IN IMMIGRATION LITIGATION

Lawsuits challenging federal immigration actions have become a catalyst for novel state standing claims over the past decade. Across the last three presidential administrations, both Republican and Democratic state attorneys general have brought these kinds of lawsuits with increasing frequency, almost exclusively against administrations led by the other party.[37] Before 2015, courts rejected standing in nearly every state-led challenge to federal immigration agency actions.[38] From the Fifth Circuit's *Texas DAPA*

[32] *See infra* notes 37–114 and accompanying text.

[33] *See infra* notes 115–159 and accompanying text.

[34] *See infra* notes 160–250 and accompanying text.

[35] *See infra* notes 251–317 and accompanying text.

[36] *See infra* notes 318–347 and accompanying text.

[37] *See* Koh, *supra* note 24, at 905, 910–35 (surveying state-led immigration litigation during the Obama, Trump, and Biden presidencies). One important counterexample is Texas's ongoing challenge to the DACA program, originally filed by Republican attorneys general from plaintiff states (Texas, Alabama, Arkansas, Louisiana, Nebraska, South Carolina, West Virginia, Kansas, and Mississippi) in 2018 when Donald Trump was president. *See Texas DACA*, 50 F.4th 498 (5th Cir. 2022). DACA was nonetheless an Obama-era program, and journalists have documented how Texas officials coordinated with hardline immigration hawks within the Trump White House to use this litigation to pressure Trump to rescind the program. *See* JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION 166–69 (2019).

[38] Several states in the mid-1990s attempted to sue the federal government to seek reimbursement for the costs of unauthorized migration. In all but one of these cases, courts refused to reach the merits on justiciability grounds. *See* Texas v. United States, No. B-94-228, 1995 U.S. Dist. LEXIS 23000, at *8–9 (S.D. Tex. Aug. 7, 1995) (state lacks standing to seek reimbursement because there is no causal link between the alleged injury and the federal government's actions), *aff'd on other grounds*, Texas v. United States, 106 F.3d 661 (5th Cir. 1997); California v. United States, 104 F.3d 1086, 1090–91 (9th Cir. 1997) (dismissing state claim as a nonjusticiable political question); New Jersey v. United States, 91 F.3d 463, 469–70 (3d Cir. 1996) (same); Padavan v. United States, 82 F.3d 23, 27–28 (2d Cir. 1996) (same); *see also* People of Colorado *ex rel.* Suthers v. Gonzales, 558 F. Supp. 2d 1158, 1162–65 (D. Colo. 2007) (finding that Colorado lacks standing for its claim that that the federal government has violated its constitutional duty to protect the states against a foreign "invasion," on both ordinary standing and special solicitude theories).

decision up until the Supreme Court's ruling in *Texas Enforcement*, however, dismissals for lack of standing in these cases have been rare.[39] In many of these cases, states have successfully established Article III standing based on traditional principles.[40] In others, they have developed new interpretations of *Massachusetts v. EPA* to argue that their immigration claims deserve "special solicitude."[41]

Part I traces the evolution of these special solicitude arguments in state-led immigration litigation. Section A first introduces the basic principles underlying state standing.[42] Section B then addresses the impact of *Massachusetts* and its introduction of the concept of special solicitude.[43] Section C then defines the "strong" theory of special solicitude that courts and state litigants have adopted in challenges to federal immigration actions.[44]

A. Basic Principles of State Standing

Modern standing doctrine derives from the language in Article III limiting the judicial power to "cases" or "controversies."[45] For decades, the Supreme Court has interpreted this language to impose a three-part test on all would-be litigants—whether individuals, private entities, or governmental bodies—consisting of injury-in-fact, traceability (i.e., causation), and redressability.[46] The case law specifies further that an injury-in-fact must be

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But see Chiles v. United States, 69 F.3d 1094, 1096 (11th Cir. 1995) (concluding that Florida does have standing to pursue this claim but dismissing it on the merits).

[39] *Texas Enforcement*, 143 S. Ct. 1964, 1968 (2023); *Texas DAPA*, 809 F.3d 134, 162 (5th Cir. 2015), *aff'd by an equally divided court*, United States v. Texas, 579 U.S. 547 (2016) (per curiam). The notable exception is the Sixth Circuit's holding that Arizona, Montana, and Ohio did not have standing to challenge Biden's immigration enforcement policies, as the alleged injuries were unduly speculative, which will be discussed later in Part I. Arizona v. Biden, 40 F.4th 375, 385–87 (6th Cir. 2022); *see infra* notes 109–114 and accompanying text.

[40] For example, states have been able to assert standing to challenge certain immigration policies based on proprietary interests. *See infra* notes 49–56 and accompanying text.

[41] As Justice Gorsuch wrote in his *Texas Enforcement* concurrence, these recent appeals to special solicitude in the immigration context were novel, as "'special solicitude' [has not] played a meaningful role in this Court's decisions in the years since [*Massachusetts*]." *Texas Enforcement*, 143 S. Ct. at 1977 (Gorsuch, J., concurring); *see also* Crocker, *supra* note 13, at 849–50 (echoing Justice Gorsuch's characterization of special solicitude's role in Supreme Court jurisprudence post-*Massachusetts*, and providing an overview of the explicit and implicit reliance—or absence of reliance—upon special solicitude in Court decisions issued between 2015 and 2022).

[42] *See infra* notes 45–65 and accompanying text.

[43] *See infra* notes 66–80 and accompanying text.

[44] *See infra* notes 81–114 and accompanying text.

[45] U.S. CONST. art. III, § 2; *see Texas Enforcement*, 143 S. Ct. at 1969 ("Article III of the Constitution confines the federal judicial power to 'Cases' and 'Controversies.' Under Article III, a case or controversy can exist only if a plaintiff has standing to sue—a bedrock constitutional requirement that this Court has applied to all manner of important disputes.").

[46] *See, e.g.*, California v. Texas, 141 S. Ct. 2104, 2113 (2021) (introducing the three elements of standing); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) (same); Lujan v. Defs. of

"(a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'"[47] Courts have insisted that this test establishes a minimum constitutional requirement for justiciability, though other "prudential" standing requirements may be considered as well.[48]

A major difficulty in the state standing context is that this basic doctrinal framework emerged primarily from cases involving private litigants.[49] As a result, it is not always clear where standing principles should apply generally to all litigants, and where special rules are necessary to account for the specific characteristics of states as government entities seeking to litigate in the public interest. There is some consensus around the idea that states should be allowed into federal court when they assert "proprietary" standing.[50] Like any other person or entity, states can and regularly do own property, enter into contracts for goods and services, and employ people. State standing to sue when these private law interests are directly affected is therefore not particularly problematic.[51]

In the immigration context, courts have accepted state standing arguments based on two general groups of proprietary theories. The first proprietary theory involves claims that federal immigration actions harm state property, including publicly owned and operated institutions. For example, in challenges to the Trump administration's 2017 "Muslim ban" orders, the Ninth Circuit agreed with states in two separate lawsuits that by unlawfully blocking the entry of foreign students and faculty, the federal government interfered with the research and teaching missions of public universities.[52]

Wildlife, 504 U.S. 555, 560–61 (1992) (same); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 US. 150, 152–54 (1970) (discussing the injury-in-fact requirement).

[47] *Lujan*, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (first citing Allen v. Wright, 468 U.S. 737, 756 (1984); then citing Warth v. Seldin, 422 U. S. 490, 508 (1975); and then citing Sierra Club v. Morton, 405 U. S. 727, 740–41 (1972)).

[48] *See id.* (describing the test for standing as an "irreducible constitutional minimum"); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014) (introducing general principles underlying the emerging recognition of "prudential" standing).

[49] *See* Huq, *supra* note 24, at 2130 ("[Standing] doctrine has further developed largely in terms of cases lodged by private litigants; its translation to state actors is not necessarily a neat or obvious one.").

[50] *See* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 410 (1995) ("When a state attempts to collect debts and enforce contracts, its sovereign status causes no particular problem; collective entities can suffer injuries to proprietary and contractual rights as easily as individuals.").

[51] *See id.* (noting that the "sovereign status [of states] causes no particular problem" when states assert proprietary standing). Part IV.D below provides some reasons to reconsider the status of proprietary standing claims.

[52] *See* Hawaii v. Trump, 859 F.3d 741, 765 (9th Cir.) ("The State's standing can thus be grounded in its proprietary interests as an operator of the University."), *vacated*, 138 S. Ct. 377 (2017); Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017) (concluding that the plaintiff "States have alleged harms to their proprietary interests traceable to the Executive Order" by asserting that the Order would prevent some students and faculty members from matriculating, ac-

More narrowly, Hawaii also alleged that Trump's executive orders would lead to a loss of tuition revenue.[53] In lawsuits challenging Trump's attempt to rescind the DACA program, states also asserted proprietary standing on the grounds that federal policies would interfere with employment relationships between the state and affected immigrants.[54]

The second group of proprietary standing claims involves allegations that the federal government's immigration policies deprived the state or one of its subdivisions of specific federal funds to which it was otherwise entitled. One example includes New York's argument that including a citizenship question on the 2020 Census would reduce the state's federal funding and political representation.[55] Another example comes from various local governments' opposition to a Trump administration policy that sought to withdraw law enforcement resources from jurisdictions that had enacted "sanctuary" policies.[56]

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cepting faculty positions, or performing research at public universities); *see also* Vahid Niayesh, *Trump's Travel Ban Really Was a Muslim Ban, Data Suggests*, WASH. POST (Sept. 26, 2019), https://www.washingtonpost.com/politics/2019/09/26/trumps-muslim-ban-really-was-muslim-ban-thats-what-data-suggest/ [https://perma.cc/FR8N-9QPV] (noting that the executive orders issued by Trump were "[c]ommonly known as the Muslim ban").

[53] *See Hawaii*, 859 F.3d at 765 ("[The Executive Order] harms the State's interests because . . . students who are unable to attend the University will not pay tuition . . . .").

[54] *See* Complaint for Declaratory and Injunctive Relief at 5, New York v. Trump, No. 1:17-cv-05228 (E.D.N.Y. Sept. 6, 2017) ("New York State also has a proprietary interest in maintaining a qualified workforce. Both New York State and municipalities across New York have hired DACA grantees to work in government agencies and institutions because of their specialized skills and qualifications."); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1033–35 (N.D. Cal.) (finding standing for state and municipal plaintiffs to sue the federal government due to interests in maintaining employment relationships), *aff'd in part*, 908 F.3d 476 (9th Cir. 2018), *vacated in part on other grounds sub nom.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

[55] *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2565 (2019) ("Respondents assert a number of injuries—diminishment of political representation, [and] loss of federal funds . . . all of which turn on their expectation that reinstating a citizenship question will depress the census response rate . . . ."). Despite holding that state plaintiffs had standing to challenge the inclusion of the census question, the following year the Court subsequently held that there was no standing to challenge the Trump administration's order to exclude undocumented immigrants from the congressional apportionment based off the 2020 census. *See* Trump v. New York, 141 S. Ct. 530, 534–35 (2020) (rejecting plaintiffs' theory for standing). That holding, however, was based on the Court's view that the injuries to the states' "congressional representation and federal funding" were too speculative to give rise to justiciability. *Id.* at 535–36. In other words, the issue was traceability rather than injury-in-fact. *Id.*

[56] City & County of San Francisco v. Trump, 897 F.3d 1225, 1235 (9th Cir. 2018) ("A 'loss of funds promised under federal law satisfies Article III's standing requirement.'" (quoting Organized Village of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 965 (9th Cir. 2015))); *see also* City of Chicago v. Sessions, 888 F.3d 272, 277–78, 289–90 (7th Cir. 2018) (explaining the emergence of "sanctuary cities" and the executive order at issue, and finding that the plaintiff "[c]ity had standing to seek injunctive relief" against this executive order). These lawsuits were brought by local, not state governments; the standing arguments in these cases, however, are applicable to both state and local plaintiffs.

The more difficult questions of state standing involve states' attempts to litigate public policy interests, as opposed to their own quasi-private concerns. In other words, when can states claim standing to redress injuries that they believe harm their ability to make policy in line with their constituents' wishes? Courts answering this question have distinguished between "sovereign" interests held directly by the state itself, and "quasi-sovereign" interests, taken to belong to the states' residents as a whole.

States can invoke two basic theories of standing based on sovereign interests. First, states have a sovereign interest in "recognition from other sovereigns," which courts have interpreted as an interest in maintaining state borders.[57] Second, states may also seek to vindicate an interest in "sovereign power over individuals and entities within the relevant jurisdiction [which] involves the power to create and enforce a legal code."[58] In other words, sovereign interests of the state as such concern the state's geographic integrity and power to enact and maintain its own legal system. Injuries that affect these sovereign interests are considered direct injuries to the state itself.

States may also in some instances assert standing based on indirect injuries to their "quasi-sovereign" interests. This broader category of interests corresponds to the "interests that the State has in the well-being of its populace."[59] When the state sues to advance these interests, it sues as parens patriae ("parent of the people").[60] As other scholars have noted, this conception of the state's ability to sue on behalf of the general welfare of its residents is closely tied to the police power: states' general authority to regulate in the public interest.[61] Parens patriae standing enables states to advance these general welfare interests as litigants in federal court.

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[57] Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982); *see also* Brescia, *supra* note 24, at 365 (describing how "states utilize a range of approaches when challenging federal power" including the approach of "asserting their own rights as sovereigns within a federal system"); Woolhandler & Collins, *supra* note 50, at 415–16 (noting that early federal courts allowed states to litigate boundary disputes while disfavoring other sovereignty interests).

[58] *Snapp*, 458 U.S. at 601.

[59] *Id.* at 602.

[60] *Id.* at 600, 602 (citing Louisiana v. Texas, 176 U.S. 1, 20 (1900)) (translating parens patriae to mean "parent of the country"). Although sources differ on the direct translation of parens patriae, this Article will translate it as "parent of the people." *See id.*

[61] *See* Lawton v. Steele, 152 U.S. 133, 136 (1894) (the police power "is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance"); Woolhandler & Collins, *supra* note 50, at 475–77 (discussing the emergence of parens patriae standing, and its relation to state police power); Roesler, *supra* note 23, at 662–63 ("[T]he idea of the state acting as parens patriae in the early twentieth century appears to overlap considerably with the concept of a state's police power. Both concepts are expressions of the sovereign's power to govern in the public interest."). On the historical origins of the police power, see generally

States' ability to invoke quasi-sovereign interests to challenge federal agency actions remains contested. The Supreme Court has recently upheld a century-old principle that states may not invoke parens patriae standing against the federal government to challenge the constitutionality of a federal statute.[62] The rationale for this standing bar is that states and the federal government each have a responsibility to advance the interest of their citizens; when federal rights are concerned, the state cannot usurp the federal government's own role as the people's representative.[63] There remains some uncertainty, however, as to whether this parens patriae bar applies to challenges to agency actions.[64] In the *Texas Enforcement* litigation, the U.S. Solicitor General argued that this principle barred Texas's challenge, though the Supreme Court did not directly address this argument.[65]

B. The Ambiguities of Special Solicitude

Much of the outstanding confusion on this issue is a result of *Massachusetts v. EPA*'s introduction of the idea of special solicitude for state standing. *Massachusetts* opened the door to state litigants invoking quasi-sovereign interests to establish standing in a much wider variety of lawsuits against federal agency actions. In its lawsuit challenging the EPA's refusal to regulate greenhouse gases, Massachusetts did not characterize its own argument as a parens patriae claim; instead, the state's main theory of injury was proprietary—i.e., that unregulated climate change led to a loss of its own land along the coast.[66] The Court nonetheless turned to parens patriae cases to explain why "States are not normal litigants for the purposes of

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WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

[62] Haaland v. Brackeen, 143 S. Ct. 1609, 1640 (2023) ("[A] State does not have standing as parens patriae to bring an action against the Federal Government." (quoting *Snapp*, 458 U.S. at 610 n.16)); *cf.* Massachusetts v. Mellon, 262 U.S. 447, 485 (1923) ("It cannot be conceded that a State, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.").

[63] *See Mellon*, 262 U.S. at 485–86 ("[I]t is no part of [the State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate . . . .").

[64] *See* Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2021 (2019) (noting that "courts have been somewhat more indulgent to state standing in suits challenging federal administrative action under the Administrative Procedure Act (APA)").

[65] Brief for the Petitioners at 12–13, *Texas Enforcement*, 143 S. Ct. 1964 (2023) (No. 22-58); *Texas Enforcement*, 143 S. Ct. at 1972 n.3.

[66] Reply Brief for Appellant-Petitioners at 2, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120) (equating the loss of coastal land to the "loss of sovereign territory, [which] has been a cognizable Article III injury since the founding of the republic").

invoking federal jurisdiction."[67] In so doing, the Court potentially made it far easier for states to establish standing by articulating quasi-sovereign interests—that is, interests in any exercise of state police powers to promote the public welfare.

Special solicitude rests on a theory of federalism. "When a State enters the Union," Justice Stevens's *Massachusetts* majority opinion explained, "it surrenders certain sovereign prerogatives."[68] By this, the Court meant that states' membership in the federal system deprives them of certain means of exercising their police powers to protect their residents' well-being.[69] Either because the United States Constitution reserves certain powers for the federal government or because federal statutes may preempt state laws under the Supremacy Clause, states cannot always advance their quasi-sovereign interests as they might like.[70] In the Court's view, states are "entitled to special solicitude in our standing analysis" to compensate for these limitations on their ability to advance quasi-sovereign or police power interests.[71] At least, this was true in cases like *Massachusetts*, where the state sought to exercise a "procedural right to challenge the rejection of its rulemaking petition" created by Congress.[72]

Based on this sovereignty-ceding rationale, *Massachusetts* appeared to create a new test designed to favor state standing to sue federal agencies. As long as a state could identify a quasi-sovereign interest affected by an agency action and Congress had created some "procedural right" to sue, it would be entitled to special solicitude.[73] But this formulation raised as least as many questions as it answered. First, it was not clear whether any state quasi-sovereign interest can trigger special solicitude, or only those interests that correspond to state powers that are diminished within the federal system. Second, the *Massachusetts* Court did not specify whether the second component of this new test, the "procedural right" prong, limits special solicitude to cases where Congress created detailed procedures for review of

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[67] *Massachusetts*, 549 U.S. at 518–19 (first citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907); then citing Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982); and then citing Alden v. Maine, 527 U.S. 706, 715 (1999)).

[68] *Massachusetts*, 549 U.S. at 519.

[69] *Id.*

[70] *Id.* ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances *the exercise of its police powers* to reduce in-state motor-vehicle emissions might well be preempted.") (emphasis added).

[71] *Id.* at 520.

[72] *Id.*

[73] *Id.*; *see also* Crocker, *supra* note 13, at 828 ("All a plaintiff raising a procedural right needed to establish standing, the Court said, was 'some possibility that the requested relief w[ould] prompt the injury-causing party to reconsider' its actions." (quoting *Massachusetts*, 549 U.S. at 518)).

specific agency actions, like the review of rulemaking petition denials under the Clean Air Act (CAA).[74] If not, virtually any challenge to an agency action could potentially trigger special solicitude for states if they invoke the general right to judicial review under § 702 of the Administrative Procedure Act (APA).[75]

Finally, it remains uncertain whether *Massachusetts* really created a new test at all—that is, whether special solicitude actually changes how states may establish standing. On the one hand, the Court noted that in many situations where Congress creates a "procedural right," a litigant "can assert that right without meeting all the normal standards for redressability and immediacy."[76] Under one interpretation, this suggests that if a state can establish that it is entitled to special solicitude, it may therefore be exempt from meeting some or even all of the ordinary criteria for standing. On the other hand, the *Massachusetts* Court proceeded to analyze the state's standing using the ordinary test, concluding that it had established injury, causation, and redressability.[77] The Court arguably did not rely on its discussion of Massachusetts's inability to invade other states or negotiate treaties with foreign powers to find that the state had standing.[78] Under this interpretation, special solicitude is dicta, and its role in standing doctrine may amount to little more than a rhetorical signal that the court is inclined to find that the state plaintiff has standing on other grounds.[79] Although some scholars have attributed to *Massachusetts* a marked rise in litigation brought by state attorneys general, Professor Katherine Mims Crocker's empirical analysis suggests that the special solicitude rationale outlined in that case has rarely driven outcomes in the lower federal courts.[80]

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[74] 42 U.S.C. § 7607(b)(1).

[75] *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[76] *Massachusetts*, 549 U.S. at 517–18 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992)).

[77] *Id.* at 521–26.

[78] *See id.* at 519–20 (addressing this sovereignty-ceding theory separately from the traditional standing analysis).

[79] Several scholars take this view. *See, e.g.*, Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2039 (2008) (the federalism rationale for special solicitude perhaps "was simply a way of garnering Justice Kennedy's vote and . . . a rule good for one case only"); Huq, *supra* note 24, at 2134 ("[A]s much attention as this 'special solicitude' language has attracted, I am not sure that the doctrine would be any less pellucid had it never been used.").

[80] *Compare* Baude & Bray, *supra* note 13, at 154 (noting that the influx of states challenging executive actions was a "consequence[] [which was a] predictable" result of the Court's broad interpretation of state standing in *Massachusetts*), *with* Crocker, *supra* note 13, at 861–88 (providing an "exhaustive catalog" of circuit court treatment of special solicitude in the years following *Massachusetts*, concluding that "special solicitude may have rarely if ever made a dispositive difference in providing state standing").

C. The "Strong" Theory of Special Solicitude in Immigration Litigation

Whatever the broader impact of special solicitude in public law litigation, this theory of standing has had an important impact in immigration cases.[81] State challenges to federal immigration policies have provided the federal courts with an opportunity to test these unresolved questions over special solicitude, starting with the 2015 *Texas DAPA* case. The alleged injury in *Texas DAPA* was that the DAPA program would have made beneficiaries eligible for driver's licenses, which Texas subsidizes, resulting in "millions of dollars of losses in Texas."[82] Setting the model for numerous subsequent state-led lawsuits, special solicitude here played an important role in establishing the state's claims to standing based on indirect fiscal injuries resulting from federal agency actions.

The Fifth Circuit began its standing analysis in *Texas DAPA* by comparing the case to *Massachusetts v. EPA*. In *Massachusetts*, a state challenged an EPA decision to refrain from regulating certain greenhouse gas emissions.[83] In Texas's suit, a state challenged a Department of Homeland Security policy that would have granted undocumented parents of U.S. citizens work authorization and protection from deportation.[84] The court noted that both cases involved state suits against agencies that "turn[] on the proper construction of a congressional statute," and that both involved a statutory right to seek review.[85] Texas could only claim a "procedural right" to sue under the general review provision of the APA, as opposed to the more robust CAA mechanism in *Massachusetts*.[86] The court explained, however, that because Texas challenged an agency's "decision to act, rather than its decision to remain inactive," the APA's review provision was sufficient to satisfy the "procedural right" prong for establishing special solicitude.[87]

Most importantly, the court concluded that the DAPA program "affects the states' 'quasi-sovereign' interests by imposing substantial pressure on [state lawmakers] to change their laws, which provide for issuing driver's

[81] Professor Crocker hints at this as a partial exception to her overall conclusion. *See* Crocker, *supra* note 13, at 885 (noting that whether the Fifth Circuit relied on special solicitude to find standing in *Texas DACA* was a "close call").

[82] *Texas DAPA*, 809 F.3d 134, 152–53 (5th Cir. 2015), *aff'd by an equally divided court*, United States v. Texas, 579 U.S. 547 (2016) (per curiam).

[83] *Id.* at 151 (citing Massachusetts v. EPA, 549 U.S. 497, 526 (2007)).

[84] *Id.* at 151–52.

[85] *Id.* at 152 (quoting *Massachusetts*, 549 U.S. at 516).

[86] *Id.*

[87] *Id.*

licenses to some aliens and subsidizing those licenses."[88] DAPA would have granted beneficiaries "lawful presence" under federal immigration law, which in turn would have made them eligible for licenses under Texas law.[89] For the *Texas DAPA* court, Texas's status within the federal system deprived it of its "sovereign prerogatives over immigration."[90] Just as Massachusetts, as a state within the union, is not able to invade its higher-emitting neighbors or negotiate international climate treaties, Texas and its co-plaintiff states "cannot establish their own classifications of aliens."[91] Furthermore, just as Massachusetts's greenhouse gas policies might be preempted, Texas's attempts to "discriminate against subsets of aliens in their driver's license programs" might "run[] afoul of preemption or the Equal Protection Clause."[92] Texas therefore satisfied the requirements for special solicitude and, for the Fifth Circuit, this meant that it could more easily dismiss concerns over the attenuated causal connection between the state's driver's license costs and the DAPA program.[93]

The federal government argued, unsuccessfully, that the traditional immigration federalism doctrine of plenary power should create a special "presumption . . . against justiciability in the immigration context."[94] The government's appellate briefs cited to numerous cases establishing the federal government's exclusive power over the admission and expulsion of noncitizens.[95] Following this reasoning, the structural allocation of immigration enforcement authority to the federal government should outweigh whatever claim to special solicitude Texas may have.[96] The Fifth Circuit

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[88] *Id.* at 153. The Fifth Circuit and the district court below rejected an alternative argument that Texas had standing as parens patriae, representing state residents "facing economic competition from DAPA beneficiaries." *Id.* at 150.

[89] *Id.* at 152–53.

[90] *Id.* at 153.

[91] *Id.* (citing Massachusetts v. EPA, 549 U.S. 497, 519 (2007)).

[92] *Id.* at 153–54. The court's discussion of the Equal Protection Clause is curious, because *Massachusetts* did not suggest that states should have special solicitude to advance interests that conflict with substantive constitutional rights. It appeared here to be motivated by the Ninth Circuit's decision in *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1063–67 (9th Cir. 2014), which found that the Equal Protection Clause likely forbade Arizona from denying DACA recipients access to driver's licenses that are otherwise available to immigrants with lawful presence.

[93] *Texas DAPA*, 809 F.3d at 159 ("[T]he government theorizes that Texas's injury is not fairly traceable to DAPA because it is merely an incidental and attenuated consequence of the program. But *Massachusetts v. EPA* establishes that the causal connection is adequate.").

[94] *Id.* at 154. On plenary power, see *infra* Part III.C.

[95] *See* Brief for the Appellants at 21–22, *Texas DAPA*, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238) (first citing Fiallo v. Bell, 430 U.S. 787, 792 (1977); then citing Plyler v. Doe, 457 U.S. 202, 225 (1982); then citing Mathews v. Diaz, 426 U.S. 67, 81 (1976); and then citing Arizona v. United States, 567 U.S. 387, 409 (2012)).

[96] *Id.* at 22 ("That States are the plaintiffs here heightens, rather than diminishes, these nonjusticiability principles.").

dismissed the government's argument, however, with only the brief retort that none of these cases specifically discussed standing.[97] To the extent that immigration federalism cases such as *Arizona v. United States* establish exclusive federal power over immigration,[98] this actually strengthened Texas's argument for standing. Special solicitude was warranted because, by participating in a system where the federal government enjoys plenary power, states have "surrendered some of their sovereign prerogatives over immigration."[99]

Texas DAPA set the stage for a wave of lawsuits, mostly by Republican state attorneys general, against the Biden administration's immigration policies.[100] Courts have relied on *Texas DAPA*'s interpretation of *Massachusetts v. EPA* in finding special solicitude for state standing to challenge a wide variety of immigration actions, including broad policies governing the entry of migrants across the border and immigrant detention.[101]

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[97] *See Texas DAPA*, 809 F.3d at 154 ("None of the cases the government cites involved standing and include only general language about the government's authority over immigration; without a specific discussion of standing, they are of limited relevance.").

[98] 567 U.S. 387, 416 (2012) ("Arizona may have understandable frustrations with the problems caused by illegal immigration while [the political process of developing national immigration laws] continues, but the State may not pursue policies that undermine federal law.").

[99] *Texas DAPA*, 809 F.3d at 153 (citing *Arizona*, 567 U.S. at 394–99).

[100] As discussed above, Democratic attorneys general also sued over many of the Trump administration's immigration actions. *See supra* notes 48–52 and accompanying text. Few of these cases, however, involved novel special solicitude arguments. Professor Jennifer Lee Koh observes that because Democratic state challenges to Trump administration policies tended to be joined by individual and organizational plaintiffs, "state standing doctrine remained relatively static in the immigration context" during Trump's time in office. Koh, *supra* note 24, at 919–20. At the same time, many Democratic-led lawsuits have nonetheless articulated claims to standing based on various indirect fiscal injury and parens patriae theories. *See, e.g.*, Regents of the Univ. of Cal. v. U.S. Dept of Homeland Sec., 279 F. Supp. 3d 1011, 1033–35 (N.D. Cal.) (recognizing state plaintiffs' standing to challenge Trump's DACA rescission, in part, due to fiscal impact of DACA holders exiting the workforce and losing health insurance coverage), *aff'd in part*, Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018), *vacated in part on other grounds sub nom.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020); Cook County v. McAleenan, 417 F. Supp. 3d 1008, 1017 (N.D. Ill. 2019) (recognizing standing based on plaintiff county's argument that the Trump administration's public charge rule injured the county by discouraging immigrants from seeking preventative healthcare, thereby increasing the cost of emergency services to the county), *aff'd sub nom.*, Cook County v. Wolf, 962 F.3d 208 (7th Cir. 2020); Aziz v. Trump, 231 F. Supp. 3d 23, 32 (E.D. Va. 2017) (allowing Virginia to intervene in a suit against President Trump's Muslim ban order as parens patriae to protect its residents from the discriminatory application of the immigration laws); Hawaii v. Trump, 859 F.3d 741, 765–66 n.6 (9th Cir.) (declining to address both Hawaii's parens patriae-based standing claim, and its standing claim based on general economic harm to state tourism), *vacated*, 138 S. Ct. 377 (2017). The applicability of special solicitude to immigration cases therefore has the potential to affect challenges by attorneys general of both parties.

[101] *See, e.g.*, Texas v. Biden, 20 F.4th 928, 969 (5th Cir. 2021) (citing Massachusetts v. EPA, 549 U.S. 497 (2007); *Texas DAPA*, 809 F.3d at 134), *rev'd on other grounds by* Biden v. Texas, 142 S. Ct. 2528, 2548 (2022) (noting that Texas is entitled to special solicitude in its challenge against the rescission of the Migrant Protection Protocols program); *Texas Enforcement*, 40 F.4th 205, 216 (5th Cir. 2022) (noting that "Texas is entitled to 'special solicitude'" in the standing

In some of these cases, courts have taken the *Texas DAPA* reasoning a step further, claiming quasi-sovereign interests in virtually any incidental impact of federal immigration policy. For example, in 2022, in *Texas DACA*, the Fifth Circuit could have easily found standing for Texas on identical grounds as it did in the earlier case, given the shared structure of DACA and DAPA.[102] The *Texas DACA* court nonetheless wrote that articulating a quasi-sovereign interest does not require the state to identify any actual immigration-related law or policy that is threatened by federal action—such as a law denying driver's licenses to immigrants without lawful presence.[103] Rather, because federal law preempts states from enacting many kinds of immigration laws, Texas had a "quasi-sovereign interest in classifying aliens," which the court equated with an interest in "immigration policy" writ large.[104] The Fifth Circuit's *Texas DACA* opinion essentially concludes that any federal immigration policy that might increase the costs of state programs—whether or not these programs reflect any specific state policy decision related to immigration—can give rise to special solicitude and therefore standing.[105]

Other courts have since begun to run wildly with this idea. In a noteworthy case involving federal immigrant detention and parole policy, Judge T. Kent Wetherell II of the Northern District of Florida wrote,

> If special solicitude is to have any meaning, it must apply in the immigration context because the states are dependent on the federal government to keep inadmissible aliens out of their territories

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analysis of its challenge against the Biden administration's civil immigration enforcement guidelines (quoting Massachusetts v. EPA, 549 U.S. 497, 517–19 (2007))), *invalidated by Texas Enforcement*, 143 S. Ct. 1964 (2023); *Texas DACA*, 50 F.4th 498, 514–17 (5th Cir. 2022) (finding that Texas is entitled to special solicitude in the standing analysis of its challenge against the legality of the DACA program); Florida v. United States, 660 F. Supp. 3d 1239, 1264–65 (N.D. Fla. 2023), *appeal docketed* (No. 23-11528) (11th Cir. argued Jan. 26, 2024) (finding that "Florida is entitled to special solicitude" in the standing analysis of its challenge against a Biden administration policy paroling and releasing arriving immigrants); *see also* Brief for Petitioners at 42, Arizona v. Mayorkas, 143 S. Ct. 1312 (2023) (No. 22-592) (citing *Massachusetts* and *Texas DAPA* to argue that Arizona is entitled to special solicitude in seeking standing to intervene in litigation against the rescission of Title 42 border restrictions).

[102] *See Texas DAPA*, 809 F.3d at 154–55 (finding that in plaintiff states' challenge to the DAPA program, "the states are entitled to 'special solicitude' in the standing inquiry . . . [because of] the direct, substantial pressure directed at the states and the fact that they have surrendered some of their control over immigration to the federal government"). On the structural similarities between DACA and DAPA, see the court's discussion, *id.* at 146–49.

[103] *Texas DACA*, 50 F.4th at 516 ("The Court [in *Massachusetts v. EPA*] did not identify any law that Massachusetts would be moved to change. Rather, its holding depended on the constraints on the State's ability to respond.").

[104] *Id.* at 515–16.

[105] *See id.* at 517–20 (analyzing and accepting Texas's standing "claim[] that DACA inflicts pocketbook injuries on the State in the form of healthcare, education, and social services costs").

> since they ceded their sovereign right to do so . . . . Thus, if the DHS ignores the detention mandates in the INA and releases aliens into the country . . . *the sovereign interests of the states are concretely harmed because they cannot do anything to keep those aliens out of the state.*[106]

Here, special solicitude is stretched even further. According to this theory, states need no longer even identify costs resulting from federal immigration policies. Because states have an inherent interest in excluding immigrants they deem undesirable, it is an Article III injury for such people to be present in the state at all—even if this presence has no fiscal impact whatsoever.[107]

Together, these cases articulate what we can call the "strong" view of special solicitude in the immigration context. Under this view, states surrendered their sovereign prerogatives over immigration by joining the federal system but nonetheless retain quasi-sovereign interests in virtually everything related to immigration policy. Federal immigration policies can cause injuries to these state interests via indirect fiscal impacts on state budgets or even simply by causing immigrants to be in the state against the wishes of state officials. Furthermore, the APA's general judicial review provision suffices as a "procedural right" under the *Massachusetts* framework for special solicitude.[108] States are therefore entitled to special solicitude in nearly every conceivable challenge to federal immigration actions, and this means that the ordinary requirements of standing doctrine can be relaxed.

Not all federal courts of appeals have agreed with this strong view of special solicitude. Notably, the Sixth Circuit adopted a starkly different interpretation in *Arizona v. Biden*, which involved a challenge to the same civil immigration enforcement guidelines as in *Texas Enforcement*.[109] The Sixth Circuit rejected the view that special solicitude allows courts to relax "causation and redressability problems," attributing this view to the lower

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[106] *Florida*, 660 F. Supp. 3d at 1265 (emphasis added).

[107] The *Florida* court's reasoning here is informed by Justice Scalia's concurrence in part in *Arizona v. United States*, in which he wrote that states inherently possess "the power to exclude from the sovereign's territory people who have no right to be there." Arizona v. United States, 567 U.S. 387, 417 (2012) (Scalia, J., concurring in part and dissenting in part). This reasoning is perhaps the purest distillation of what Koh calls the "immigrants-as-injury" theory of standing at work in many of these cases. *See* Koh, *supra* note 24 and accompanying text.

[108] Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007).

[109] *See* Arizona v. Biden, 40 F.4th 375, 379–80 (6th Cir. 2022) (introducing plaintiff states' challenge to Guidelines for the Enforcement of Civil Immigration Law, issued by the Secretary of Homeland Security in September of 2021); *Texas Enforcement*, 143 S. Ct. 1964, 1968–69 (2023) (same).

courts in the *Texas Enforcement* litigation.[110] For the Sixth Circuit, *Massachusetts v. EPA* never purported to supplant the ordinary test for standing.[111] At most, "special solicitude" refers to the fact that states have more available theories of injury-in-fact than private litigants.[112]

In essence, *Arizona v. Biden* outlined a "weak" view of special solicitude, a modest recognition that states may have unique interests unavailable to private plaintiffs. These unique interests under the weak view, however, do not seem to sweep as broadly as to encompass any conceivable exercise of states' police power, as they do under the strong view of special solicitude. Even if these unique interests are in play, the weak view of special solicitude does not imply a mandate to relax ordinary standing rules. Without special solicitude doing the work for the states, the Sixth Circuit went on to hold that they lacked standing based on similar theories of "indirect fiscal burdens" to those advanced in *Texas Enforcement*.[113] The court rejected the idea not only that such "humdrum feature[s] of a regulation" can be a cognizable legal injury for Article III standing, but also that states can claim sweeping quasi-sovereign interests in immigration policy simply because they lack "authority to prevent people from entering or leaving their territory."[114]

In summary, state-led immigration lawsuits have produced numerous arguments and opinions interpreting the scope of special solicitude over the past decade, leading to a direct circuit split. In some cases, courts adopting the strong view of special solicitude found standing whenever federal immigration action implicates states' police power interests over immigration. Other courts approached special solicitude with far more skepticism, holding states to their ordinary standing requirements. This circuit split offered an opportunity for the Supreme Court to weigh in as to when states may sue the federal government over immigration actions, which it had not done directly during this period. As discussed in Part II, however, the Court's 2023 *Texas Enforcement* decision left much of the future of immigration state standing unclear.

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[110] *Arizona*, 40 F.4th at 385 (citing *Texas Enforcement*, 606 F. Supp. 3d 437 (S.D. Tex. 2022)), *rev'd by* 143 S. Ct. at 1976.

[111] *See id.* ("[*Massachusetts*] does not remove Article III's imperative of a cognizable case or controversy or the requirements of injury, causation, and redressability.").

[112] *See id.* at 385–86 (first citing *Massachusetts*, 549 U.S. at 517–20; and then citing Saginaw County v. STAT Emergency Med. Servs., 946 F.3d 951, 957 (6th Cir. 2020)) ("What *Massachusetts v. EPA* does show is that States sometimes are entitled to 'special solicitude' in this area because they may incur 'quasi-sovereign' injuries that private parties cannot. But while the States may have more theories of injury available to them, that does not allow them to bypass proof of injury in particular or Article III in general." (quoting 549 U.S. at 517–20)).

[113] *Id.* at 386.

[114] *Id.* at 386–87.

II. UNANSWERED QUESTIONS IN *TEXAS ENFORCEMENT*

Part II begins in Section A by explaining what the Court said—and didn't say—about state standing and special solicitude in *Texas Enforcement*.[115] Section B then surveys some of the most important outstanding issues of state standing in pending and future immigration litigation.[116]

A. Avoiding the Issue of Special Solicitude

In rejecting Texas's standing in *Texas Enforcement*, the Supreme Court appeared to go out of its way to avoid engaging with arguments made by both the state and the federal government about when states may or may not have interests related to federal immigration actions.[117] Instead, Justice Kavanaugh's majority opinion framed the standing question as whether a plaintiff can claim injuries resulting from prosecution decisions concerning a third party, answering in the negative.[118] The Court treated the federal government's discretion to arrest noncitizens and pursue deportation like any other exercise of prosecutorial discretion.[119] Any injury a party suffers when the government decides not to initiate removal proceedings against an immigrant—whether that party is a state or private entity—is not judicially cognizable for standing purposes.[120]

The Court also framed the impact of its standing decision in a way that sidestepped the recent history of state challenges to federal immigration policies. If Texas were to have standing in this case, the Court speculated, "we could anticipate complaints in future years about alleged Executive Branch under-enforcement of . . . drug laws, gun laws, obstruction of justice

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[115] *See infra* notes 117–132 and accompanying text.

[116] *See infra* notes 133–159 and accompanying text.

[117] 143 S. Ct. 1964, 1976 (2023); *see* Brief for Respondents, *supra* note 9, at 11 (citing *Massachusetts*, 549 U.S. at 520) ("[T]he States' theory of standing is not unbounded; rather, to successfully sue the federal government, States must overcome the same hurdles as other litigants—albeit with some amount of special solicitude under certain circumstances owing to their unique place in the federal system."); Brief for Petitioners, *supra* note 65, at 7 ("Federal policies routinely have incidental effects on States' expenditures, revenues, and other activities. Yet such effects have never been viewed as judicially cognizable injuries. As the recent explosion in state suits vividly illustrates, respondents' contrary view would allow any State to sue the federal government about virtually any policy—sharply undermining Article III's requirements . . . .").

[118] *Texas Enforcement*, 143 S. Ct. at 1970 (citing Linda R.S. v. Richard D., 410 U.S. 614 (1973)).

[119] *See id.* (citing *Linda R.S.*, 410 U.S. at 617, 619) (finding that the precedent establishing an Article III bar against challenging prosecutorial discretion in cases involving violations of child support orders "applies to challenges to the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute," including in the immigration context).

[120] *Id.* at 1971–72. Justice Barrett's concurrence argues convincingly that *Linda R.S. v. Richard D.*, on which the Court relies in reaching this conclusion, is actually about redressability rather than injury-in-fact. *Id.* at 1987 (Barrett, J., concurring).

laws, or the like."[121] Taking the Court at its word, it was not concerned with opening the floodgates to more of the state-led immigration litigation that had already become routine in the federal courts—despite the many pages that lower court judges had dedicated to this subject.[122] For Kavanaugh, this was a case about preserving the federal government's prosecutorial discretion against interference by the courts.[123]

Missing from *Texas Enforcement* was any clear indication of when states, qua states, can sue the federal government over immigration policies. This question appears only briefly in the footnotes of the majority opinion, where the Court indirectly expressed skepticism of special solicitude. In one note, Justice Kavanaugh acknowledged that there are "disagreements" about *Massachusetts v. EPA*, but did not feel compelled to address these disagreements, because he believed the two cases were sufficiently distinguishable.[124] He noted that *Massachusetts* involved a dispute where the plaintiff state contested the "denial of a statutorily authorized petition for rulemaking," whereas *Texas Enforcement* involved "a challenge to an exercise of the Executive's enforcement discretion."[125] This is as far as the majority went in clarifying the scope of special solicitude: at least some agency actions—decisions over whether to initiate enforcement—do not trigger special favor for state lawsuits.[126] At the very least, this implies some limits to the strong view of special solicitude described in Part I, requiring courts to think harder about what kinds of agency actions can injure state interests,

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[121] *Id.* at 1973 (majority opinion).

[122] *See, e.g.*, *Texas DAPA*, 809 F.3d 134, 161–62 (5th Cir. 2015) (evaluating and rejecting as flawed the federal government's floodgate argument against state standing to challenge federal immigration policies), *aff'd by an equally divided court*, United States v. Texas, 579 U.S. 547 (2016) (per curiam); *Texas DACA*, 50 F.4th 498, 518–19 (5th Cir. 2022) (same); Arizona v. Biden, 40 F.4th 375, 386 (6th Cir. 2022) (accepting the floodgate argument, and holding that plaintiff states did not have standing to challenge federal immigration policies at issue). During oral arguments in *Texas Enforcement*, at least some of the Justices clearly were concerned about the limits of state standing arguments in the immigration context, particularly Justice Kagan. *See* Transcript of Oral Argument at 89–90, *Texas Enforcement*, 143 S. Ct. 1964 (2023) (No. 22-58) (predicting that if the Court sides with Texas, "we're just going to be . . . in a situation where every administration is confronted by suits by states that can . . . bring a policy to a dead halt . . . by just showing a dollar's worth of costs").

[123] *See Texas Enforcement*, 143 S. Ct. at 1975 (noting that that "this case raises only the narrow Article III standing question" of whether a federal court is able to "order the Executive Branch to take enforcement actions against violators of federal law," and holding that under established precedent, the answer to this question is no).

[124] *See id.* at 1975 n.6 (citing Massachusetts v. EPA, 549 U.S. 497, 502, 526 (2007)) (acknowledging but declining to expressly define, apply, or rule based on special solicitude).

[125] *Id.* (citing *Massachusetts*, 549 U.S. at 520, 526).

[126] *See id.* (establishing this exception to the potential applicability of special solicitude in the evaluation of state standing to challenge federal actions).

and whether review of these actions under the APA creates a sufficient "procedural right" under *Massachusetts*.[127]

The Court did address what kinds of interests states can actually assert in litigation over federal immigration actions, but it did so even more obliquely. In another footnote, Kavanaugh wrote:

> [I]n our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending. And when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated.[128]

This language clearly signals disapproval of states claiming indirect fiscal injuries as harms to quasi-sovereign interest. Taken together, these two footnotes might be interpreted as expressing hostility toward the strong view of special solicitude, even a gesture toward abolishing the concept altogether. This is precisely how Justice Gorsuch read the majority. "[I]t's hard not to think," he wrote in his concurrence, that after *Texas Enforcement*, "lower courts should just leave that idea on the shelf."[129]

But if *Texas Enforcement* did mark the beginning of the end of special solicitude—or at least of its strong variant—neither the majority nor the two concurrences said much about why. If the majority disapproved of indirect fiscal injuries to state interests, it gave no indication of what kinds of quasi-sovereign interests states have in the first place. Only Justice Alito in dissent endorsed the strong view of special solicitude and its "sovereignty-ceding" rationale, defending it here despite having joined the dissent in *Massachusetts v. EPA*.[130] If this reflects one view of the role of states in federal litigation, *Texas Enforcement* did not provide an alternative view. The majority expressed a general antipathy for states' indirect fiscal claims, suggesting—like the Sixth Circuit in *Arizona v. Biden*—that no state interests are "special" enough to justify relaxing imminence, traceability, or other components of the ordinary Article III standing test.[131] But the Court did not take up

[127] On the strong theory of special solicitude, see Part I.C, *supra* notes 81–114 and accompanying text.

[128] *Texas Enforcement*, 143 S. Ct. at 1972 n.3 (first citing Massachusetts v. Laird, 400 U.S. 886 (1970); then citing Florida v. Mellon, 273 U.S. 12, 16–18 (1927); and then citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992)).

[129] *Id.* at 1977 (Gorsuch, J., concurring).

[130] *Compare id.* at 1997 (Alito, J., dissenting) ("In *Massachusetts v. EPA*, the Court suggested that allowing Massachusetts to protect its sovereign interests through litigation compensated for its inability to protect those interests by the means that would have been available had it not entered the Union."), *with Massachusetts*, 549 U.S. at 536 (Roberts, C.J., dissenting) (criticizing "special solicitude" as unsupported by the precedent).

[131] *See Texas Enforcement*, 143 S. Ct. at 1972 n.3 ("[F]ederal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer.");

the Sixth Circuit's invitation to explore where "the States may have more theories of injury available to them."[132] Because of this silence, *Texas Enforcement*'s impact on pending and future immigration cases is far from clear.

B. Questions for Future Litigation

In theory, *Texas Enforcement* might foreclose lawsuits against a wide variety of federal immigration policies structured as guidelines for the exercise of prosecutorial discretion. Given the large population of immigrants in the United States without legal status, executive decisions over whom to prioritize for arrest, detention, and deportation have a major impact on the operation of the immigration adjudication system and on the daily lives of immigrants who interact with that system.[133] In many situations—such as where a policy provides a benefit to immigrants by de-prioritizing them for enforcement—states may be the only parties that even conceivably have standing to sue. Though the *Texas Enforcement* decision on its face holds nothing about state standing in particular, by barring lawsuits against prosecutorial discretion policies, it may in practice toss many of these cases out of court.

There are some indications that litigants and lower courts are interpreting *Texas Enforcement* as a broad restriction on state standing. For example, soon after the Court announced its decision, West Virginia voluntarily withdrew its lawsuit against a Biden administration border enforcement policy.[134] Similarly, the Ninth Circuit later denied a coalition of states' attempt

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cf. Arizona v. Biden, 40 F.4th 375, 385 (6th Cir. 2022) ("[Special solicitude] does not remove Article III's imperative of a cognizable case or controversy or the requirements of injury, causation, and redressability.").

[132] *Arizona*, 40 F.4th at 385–86.

[133] *See* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 103–30 (2020) (discussing the emergence of the "shadow immigration system," where the legislative delegation of immigration enforcement to the Executive, combined with a substantial number of deportable immigrants, means that the Executive's ability to exercise discretion in determining how to prioritize deportation actions can have a significant impact on immigration policy). As of 2022, there are an estimated eleven million immigrants living in the United States without legal status. BRYAN BAKER & ROBERT WARREN, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2018–JANUARY 2022, at 1 (2024), https://ohss.dhs.gov/sites/default/files/2024-06/2024_0418_ohss_estimates-of-the-unauthorized-immigrant-population-residing-in-the-united-states-january-2018%25E2%2580%2593january-2022.pdf [https://perma.cc/YCU2-R2Y4]. Under this estimate, "roughly *half* of all noncitizens currently living in the United States . . . are formally deportable under our immigration code." COX & RODRÍGUEZ, *supra*, at 105.

[134] *See* Order of Dismissal, West Virginia v. U.S. Dep't Homeland Sec., No. 2:21-cv-22 (N.D.W. Va., July 5, 2023) (dismissing without prejudice West Virginia's challenge to the Biden administration's termination of the Migrant Protection Protocols program). In its amended complaint, West Virginia had asserted standing on a theory of special solicitude, applied to its argument about the alleged state-incurred costs arising from increased quantities of fentanyl smuggled into the country via illegal immigration. First Amended Complaint at 10–11, West Virginia v. U.S. Dep't Homeland Sec., No. 2:21-cv-22 (N.D.W. Va., Dec. 22, 2021) (citing *Massachusetts*,

to intervene in litigation over the Biden administration's 2024 asylum rule, citing *Texas Enforcement* for the proposition that "States do not have a significant protectible interest in maintaining the Rule or in reducing immigration into the United States."[135]

Perhaps even more significant, however, is the impact of *Texas Enforcement* on the Fifth Circuit district courts, which have played an outsized role in developing the strong theory of special solicitude in immigration cases.[136] In March 2024, Judge Drew Tipton of the Southern District of Texas threw out Texas's challenge to a Biden program offering parole and work permits to humanitarian migrants from Cuba, Haiti, Nicaragua, and Venezuela (CHNV).[137] Judge Tipton rejected the state's theory that the arrival of "*any* aliens" through the program was an injury to Texas because those migrants might enter the state and consume public resources.[138] Under the strong theory of special solicitude, this argument may have sufficed to establish an injury-in-fact. Instead, however, Tipton held that there was no injury, because the Biden program had resulted in a net decrease in the number of migrants arriving from the CHNV countries.[139] The opinion did not directly cite the *Texas Enforcement* decision as authority for its conclusion, and, in fact, explicitly declined to determine whether that case requires rethinking indirect state fiscal injuries.[140] Still, this result—from the same Trump appointee who initially ruled for Texas in the *Texas Enforcement* litigation—suggests that the Supreme Court's decision may lead some low-

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549 U.S. 497). The claim was voluntarily dismissed via a stipulation between the parties, that was filed "[i]n light of recent rulings by the United States Supreme Court." Stipulation of Voluntary Dismissal at 1, West Virginia v. U.S. Dep't Homeland Sec., No. 2:21-cv-22 (N.D.W. Va., July 3, 2023).

[135] E. Bay Sanctuary Covenant v. Biden, 102 F.4th 996, 1002 (9th Cir. 2024) (citing *Texas Enforcement*, 143 S. Ct. at 1972 n.3).

[136] *See infra* Part I.C, notes 81–114 and accompanying text (discussing the evolution of the strong theory of special solicitude, including the role of Fifth Circuit district courts).

[137] *See* Texas v. U.S. Dep't of Homeland Sec., No. 6:23-CV-00007, 2024 WL 1021068, at *1 (S.D. Tex. Mar. 8, 2024) (introducing the CNHV program and concluding that plaintiff states do not have standing to challenge this program), *appeal docketed*, No. 24-40160 (5th Cir. Mar. 12, 2024).

[138] *Id.* at *14.

[139] *See id.* at *15–16 (summarizing relevant precedent and concluding that "when deciding whether a state has been injured for Article III standing purposes, the Fifth Circuit reviews whether the number of aliens . . . increased relative to those same numbers prior to the implementation of the challenged program"). Because the record established a factual decrease in the number of individuals from the CHNV countries following the adoption of the challenged policy, Texas had not suffered an injury and therefore did not have standing. *Id.* at *10, 16–17.

[140] *See id.* at *17 n.17 (citing *Texas Enforcement*, 143 S. Ct. at 1964) ("Because the Court finds that Texas has not suffered an injury, it need not consider Defendants' other arguments with respect to . . . the viability of indirect costs constituting injury in the wake of *United States v. Texas*.").

er court judges to apply more scrutiny to state standing claims in immigration litigation.[141]

At the same time, *Texas Enforcement* included important caveats in dicta that may limit its application to ongoing cases involving other uses of prosecutorial discretion in immigration policy. First, the Court indicated that even though no party has standing to challenge guidelines for exercising discretion over arrests and prosecution, the outcome might be different if a federal policy also included a "provision of legal benefits or legal status."[142] This is not a hypothetical scenario. Notably, the Court's carveout appears to be designed to apply to the DACA program, which provides undocumented immigrants who entered the country as children with both protection from deportation and permission to work.[143] In the ongoing *Texas DACA* litigation, Judge Andrew Hanen was quick to note *Texas Enforcement*'s distinction between "non-prosecution" and "non-prosecution with benefits."[144] Because DACA fell into the latter category, Judge Hanen concluded that the Supreme Court's decision did not require him to alter his earlier ruling that Texas had standing to challenge the program.[145] Federal district court judges—including the aforementioned Judge Tipton—have applied similar distinctions to allow states to proceed in challenges to Biden's border wall spending plan and asylum regulations.[146] As of this writing, then, *Texas En-*

[141] *See Texas Enforcement*, 606 F. Supp. 3d 437 (S.D. Tex. 2022) (district court opinion, issued by Judge Tipton, in *Texas Enforcement* litigation), *rev'd by* 143 S. Ct. 1964 (2023). Judge Tipton was nominated to the District Court by former president Trump in February 2020. *Appointment of United States District Judge Drew B. Tipton, Corpus Christi Division*, S.D. TEX. U.S. DIST. & BANKR. CT., https://www.txs.uscourts.gov/content/appointment-united-states-district-judge-drew-b-tipton-corpus-christi-division [https://perma.cc/FRM5-E5UJ]. In January 2025, the House of Representatives also passed a bill that would affirmatively grant standing to state attorneys general to allege that the federal government's immigration policies violate certain portions of the Immigration and Nationality Act (INA), if such violations result in "financial harm in excess of $100." Laken Riley Act, H.R. 29, 119th Cong. § 4 (2025). This legislation could be read as taking the position that the *Texas Enforcement* decision closed off standing in too many state challenges to federal immigration policies.

[142] *Texas Enforcement*, 143 S. Ct. at 1974.

[143] Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152 (Oct. 31, 2022) (codified at 8 C.F.R. pts. 106, 236, 274a); *see* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1906 (2020) ("DACA . . . does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief."); *cf. Texas DAPA*, 809 F.3d 134, 148–49 (5th Cir. 2015) (noting that DAPA also confers benefits—such as eligibility for work authorization, social security, and state benefits available only to immigrants who are "*lawfully present*"—and therefore constitutes more than just discretionary non-enforcement of deportation actions), *aff'd by an equally divided court*, United States v. Texas, 579 U.S. 547 (2016) (per curiam).

[144] *Texas DACA*, 691 F. Supp. 3d 763, 779 (S.D. Tex. Sept. 13, 2023) (citing *Texas Enforcement*, 143 S. Ct. at 1973–74), *appeal docketed*, No. 23-40653 (5th Cir. argued Oct. 10, 2024).

[145] *Id.* at 780.

[146] *See* Gen. Land Off. of Tex. v. Biden, No. 7:21-CV-00420, 2024 U.S. Dist. LEXIS 40880, *15–18 (S.D. Tex. March 8, 2024) (citing *Texas Enforcement*, 143 S. Ct. at 1975) (distinguishing

forcement has not dissuaded lower courts from finding state standing in one of the most consequential pending immigration cases.

The *Texas Enforcement* decision also suggested a carveout for policies "governing the continued detention of noncitizens who have already been arrested."[147] In other words, no one may have standing to challenge the federal government's decision not to initiate removal proceedings; once those proceedings are underway, however, the Court's language suggests that perhaps states may have standing if they can allege injuries resulting from policies governing the detention or release of the immigrants in question. Once again, Justice Kavanaugh's caveat laid out a path for lower courts to find standing by distinguishing the challenged policy from the memo at issue in *Texas Enforcement*. For example, in February 2024, in *Florida v. United States*, the United States District Court for the Northern District of Florida—on a limited remand from the Eleventh Circuit on the question of standing—Judge Wetherell determined that *Texas Enforcement* did not compel reversing his earlier decision on standing.[148] His opinion relied heavily on the assertion that the Biden administration's policy for granting parole to noncitizens in DHS custody was not subject to the bar to standing outlined in *Texas Enforcement*.[149] But more than this, Judge Wetherell also maintained his contention that this policy had caused Florida to suffer an "injury to its 'sovereignty' since it could not exclude from its territory the aliens who were released into the country under the challenged policies," and that "nothing in *Texas* [*Enforcement*] appears to undermine that holding."[150]

On readings like this, *Texas Enforcement* allows the strongest versions of special solicitude to survive. In other pending cases, states have also seized on the Court's self-avowedly narrow holding to support their stand-

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between the prosecutorial discretion at issue in *Texas Enforcement*, and the "Executive Branch's alleged failure to comply with Congress's instructions to construct additional border walls"); Texas v. Mayorkas, No. 2:22-CV-094-Z, 2024 U.S. Dist. LEXIS 21947, at *5–7 (N.D. Tex. Feb. 6, 2024) (citing *Texas Enforcement*, 143 S. Ct. at 1975) (distinguishing between the prosecutorial discretion at issue in *Texas Enforcement*, and the alleged indirect harms arising for plaintiff state from the challenged asylum policy changes).

[147] *Texas Enforcement*, 143 S. Ct. at 1974.

[148] *See* Florida v. United States, Nos. 3:21cv1066, 3:23cv9962, 2024 U.S. Dist. LEXIS 29494, at *2–3 (N.D. Fla. Feb. 20, 2024) (holding that the *Texas Enforcement* decision does not impact the court's prior determination that Florida had standing to challenge the DHS parole policies for individuals already detained by immigration authorities); *supra* note 101 and accompanying text.

[149] *See Florida*, 2024 U.S. Dist. LEXIS 29494, at *4–5 (contrasting the policy at issue in *Florida* with that in *Texas Enforcement* and finding that "[n]othing in *Texas* [*Enforcement*] held that federal courts cannot adjudicate the validity of non-detention/parole policies like these"). Judge Wetherell also observed that the Supreme Court's *Texas Enforcement* opinion expressly noted that "policies governing the continued detention of noncitizens who have already been arrested arguably might rise a different standing question than arrest or prosecution policies." *Id.* at *4 (quoting *Texas Enforcement*, 143 S. Ct. at 1974).

[150] *Id.* at *8.

ing claims in challenges to immigration policies—at least those that are not formally exercises of prosecutorial discretion. For example, in a challenge to the Biden administration's 2022 public charge rule, as in other cases, Texas argued that the special solicitude analysis outlined by the Fifth Circuit in earlier cases remained good law, because *Texas Enforcement* "said *nothing* about special solicitude."[151]

Texas Enforcement did give a few other indications that the Court might be hostile to state standing in future immigration cases, but also undercut these indications at each turn. The opinion suggests that government actions that do not "exercise coercive power over an individual's liberty or property" cannot "infringe upon interests that courts often are called upon to protect."[152] One could imagine that this language might be used to attack standing in cases where the government decides to grant immigration benefits separately from any prosecution decision, or to remove barriers to entry across the border. At the same time, it is difficult to square this reading with the Court's apparent willingness to treat some grants of immigration benefits as infringing on some party's interests.[153] The Court's treatment of ben-

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[151] Plaintiff's Reply in Support of Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment at 4, Texas v. Mayorkas, No. 6:23-cv-00001 (S.D. Tex., Nov. 17, 2023) (emphasis in original but additional emphasis omitted); *cf.* Response to Defendants' Motion to Dismiss at *3–13, Texas v. Mayorkas, No. 2:23–cv-00024 (W.D. Tex., May 10, 2024) (asserting that Texas has standing, post-*Texas Enforcement*, to challenge the Biden administration's asylum processing rules—including an argument that Texas should be granted special solicitude); Plaintiff States' Response to Notices of Supplemental Authority at 10–12, *Texas DACA*, 691 F. Supp. 3d 763 (S.D. Tex. 2023) (No. 1:18-cv-00068) (filing by state plaintiffs in the *Texas DACA* litigation making a similar argument about special solicitude in response to the *Texas Enforcement* decision). In other cases unrelated to immigration, federal district courts have accepted arguments that any aspects of *Texas Enforcement* abridging special solicitude are mere dicta. *See* Texas v. Cardona, No. 4:23-cv-00604, 2024 U.S. Dist. LEXIS 103452, at *57–58 (N.D. Tex., June 11, 2024) (citing *Texas Enforcement*, 143 S. Ct. at 1977) (noting that, in a state challenge against Title IX policies, federal defendant agencies' argument "latch[es] on to dictum from Justice Gorsuch's concurring opinion in [*Texas Enforcement*] to suggest that this Court ignore special solicitude entirely . . . it remains that special solicitude is still a binding legal doctrine that the Court must heed" (citations omitted)); Missouri v. Biden, 680 F. Supp. 3d 630, 718 (W.D. La. 2023) (accepting plaintiff state's special solicitude argument), *vacated*, 114 F.4th 406 (5th Cir. 2024).

[152] *Texas Enforcement*, 143 S. Ct. at 1971.

[153] *See Texas Enforcement*, 143 S. Ct. at 1974 (suggesting that the standing analysis may differ if plaintiff states were challenging a policy that also provides "legal benefits or legal status"). The Court's willingness to find standing for Missouri in *Biden v. Nebraska* may also undercut any deterrent effect on state lawsuits from the *Texas Enforcement* decision. Although some legal scholars have argued that federal agency decisions to forgive student debt should be treated as unreviewable exercises of prosecutorial discretion, the Supreme Court did not adopt this approach when deciding a case involving states' challenges to the Biden administration's debt relief plan. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) (holding that Missouri had standing to challenge the Department of Education's student debt cancelation plan); *cf.* Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFF. L. REV. 281, 381–95 (2020) (ar-

efits proved far more consequential than any potential limitation on standing to challenge non-coercive actions in a lawsuit involving the Biden administration's program to provide relief to undocumented spouses of U.S. citizens.[154] In a November 2024 decision, Judge Campbell Barker held that the state challengers had standing, in part by characterizing the program as "conferring legal status or benefits," in line with the *Texas Enforcement* carveouts discussed above.[155] For Judge Barker, as for his fellow district judges within the Fifth Circuit, this meant that prior precedent applying the strong theory of special solicitude remained good law.[156]

The Court also posits that lawsuits asking courts to interfere with Executive Branch immigration policies might violate the separation of powers, "run[ning] up against the Executive's Article II authority to enforce federal law."[157] This might be a powerful limitation on the justiciability of immigration challenges, but once again, the opinion later contradicts this conclusion. Namely, the Court reserved the option to find that a party has standing based on a claim that "the Executive Branch wholly abandoned its statutory responsibilities."[158] States have repeatedly raised this sort of argument in immigration litigation, including in *Texas Enforcement* itself—although the Court reached no holding on this issue.[159]

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guing that the Department of Education's power to cancel debt is an unreviewable exercise of prosecutorial discretion).

[154] *See* Texas v. U.S. Dep't of Homeland Sec. (*Texas v. DHS*), No. 6:24-cv-00306, 2024 WL 4711951, at *28–30 (E.D. Tex. Nov. 7, 2024). In June 2024, the Biden administration announced a program allowing certain undocumented spouses of U.S. citizens to "parole in place," enabling them to apply for immigration status based on their marriages. *See Keeping Families Together*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/keepingfamiliestogether [https://perma.cc/3CW5-D8TQ] (Nov. 13, 2024).

[155] *Texas v. DHS*, 2024 WL 4711951 at *25 (citing *Texas Enforcement*, 143 S. Ct. at 1974); *see also supra* notes 142–146 and accompanying text.

[156] *Texas v. DHS*, 2024 WL 4711951 at *25; *see also supra* note 151 and accompanying text. Even when lower courts have taken Justice Gorsuch's hint to abandon theories based on special solicitude, they have also continued to find that states have standing based on the "attenuated" fiscal injuries caused by immigrants' presence within plaintiff states' boundaries. *See* Kansas v. United States, No. 1:24-cv-00150, 2024 WL 5220178, at *4–5 (D.N.D. Dec. 9, 2024) (declining to apply special solicitude, but finding that North Dakota had standing to challenge the Biden administration's rule allowing DACA recipients to enroll in federal health insurance exchanges).

[157] *Texas Enforcement*, 143 S. Ct. at 1971.

[158] *Id.* at 1973.

[159] Justice Gorsuch's concurrence noted the strangeness of the Court's failure to address this argument given its discussion of "abdication" arguments. *Id.* at 1977–78 (Gorsuch, J., concurring). Texas maintains a similar argument in the *Texas DACA* litigation. *See* Plaintiff States' Response to Notices of Supplemental Authority at 8–10, *Texas DACA*, 691 F. Supp. 3d 763 (S.D. Tex. 2023) (No. 1:18-cv-00068) (arguing for standing on the grounds that DACA constitutes an abdication by the Executive of his statutory obligations under current immigration law); *see also* Florida v. United States, Nos. 3:21cv1066, 3:23cv9962, 2024 U.S. Dist. LEXIS 29494, at *5–6 (N.D. Fla. Feb. 20, 2024) (rejecting the applicability of this "Article II problems" analysis in the Florida detention and parole case).

In short, when asked to evaluate the novel theories of standing and special solicitude that states have advanced over the past decade in suits challenging federal immigration actions, the Supreme Court punted. The *Texas Enforcement* decision introduced a variety of arguments that appear to weigh against state standing in the immigration context, but also provided at least as much fodder for state attorneys general in support of standing. Most importantly, although the Court toyed with abolishing special solicitude altogether, it was ultimately unable to articulate a clear position on the matter. As a result, it is unclear what the Court makes of the strong view of special solicitude—the idea that states have inherent sovereign interests in virtually everything related to immigration and that courts should give these interests special consideration because of the states' position in the federal system—articulated by various courts and state attorneys general. *Texas Enforcement* has therefore done little on its own to alter the practice of states suing to block immigration policies with which they disagree.

III. SPECIAL SOLICITUDE'S IMMIGRATION FEDERALISM PROBLEM

Part III argues that the strong version of special solicitude should not apply in the immigration context. The sovereignty-ceding rationale for granting states special access to the federal courts is misguided. States should not have special access to federal courts to advance quasi-sovereign interests—that is, interests in exercising historic police powers—that they supposedly cannot pursue under the federal system. This position rests on an anachronistic view that federal authority inherently conflicts with state police powers. This is not to say, however, that there should never be standing to assert interests unique to states in lawsuits against federal agency action. Rather, standing ought to correspond to states' actual governing roles. The Court was right to move toward abandoning the strong theory of special solicitude in *Texas Enforcement*, and Part III explains why.

Immigration has been a particularly tempting area of law to apply the sovereignty-ceding rationale for special solicitude. There is a long—and flawed—tradition in the federal courts of recognizing the federal government's broad power over immigration.[160] In reality, immigration is not fundamentally different from the bulk of U.S. law, which recognizes concurrent authority between state and federal governments, and allows for frequent cooperative schemes between both levels of government—no less than elsewhere, immigration has moved beyond "dual" federalism.[161] There is

[160] Part III concludes by explaining the flaws of this approach. *See infra* notes 219–249 and accompanying text.

[161] On the evolution of immigration law away from "dual federalism," see *supra* note 19 and accompanying text.

therefore no reason to make an exceptional standing rule for states aggrieved by federal immigration policies.

In taking this position, this Article does not reject special solicitude as wholly meaningless. If the Fifth Circuit's strong theory of special solicitude is incorrect, the Sixth Circuit's "weak" approach remains defensible.[162] That is, courts should seek to identify what unique interests states may have in disputes over immigration policies.[163] Part III provides the theoretical basis for locating these interests in immigration federalism. Section A begins by discussing the how the *Massachusetts v. EPA* Court grafted a century-old interpretation of police power into the modern approach to state standing.[164] Section B then explores how modern federal-state relations have reshaped states' sovereign interests.[165] Section C concludes by explaining why these considerations matter in the immigration context, despite the common view that immigration should be treated as a legal exception.[166]

A. The Emergence of Police Power Standing

The *Massachusetts v. EPA* Court derived the view that states should have special standing to sue federal agencies to advance "quasi-sovereign" interest from a starkly different context in U.S. legal history.[167] The early twentieth-century parens patriae cases upon which the Court relied were public nuisance cases, where states sought original jurisdiction in the Supreme Court. For example, in *Georgia v. Tennessee Copper Co.*, Georgia asked the Court for relief from industrial pollution emanating from sources located in Tennessee.[168] It was in this context that Justice Holmes articulated the "sovereignty-ceding" rationale:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their

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[162] On the Fifth Circuit's strong theory of special solicitude, see *supra* notes 81–108 and accompanying text. On the Sixth Circuit's weak theory of special solicitude, see *supra* notes 109–114 and accompanying text.

[163] *See* Arizona v. Biden, 40 F.4th 375, 385–86 (6th Cir. 2022) (citing Massachusetts v. EPA 549 U.S. 497, 517–20 (2007)) (concluding that special solicitude suggests only that states, as sovereigns, might incur types of "quasi-sovereign" injuries that are unavailable to private plaintiffs).

[164] *See infra* notes 167–188 and accompanying text.

[165] *See infra* notes 189–218 and accompanying text.

[166] *See infra* notes 219–250 and accompanying text.

[167] *Massachusetts*, 549 U.S. at 520.

[168] 206 U.S. 230, 236 (1907); *see supra* Part I.B, notes 66–80 and accompanying text (discussing the *Massachusetts* Court's opinion).

> still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.[169]

The purpose of this reasoning was not to permit a broad class of state claims against the federal government. It had nothing to do with authorizing suits against the federal government at all. Rather, it explained why, in some narrow class of cases, states could invoke the Supreme Court's original jurisdiction—which requires the state to be a party[170]—to seek recourse for harms resulting from out-of-state sources. Georgia could not invade Tennessee to stop the Tennessee Copper Company from emitting "noxious gas," so it had to seek relief from the Court.[171]

The function of quasi-sovereign interests in this context was to limit the justiciability of state claims rather than to expand it.[172] To justify exercising its original jurisdiction, the Court needed to articulate why Georgia as a State—and not just the various individual residents who might be affected—had a stake in redressing the effects of pollution. It was concerned that states might abuse the Court's original jurisdiction by standing in for the interests of other private parties who could not invoke it themselves.[173] The Court concluded that a state could invoke its original jurisdiction based on these kinds of disparate harms to people within its borders, but only if something truly important to the state as a sovereign were affected: the preservation of the "earth and air within its domain."[174] Though the concept of parens patriae is historically linked to the state's police power authority to promote the public welfare, nowhere did Justice Holmes say that any in-

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[169] *Tenn. Copper Co.*, 206 U.S. at 237 (citing Missouri v. Illinois, 180 U.S. 208, 241 (1901)); *see* Massachusetts v. EPA, 549 U.S. at 519 (citing *Tenn. Copper Co.*, 206 U.S. at 237) (discussing the parallels between the quasi-sovereign interests asserted by Georgia and Massachusetts, both of which the Court found supported each state's respective argument for standing).

[170] *See* U.S. CONST. art. III, § 2 ("In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . .").

[171] *Tenn. Copper Co.*, 206 U.S. at 236–37.

[172] Roesler, *supra* note 23, at 666–67 ("[T]he principle of quasi-sovereignty began as a principle designed to limit the Court's original jurisdiction over public nuisance cases brought by states and to ensure private litigants could not overcome state sovereign immunity by suing through a nominal state party.").

[173] *See id.* at 663–64 (discussing the Court's concern about this risk, including ways in which "the Court made clear that it would look beyond the named parties to ensure that the case presented a controversy between two *states* as required by the Constitution").

[174] *Tenn. Copper Co.*, 206 U.S. at 237. The Court noted that this is an interest that exists "independent of and behind the titles of its citizens," an observation through which the Court appears to emphasize that the state is not deriving this interest solely through the harms inflicted upon its residents. *Id*.

terest the state might have in exercising its police power could justify its ability to sue—only this fundamental interest in the territory it controls.[175]

This parens patriae rationale emerged in a new form toward the end of the twentieth century. In 1982, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez*, the Supreme Court repurposed the sovereignty-ceding rationale to support Puerto Rico's parens patriae standing to advance residents' rights under federal law.[176] In that case, Puerto Rico sued Virginia apple growers for violating a federal statutory scheme that required them to prioritize Puerto Ricans for agricultural jobs before recruiting workers from abroad.[177] Here, there was no interstate nuisance, and Puerto Rico did not seek to invoke the Court's original jurisdiction.[178]

In so doing, the Court dramatically expanded the scope of quasi-sovereign interest to justify Puerto Rico's suit on behalf of its workforce.[179] Nearly all of the cases the Court cited in support of parens patriae authority, like the *Tennessee Copper Co.* pollution case, concerned interstate disputes relating to natural resources.[180] None of these cases articulated a basis for state standing to advance its general police power authority. In fact, at least one appeared to suggest the opposite.[181] In contrast, the *Snapp* Court de-

[175] *See id.* at 237–38 (finding that Georgia had standing through analysis relying upon the quasi-sovereign interests of the state, and not the notion of police power); Roesler, *supra* note 23, at 662–65 (discussing the historical overlap between parens patriae standing and state police power, and the limitations imposed on a state's ability to exercise its own police power in matters involving other states).

[176] *See* 458 U.S. 592, 609–10 (1982) (applying the quasi-sovereign interest requirement to parens patriae standing). For standing purposes, the Court treated Puerto Rico as a state. *Id.* at 608 n.15 ("Although we have spoken throughout of a 'State's' standing as parens patriae, we agree with the lower courts and the parties that the Commonwealth of Puerto Rico is similarly situated to a State in this respect: It has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State.").

[177] *Id.* at 594–98.

[178] Roesler, *supra* note 23, at 670.

[179] *See id.* (noting that by requiring a quasi-sovereign interest for a state to assert parens patriae standing, "the Court subtly extended the quasi-sovereign requirement" from its use in earlier cases—for example, Puerto Rico was not invoking original jurisdiction in the Supreme Court).

[180] *Snapp*, 458 U.S. at 603 (citing North Dakota v. Minnesota, 263 U.S. 365 (1923) (concerning flooding); Wyoming v. Colorado, 259 U.S. 419 (1922), *vacated on other grounds*, 353 U.S. 953 (1957) (water rights); New York v. New Jersey, 256 U.S. 296 (1921) (sewage discharge); Kansas v. Colorado, 206 U.S. 46 (1907) (water rights); *Tennessee Copper Co.*, 206 U.S. 230 (industrial pollution); Kansas v. Colorado, 185 U.S. 125 (1902) (water rights); Missouri v. Illinois, 180 U.S. 208 (1901) (pollution discharge resulting from the reversal of the flow of the Chicago River)).

[181] *Snapp*, 458 U.S. at 602 (citing Louisiana v. Texas, 176 U.S. 1, 19 (1900)). In *Louisiana v. Texas*, the Supreme Court held that Louisiana did not have standing to challenge a Texas quarantine law based on the resulting economic harms, because "the vindication of the freedom of interstate commerce is not committed to the State of Louisiana . . . ." 176 U.S. at 19. In other words, although Louisiana's police powers enable it to regulate commerce within its own borders, this does not mean that it automatically has standing to sue over matters of interstate commerce, a power committed to the federal government.

fined quasi-sovereign interests to include "a set of interests that the State has in the well-being of its populace."[182] The Court explicitly rejected setting any formal limits to these interests, but it indicated that a quasi-sovereign interest is likely present where "the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."[183] This includes not only interests in the "physical and economic" well-being of state residents, but also an interest in "not being discriminatorily denied its rightful status [as a State] within the federal system."[184] As a result, the Court not only extended Justice Holmes's logic to recognize quasi-sovereign interests in essentially anything a state can do—or would be able to do if not for some federal constraint—to further its police powers; it also included in this category the state's interest in protecting its residents' interests under any federal statute.

Invoking the sovereignty-ceding rationale, the *Massachusetts* Court read *Snapp*'s expansion of quasi-sovereign standing to apply to state challenges against federal agency action.[185] This move was perhaps unsurprising given the origins of this principle in disputes over environmental and natural resources.[186] But it nonetheless represented a profound transformation. A rationale that originally justified exercising the Supreme Court's jurisdiction to resolve disputes between states now authorized states to sue the federal government.[187] Suddenly, states' subordinate status in the federal system—i.e., their inability to conduct military or diplomatic affairs, or the possibility of federal preemption—became a justification for increased access to federal courts.

To summarize, Justice Holmes's justification for parens patriae standing was quite limited. In some situations, because states could generally only act within their own borders, it was necessary for states to invoke the Court's original jurisdiction to seek relief from out-of-state harms. But to avoid clogging the Court's dockets with all kinds of interstate nuisance suits, states could only seek this kind of relief if one of its core responsibilities was at stake—such as protecting the land and natural resources within its territory—not simply any responsibility it might claim under its police

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[182] *Snapp*, 458 U.S. at 602.

[183] *Id.* at 607.

[184] *Id.*

[185] *See* Massachusetts v. EPA, 549 U.S. 497, 519 (2007) (citing *Snapp*, 458 U.S. at 607) (noting that the "sovereign prerogatives" discussed in *Snapp* "are now lodged in the Federal Government," including the congressional delegation of rulemaking authority on the regulation of air pollution to the EPA).

[186] *See* Kirsten H. Engel, *State Standing in Climate Change Lawsuits*, 26 J. LAND USE & ENV'T L. 217, 225 (2011) (explaining that nuisance actions remain a regular feature of state-led environmental litigation in the twenty-first century).

[187] Roesler, *supra* note 23, at 671–72.

power authority. Together, *Snapp* and *Massachusetts* repurposed this principle to apply in the context of the modern administrative state, including in direct state challenges to federal action.[188] In these decisions, the Court suggested broad state standing to sue federal agencies based on virtually any quasi-sovereign interest a state might pursue under its police powers.

B. State Sovereign Interests Under Modern Federalism Principles

This notion that states have a stake in litigating anything the federal government does that affects police power interests is difficult to square with most modern accounts of the U.S. federal system. If this is what the *Massachusetts* Court meant when it introduced the notion of special solicitude, it sweeps far too broadly in authorizing state lawsuits against the federal government. Section B discusses how legal scholars have understood the transformation of the federal system that took place throughout much of the twentieth century, moving away from a rigid dualistic division of authority.[189] Section B then evaluates the various arguments about how these shifting conceptions of federalism should impact the theories under which states may assert standing.[190]

For many decades, legal scholars have announced the death of dual federalism, the view that state and federal governments operate within separate, mutually exclusive spheres of authority—the state free to exercise its police powers within its own borders, and the federal government limited to its enumerated constitutional powers including over interstate commerce.[191] Already by the middle of the twentieth century, the rise of the New Deal state had made this position difficult to maintain.[192] Under a dual federalism model, the Supreme Court declared certain areas of law, such as employment relations, to be domains of state police power, beyond the federal gov-

[188] *Id.* at 675.

[189] *See infra* notes 191–203 and accompanying text.

[190] *See infra* notes 204–218 and accompanying text.

[191] *See, e.g.*, Corwin, *supra* note 19, at 4 (discussing the disappearance of dual federalism); Hills, *supra* note 19, at 815 (same); Schapiro, *supra* note 19, at 246 (same); Roesler, *supra* note 23, at 677–78 (same); Young, *supra* note 24, at 1903–04 (same).

[192] *See* Young, *supra* note 24, at 1903–04 (characterizing the New Deal as an inflection point after which dual federalism "gave way to cooperative federalism structures"); Corwin, *supra* note 19, at 4 (discussing the impact of judicial challenges to the New Deal on the federal system). At the same time, the pre-New Deal notion of "dual federalism" obscures the diversity of ideas about the nature of the federal system and intergovernmental relations that were influential throughout much of the nineteenth century. On this variation in nineteenth-century federalism, see generally ALISON L. LACROIX, THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS (2024).

ernment's interstate commerce authority.[193] The New Deal Court upended this conception, affirming the federal government's power to pass labor and employment legislation and broad social welfare bills such as the Social Security Act.[194] The modern conception of federalism that has developed since this period tolerates broad areas of concurrent authority, allowing both state and federal governments to create and enforce laws on the same subjects, even those historically associated with state police powers.[195]

Concurrent authority also goes hand-in-hand with cooperative federalism, a pervasive relationship in the modern system under which interlocking schemes of state and federal action are organized to achieve shared policy aims.[196] In general, cooperative federalism programs seek to incentivize state participation in achieving federal objectives by offering grants and other fiscal incentives, or by threatening to preempt action by non-participating states.[197] The federal government had long sought out state participation along these lines—even well before the New Deal transformation—including in the areas of immigration and naturalization.[198] In the latter half of the twentieth century, however, Congress continued to use this cooperative model as the basis for more complex new statutory schemes. Important examples include Medicaid, which enables states both to administer benefits and to set eligibility criteria subject to federal approval,[199] and

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[193] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936) ("The relation of employer and employee is a local relation . . . . The employees are not engaged in or about commerce, but exclusively in producing a commodity.").

[194] *See* Schapiro, *supra* note 19, at 250 ("Early in the twentieth century, the United States Supreme Court attempted to maintain some kind of dual federalist system, but those efforts ended with the rise of the New Deal Court in 1937."); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29–30 (1937) (upholding Congress's power to enact the National Labor Relations Act); Helvering v. Davis, 301 U.S. 619, 640–46 (1937) (upholding the payroll tax provisions of the Social Security Act).

[195] *See* Schapiro, *supra* note 19, at 245–57 (noting the absence of guidance from the Court regarding how to address the "areas of concurrent authority" between state and federal governments, which "vastly outnumber any possible realms of exclusive power").

[196] *See* Fahey, *supra* note 20, at 1323 (characterizing cooperative federalism as "not just a model of federalism [but also] a model of administration," under which national regulatory schemes "are administered jointly by federal and state bureaucracies").

[197] *See* Ava Ayers, *Discriminatory Cooperative Federalism*, 65 VILL. L. REV. 1, 11 (2020) (characterizing conditional grants and conditional preemption as "a carrot and a stick, respectively" that Congress uses to incentivize state participation in federal programs).

[198] *See* Naturalization Act of 1790, Pub. L. No. 1-3, 1 Stat. 103 (establishing criteria for citizenship, to be applied by the state in which an individual applying for citizenship was a resident); Corwin, *supra* note 19, at 18–20 (listing other early examples of cooperative federalism involving fugitive slaves, prosecutions for counterfeiting, forestry, education, and highway construction); Jacob Hamburger, Immigration Law's Internal Dimension 27, 34–42 (July 15, 2024) (unpublished manuscript) (on file with author) (discussing cooperative immigration regimes in the late nineteenth and early twentieth centuries).

[199] *See* 42 U.S.C. § 1396b(a)(1) (establishing criteria for federal payments to "each State which has a plan approved under [Medicaid]"); Harris v. McRae, 448 U.S. 297, 308 (1980) (de-

the CAA, which delegates to states both regulatory and enforcement power.[200]

Cooperative federalism schemes also frequently involve authorizing states to sue to enforce federal laws. In some cases, Congress explicitly deputizes state attorneys general by enabling them to sue private actors for violations of federal laws, a common feature of consumer protection statutes.[201] In others, federal laws create general "citizen-suit" provisions that authorize any interested party to sue, including states.[202] The state's "procedural right" to sue in *Massachusetts* involved such a provision of the CAA.[203]

In this context, the notion that states "surrender" their ability to pursue the public welfare in broad areas of law is a strange anachronism. Under the modern federal structure, states do not have an interest in federal law and agency action because these displace their original police power authority, but rather, because federal action creates opportunities for state participation in and integration into statutory and regulatory schemes.[204] In other words, states gain a stake where federal action empowers them to act, not where it disempowers them.

Some scholars argue that in this world of concurrent state-federal authority and cooperative federalism, states should have standing to sue the federal government over virtually anything. Notably, Professor Ernest Young has written that because "changes in federal law pervasively affect state governments," it is not particularly difficult to conclude that "states have an interest in challenging unlawful changes to federal policy."[205] In other words, accepting cooperative federalism means accepting that state interests are essentially everywhere. Although Young advocates for some special rules favoring state

scribing Medicaid as a "system of 'cooperative federalism,'" wherein "if a State agrees to establish a Medicaid plan that satisfies the requirements . . . the Federal Government agrees to pay a specified percentage of the 'total amount expended . . . as medical assistance under the State plan'" (first quoting King v. Smith, 392 U.S. 309, 316 (1968); and then quoting 42 U.S.C. § 1396b(a)(1))).

[200] *See* Young, *supra* note 24, at 1904 ("Under the Clean Air Act, for example, Congress establishes the basic parameters for air pollution regulation . . . . [and] delegates authority to states . . . to develop and enforce implementation plans to achieve those federally mandated levels of pollution.").

[201] *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 689, 708–09 (2011) ("Express provisions for state enforcement [of federal laws] appear largely—though not exclusively—in the field of consumer protection.").

[202] *See id.* at 710 (noting that these "citizen suit provisions" authorize this by including states within the defined term "interested person[s]" entitled to bring a claim).

[203] Massachusetts v. EPA, 549 U.S. 497, 520 (2007) (citing 42 U.S.C. § 7607(b)(1)).

[204] *See* Roesler, *supra* note 23, at 677 ("Having agreed to play an administrative role, [states] have a direct interest in shaping the policies and actions of the federal agencies . . . .").

[205] *See* Young, *supra* note 24, at 1903.

standing, in his view, ordinary standing rules suffice to allow states to advance these interests in litigation against the federal government.[206]

Others take the opposite approach. For Professors Ann Woolhandler and Michael Collins, *Snapp* and *Massachusetts* represent a dangerous invitation for state attorneys general to litigate their political grievances against the federal government.[207] State interests have no conceptual limit, because states are general-purpose governments, whose police powers authorize them to do anything that might advance the public interest.[208] If any conceivable use of this power to promote the public good counts as an "interest" for standing purposes, then state standing stretches far too broadly.[209] For Woolhandler and Collins, then, some rule disfavoring state standing is needed—and they propose several alternatives, including dramatically limiting the scope of both sovereign and quasi-sovereign interests.[210]

Young is correct that state standing must account for the modern structure of intergovernmental relations, something that Woolhandler and Collins's self-consciously anachronistic call to return to nineteenth-century conceptions of justiciability may be ill-suited to accomplish. At the same time, Woolhandler and Collins are right to worry about the open-endedness of police power standing, as well as its potential for political manipulation and abuse. A better theory of state standing will be able to find some principled limit within the structures of modern cooperative federalism arrangements. Not all of these structures operate in the same way. We need a theory of what interests are created by specific shared governance regimes.

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[206] *Id.* at 1895–96.

[207] *See* Woolhandler & Collins, *supra* note 64, at 2031 ("Article III courts do not exist to resolve the policy disputes between governments . . . ."). Professors Woolhandler and Collins observed that *Massachusetts* seemingly expanded the applicability of parens patriae standing, because although "the Court recognized prohibitions on states' ability to bring parens patriae suits against the federal government, it indicated that such prohibitions apply with lesser force where there is an allegation that an agency is not complying with federal law . . . ." *Id.* at 2021 (citing Massachusetts v. EPA, 549 U.S. at 520). Years earlier, the authors had conducted a similar analysis of the *Snapp* decision, wherein they characterized the Court's opinion as giving "its most expansive statement of the parens patriae doctrine . . . ." Woolhandler & Collins, *supra* note 50, at 476.

[208] *See* Woolhandler & Collins, *supra* note 50, at 395 (discussing the trend of states asserting standing based on "any interest that [the] state *might* have pursued through legislation").

[209] *See* Woolhandler & Collins, *supra* note 64, at 2024 ("The problem is not that states lack real injuries. . . . The problem is that states can easily satisfy the current standing tests . . . .").

[210] *See id.* at 2028 (discussing possible limits that would return states to "traditional disfavored status as plaintiffs"); Woolhandler & Collins, *supra* note 50, at 516 ("[O]ur approach to state standing admittedly retreats somewhat from a public law model that favors shared interests and aggregated plaintiffs. We resort to a more private law model for standing . . . ."). The authors also advocate for abandoning the injury-in-fact test in favor of the older "legally protected interest" test, which would require that an interest for standing purposes bear some relationship to a common-law or statutory cause of action. *Id.* at 504–10; *cf.* Sunstein, *supra* note 27, at 183–93 (discussing the shift from "legal injury" to "injury in fact" in standing law).

Two other scholars of state standing help us build this theory. First, Professor Shannon Roesler has advocated for an approach to standing that identifies state sovereign interests with "interest in shared governance."[211] In the context of cooperative federalism, a state's interest as a sovereign government encompasses its role deciding whether to enter into, and then participating in, federal administrative schemes.[212] As a result, under this approach a state would have Article III standing to challenge a federal law or agency action "if the federal law at issue contemplates a role for state governments in its implementation."[213] Roesler's account largely obviates the need for special solicitude—except under the "weak" view described above[214]—and for the concept of quasi-sovereign interests more broadly. This theory would grant standing in *Massachusetts*, for example, because the state had governance interests under the CAA's cooperative statutory schemes, and the state's standing theory therefore did not require the Court to identify broad police power interests in the public welfare.[215]

Professor Tara Leigh Grove has made a case for a slightly more restrictive approach to state standing which nonetheless offers an important supplement to the theory described above. For Grove, the only situation in which a state has unique interests to assert against the federal government is when federal law or action directly "preempt[s], or otherwise undermine[s] the continued enforceability of, state law."[216] Though this suggests a narrower set of cases where states have standing than in Roesler's account, both scholars seek to narrow the focus of state standing to the state's status as a government. Importantly, Grove observes that cooperative structures frequently do not simply ask state officials to help out with federal objectives, but also seek out state participation by incorporating these objectives into the state's own legal code.[217]

[211] Roesler, *supra* note 23, at 677.

[212] *Id.*

[213] *Id.* at 678.

[214] On the weak theory of special solicitude, see *supra* notes 109–114 and accompanying text.

[215] *See* Roesler, *supra* note 23, at 675–76 (citing Massachusetts v. EPA, 549 U.S. 497 (2007)) ("[I]n cases involving cooperative administrative schemes like the one in *Massachusetts*, the state seeks to vindicate its own sovereignty interests . . . . The regulatory regime under the CAA includes an implementation role for state governments; indeed, the federal government could not implement the administrative scheme without state cooperation. When states agree to undertake these responsibilities, they do so as sovereign governments seeking to further the general welfare of their citizens.").

[216] Grove, *supra* note 26, at 855.

[217] *Id.* at 875. Professor Bridget Fahey has also made the important observation that even where states do not enact legislation as part of cooperative federalism arrangements, they nonetheless engage in a different kind of lawmaking as part of the process of drafting memoranda of agreement with the federal government or plans for federal approval. *See* Fahey, *supra* note 20, at 1367–69 (discussing the role of "the soft law of *nonbinding* documents" within the broader cooperative federalism system).

In short, states have governing interests in contesting the legality of cooperative federalism frameworks that seek and secure their participation. Likewise, they have interests in defending their own laws—sometimes enacted as part of these frameworks—against federal action that preempts or undermines them. Part IV describes in detail what these state governing interests look like in the immigration context.[218]

C. The Disappearance of Dual Federalism in Immigration

First, however, it is necessary to clarify why this discussion of federalism and standing applies to immigration. One might well be forgiven for believing that it does not.[219] Immigration case law has for over a century stressed the extraordinary, even exclusive, power of the federal government over immigration: a feature that some scholars have described as "an exceptional relic of 'dual federalism.'"[220] If immigration were truly an island of dual federalism in a sea of concurrent state-federal authority and cooperative lawmaking, then perhaps there might be a case for holding onto the "sovereignty-ceding" rationale to justify state standing in the immigration context. But although courts have applied unique approaches to federal preemption of state immigration regulations, states are not completely powerless in this field. There is therefore no reason to create a special rule granting state litigators access to federal courts to assert interests related to immigration policy.

To be sure, the "plenary power" tradition in immigration case law articulates a dualistic understanding of immigration authority in the U.S. federal system.[221] For much of the country's early history, state and local governments routinely regulated and restricted the entry of people into the United States as well as movement between states.[222] Soon after Congress enacted systematic immigration legislation, however, the Supreme Court

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[218] *See infra* notes 251–317 and accompanying text.

[219] Some scholars have looked to immigration as an exception to their general positions on standing in the context of cooperative federalism, based on the common but—in my view—inaccurate perception that immigration is exclusively federal and does not contemplate state cooperation. *See, e.g.*, Roesler, *supra* note 23, at 701 (arguing that the states in *Texas DAPA* did not have governance interests in immigration because the INA "does not contemplate an implementation role for state governments"); Young, *supra* note 24, at 1905 (stating that immigration is an area of law that is not "governed by cooperative federalism regimes").

[220] David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 604 (2017) (citing Corwin, *supra* note 19, at 3–4).

[221] On plenary power, see *supra* note 21 and accompanying text.

[222] *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–84 (1993) (describing the various forms of immigration regulation at the sub-federal level in this period, and challenging the view that immigration was unregulated prior to Congress's intervention); Hamburger, *supra* note 198, at 20–24 (providing an overview of state- and local-level migration controls in early U.S. history).

began expressing the position that the federal government retains exclusive power over immigration.[223]

Notably, in *Chy Lung v. Freeman*, the Court reasoned that states cannot be allowed to decide how foreign subjects can be treated, because the federal government is ultimately responsible for conducting relations with other nations—and as a result, it struck down California's law that allowed the state to exclude arriving immigrants who fail to pay a bond.[224] In 1889, in *Chae Chan Ping v. United States*, also known as the *Chinese Exclusion Case*, the Supreme Court went a step further. Upholding the constitutionality of the Chinese Exclusion Act, the Court reasoned that certain powers central to national sovereignty must belong solely to the federal government.[225] The Constitution grants some of these powers explicitly to the legislative branch, including the power to declare war or ratify treaties.[226] Although the Constitution says nothing about "the power of exclusion of foreigners," the Court declared this power to also be "an incident of sovereignty belonging to the government of the United States, as part of those sovereign powers delegated by the Constitution . . . ."[227] The *Chinese Exclusion Case* was not itself a case about the allocation of power between state and federal governments, but the decision nonetheless includes strong language denying states' authority to regulate immigration.[228] This principle of exclusive federal authority over immigration, understood as a feature of national sovereignty, is a core feature of the

[223] *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."); Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 605–06 (1889) ("The control of local matters [has been] left to local authorities, and national matters being entrusted to the government of the Union . . . . For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

[224] *Chy Lung*, 92 U.S. at 279–80.

[225] *Chinese Exclusion Case*, 130 U.S. at 604–05.

[226] *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . . To declare war . . . ."); *id.* at art. II, § 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."); *Chinese Exclusion Case*, 130 U.S. at 604 (listing "[t]he powers to declare war, [and] make treaties" as "sovereign powers, restricted in their exercise only by the Constitution itself").

[227] *Chinese Exclusion Case*, 130 U.S. at 609.

[228] *Id.* at 605–06 ("The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate . . . . For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *see also* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 34–35 (2015) (arguing that the *Chinese Exclusion Case* Court's use of federalism reasoning was central to its explanation for why the courts should defer to the political branches of the federal government).

plenary power doctrine which has exerted a lasting influence over immigration case law since the late nineteenth century.

Completing the dualistic plenary power framework, subsequent immigration federalism cases distinguished between two separate spheres of immigration regulation. Courts began to distinguish between "immigration law" in a strict sense, which governs who may enter, remain in, and be expelled from the United States; and "alienage law," which encompasses state or local regulations of noncitizens—i.e., regulations based on "alienage" status—within their jurisdictions.[229] States in this framework are barred from enacting "pure" immigration law, but alienage law encompasses a wide variety of subjects traditionally understood to fall under historic state police powers.[230] Although states had the authority to enact alienage regulations, courts did not feel compelled to defer to state governments when presented with challenges on various constitutional grounds.[231] Thus, the central question in mid-twentieth century immigration preemption cases became whether a state law was immigration law or alienage law, although answering this question in practice was often far from straightforward.[232]

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[229] *See* De Canas v. Bica, 424 U.S. 351, 354–55 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power. But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration . . . ."); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202–03 (1994) (describing the distinction between "immigration" and "alienage," and noting that "as state lawmaking moves away from the 'immigration' end of the spectrum and toward 'alienage,' it touches more on areas that states routinely regulate . . . [where] questions of state preclusion are more difficult").

[230] *See De Canas*, 424 U.S. at 356–57 (holding—in a decision prior to the enactment of the Immigration Reform and Control Act of 1986—that the INA did not preempt state regulations of immigrant employment); Graham v. Richardson, 403 U.S. 365, 372–73 (1971) (first citing Hauenstein v. Lynham, 100 U.S. 483 (1880) (real property); then citing Terrace v. Thompson, 263 U.S. 197 (1923) (land ownership); then citing McCready v. Virginia, 94 U.S. 391 (1877) (oyster fishing); and then citing Patsone v. Pennsylvania, 232 U.S. 138 (1914) (hunting and firearm ownership)) (collecting late nineteenth-century and early twentieth-century cases addressing state laws restricting noncitizens' rights to hunt and fish, own firearms, and own or transfer rights to real property).

[231] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (applying the Fourteenth Amendment's Equal Protection Clause as well as federal civil rights protections to noncitizens); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (applying Fifth and Sixth Amendment protections to noncitizens accused of crimes); *Graham*, 403 U.S. at 372 (holding that state welfare eligibility policies based on alienage are "subject to close judicial scrutiny" under the Equal Protection Clause); Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (declining to treat undocumented aliens as a suspect class, but applying heightened scrutiny to state laws excluding undocumented children from public education).

[232] For example, in *Truax v. Raich*, the Court struck down an Arizona law setting quotas for noncitizen employment, in part because "[t]he assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." 239 U.S. 33, 42 (1915). In other words, restricting immigrant work is equivalent to restricting immigration itself, which is forbidden to the states. Sixty years later, in

Although this dualistic immigration preemption framework remained influential for many decades, it largely ignored the long history of cooperative federalism in immigration. Federal initiatives to secure state immigration participation date back to the earliest days of the country's history. In the eighteenth and nineteenth centuries, for example, state judges were empowered to process applications for naturalization, and state agencies could contract with the federal government to take on responsibilities for inspecting ships arriving from overseas.[233] During the Progressive Era, federal and state agencies collaborated in schemes to "distribute" immigrant labor throughout the country.[234] Even well into the twentieth century, after the federal government had begun to build significant bureaucratic and law enforcement infrastructure of its own, it continued to rely on partnerships with state and local authorities.[235] Of these partnerships—discussed in greater detail in Part IV—a notable example is the § 287(g) program, named after a 1996 addition to the Immigration and Nationality Act (INA) which allows for supervised delegation of authority to sub-federal officials to enforce civil immigration law.[236]

De Canas v. Bica, the Court characterized an even more restrictive regulation of work as a clear example of the state's inherent police power. 424 U.S. at 356; *see* Jacob Hamburger, *Hybrid-Status Immigrant Workers*, 73 DUKE L.J. 737, 791–92 (2024) (contrasting these outcomes in *Truax* and *De Canas*). In light of these ambiguities, Adam Cox has sharply criticized the conceptual distinction between immigration and alienage law—or, in Cox's terminology, "selection rules" and "regulatory rules." *See* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 343 (2008) ("Despite the fact that the distinction between selecting and regulating rules is part of the conceptual bedrock of immigration law, it is a foundation without substance."). For Cox, this distinction does not hold, because "*every* territorially bounded rule produces both selection pressure and regulatory pressure." *Id.* at 358.

[233] *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 ("That any alien [eligible for naturalization] may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided . . . ."); Immigration Act of 1882, Pub. L. No. 47-376, § 2, 22 Stat. 214, 214 (empowering the Secretary of the Treasury to "enter into contracts" with state officials enabling the latter "to examine into the condition of passengers arriving at the ports within such State in any ship or vessel"). Note that this cooperative feature of the 1882 Act was in effect at the time of the Court's famous articulation of exclusive federal power in the *Chinese Exclusion Case*. *See* Hamburger, *supra* note 198, at 27 n.132.

[234] *See* Hamburger, *supra* note 198, at 28–42 (providing an overview of these distribution schemes).

[235] As Adam Cox and Cristina Rodríguez explain, the twentieth-century "deportation state" created an unprecedentedly large population of immigrants subject to removal, which the federal government could not identify and police on its own. It therefore became reliant on state and local law enforcement to fulfill its deportation mandate. *See* COX & RODRÍGUEZ, *supra* note 133, at 79–102.

[236] *See* INA § 287(g), 8 U.S.C. § 1357(g) ("[T]he Attorney General may enter into a written agreement with a State . . . pursuant to which an officer or employee of the State . . . who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function at the expense of the State . . . ."); *see also* Huyen Pham, *287(g) Agree-*

The Supreme Court's 2012 decision in *Arizona v. United States*, its most significant statement on immigration federalism in the twenty-first century, was also its first to account for cooperative federalism in immigration to a significant degree.[237] In the process, it arguably did away with the dualistic immigration-alienage distinction that had long guided immigration preemption. Although the Court began its opinion with language reaffirming the exclusive authority of the federal government over immigration, the dualistic plenary power framework ultimately did not provide the basis for its determinations over which portions of the Arizona immigration bill at issue (known as S.B. 1070) were invalid.[238]

Arizona involved preemption challenges to four provisions of S.B. 1070. At first glance, two of those provisions would seem to have been "immigration" regulations, because they purported to grant state and local police the power to make decisions about whether a noncitizen has lawful immigration status or is deportable. The first provision, Section 6, read that state officers "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States."[239] The second provision, Section 2(B)—the "show-me-your-papers" law—"require[d] state officers to make a 'reasonable attempt . . . to determine the immigration status'" of anyone lawfully arrested for other reasons, "if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'"[240]

Of these two provisions, the Court found that only Section 6 was preempted, not because it was a regulation of "immigration," but because it conflicted with the terms of state-federal cooperation under Congress's immigration enforcement scheme.[241] Section 6 effectively granted state and local officers the authority to initiate civil immigration enforcement proceedings, enabling them to arrest anyone they believed lacked lawful immigration status or had committed crimes that made them deportable. In contrast, the "[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer," namely, through

ments in the Trump Era, 75 WASH. & LEE L. REV. 1253, 1257–73 (2018) (summarizing the history of the § 287(g) program).

[237] 567 U.S. 387 (2012).

[238] *Id.* at 394 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."). Kerry Abrams refers to the Court's reference to plenary power in *Arizona* as little more than a "rhetorical penumbra." Abrams, *supra* note 21, at 603.

[239] *Arizona*, 567 U.S. at 407 (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2024)) (alterations in original).

[240] *Id.* at 411 (quoting ARIZ. REV. STAT. ANN. § 11-1051(B)) (alterations in original).

[241] *Id.* at 408.

programs like § 287(g).[242] State attempts to make independent determinations about who should be the target of immigration enforcement violate "the principle that the removal process is entrusted to the discretion of the Federal Government."[243] If states want to enforce federal immigration law, *Arizona* tells them that they have one option: enroll in cooperative enforcement programs created and managed by the federal government.

In contrast, the "show-me-your-papers" provision of Section 2(B) was allowed to stand, as it only empowered officers to collect immigration information during otherwise lawful encounters.[244] This provision therefore did not purport to give state officials any additional power to target individuals for civil immigration enforcement. Furthermore, Section 2(B) fit within the goals of the federal government's cooperative enforcement programs, which in general seek to facilitate the exchange of immigration information between state and federal officials. The Court struck down Section 6 but upheld Section 2(B), but its rationale for doing so did not depend on the immigration-alienage distinction. Rather, these two enforcement provisions differed in how they fit into federal enforcement scheme and the role for state and local governments therein.

Compare the Court's treatment of these enforcement provisions with its rationale for preemption of S.B. 1070's employment restrictions. In 1976, the Court in *De Canas v. Bica* established that the regulation of immigrant employment was a quintessential exercise of state police power—in other words, a lawful alienage regulation.[245] In the meantime, Congress passed its own restrictions on immigrant work that preempted most state legislation to this effect.[246] But the *Arizona* Court did not strike down Section 5(C) of S.B. 1070 on the grounds that it constituted an improper regulation of "immigration," nor did this decision require a determination that all regulations of immigrant employment were no longer within the bounds of state authority. Instead, the Court found once again that Arizona's criminali-

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[242] *Id.* at 408–09. The Court also cites more limited provisions of the INA granting states enforcement authority. *Id.* These include two provisions that also require authorization from or consultation with federal officials: INA § 103(a)(10), 8 U.S.C. § 1103(a)(10) (allowing the Attorney General to authorize states to assist during an "imminent mass influx of aliens"); INA § 242C, 8 U.S.C. § 1252c (authorizing state and local officials to arrest noncitizens who are illegally present and have been deported after a felony conviction after confirming with immigration officials). The Court also cites an example of a criminal offense under the INA, which like other federal criminal offenses, state law enforcement may enforce—but not prosecute—pursuant to their arrest authority: INA § 274, 8 U.S.C. § 1324(c) (authorizing arrest for federal harboring offenses).

[243] *Arizona*, 567 U.S. at 409.

[244] *Id.* at 414.

[245] 424 U.S. 351, 356 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* Kansas v. Garcia, 140 S. Ct. 791, 797 (2020).

[246] *See generally* Immigration Reform and Control Act of 1986.

zation of unauthorized work conflicted with the federal government's comprehensive immigration framework.[247]

In other words, the Court's approach to immigration preemption in *Arizona* centered around whether state action fit within Congress's overall statutory scheme for immigration enforcement—not whether it is an "immigration" or "alienage" regulation. To answer this question, *Arizona* applied a strong form of conflict preemption analysis, under which states may not exercise any independent discretionary authority even to apply the same legal standard as federal law.[248] *Arizona* may not have completely eliminated dualistic reasoning from U.S. immigration law,[249] but it is nonetheless strong evidence that immigration law is compatible with ordinary principles of modern federalism.

As a result, there is no reason to exempt immigration from the approach to standing outlined in Part III.B.[250] Like most other areas of law in the U.S. legal system, state and federal governments share authority to regulate and enforce immigration law, though the division of labor is governed by a complex statutory framework. Within this framework, states have governing roles in both the enforcement and regulation of immigration law. Part IV uses these state governing roles in the modern structure of immigration federalism to identify where states have sovereign interests that can give rise to standing in disputes over federal immigration policy.

IV. State Immigration Interests

Part III explained why the strong version of special solicitude courts have applied in the immigration context is wrong. States are not entitled to bypass ordinary standing rules to advance quasi-sovereign interests they claim in restricting immigration. But this does not mean that states lack unique interests related to immigration that can support standing—as the

[247] *Arizona*, 567 U.S. at 406–07. Namely, the Arizona law imposed criminal penalties on immigrants seeking unauthorized employment, penalties that are absent in federal immigration law—and the Court noted that "[t]he legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose [such] criminal penalties . . . ." *Id.* at 405; *cf.* INA § 274a, 8 U.S.C. § 1324a.

[248] Adam Cox observes that *Arizona*'s interpretation of a "conflict" between state and federal immigration enforcement is highly unusual in the U.S. system. *See* Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 Sup. Ct. Rev. 31, 54.

[249] Courts in the wake of *Arizona* have occasionally been unsure as to whether that case's conflict preemption analysis displaced the traditional immigration-alienage distinction. In an important Third Circuit decision evaluating a Pennsylvania town's rental restrictions on undocumented immigrants, for example, the court simply applied both forms of analysis. *See* Lozano v. City of Hazleton, 724 F.3d 297, 314–17, 317–21 (3d Cir. 2013) (stating first that the housing restrictions were preempted as a regulation of immigration, and then holding that the restrictions conflict with federal immigration law).

[250] *See supra* Part III.B, notes 191–218 and accompanying text.

weak theory of special solicitude suggests. Building on the approach to standing articulated above, Part IV explains where states can assert standing to challenge federal immigration policies based on two key sets of interests: Section A addresses those interests related to cooperative immigration schemes,[251] and Section B addresses those interests related to valid state laws regulating immigrant integration and membership.[252] In contrast, Section C explains why states cannot claim standing based on interests in controlling immigration into their borders, or policing the federal government's enforcement of immigration law generally.[253] Finally, Part IV concludes in Section D by examining how this standing framework might prompt us to reconsider how non-sovereign or "proprietary" standing functions in the immigration context.[254]

A. Negotiating Cooperative Relationships

As noted above, federal immigration law enables various forms of cooperation between federal, state, and local governments. Section A introduces the mechanisms of cooperative federalism in the immigration context.[255] It then discusses the ways in which these mechanisms can give rise to cognizable interests in the context of state standing.[256]

Cooperative federalism is most visible in the context of immigration enforcement, where the federal government frequently invites assistance from sub-federal law enforcement in investigating, arresting, and detaining noncitizens suspected of having violated immigration law. The § 287(g) program enables participating state and local officers to conduct arrests under Immigration and Customs Enforcement (ICE) administrative warrants, and screen criminal suspects for immigration violations.[257] State governments and their local subdivisions can also enter into inter-governmental service agreements

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[251] *See* Part IV.A, *infra* notes 251–275 and accompanying text.

[252] *See* Part IV.B, *infra* notes 276–302 and accompanying text.

[253] *See* Part IV.C, *infra* notes 303–312 and accompanying text.

[254] *See* Part IV.D, *infra* notes 313–317 and accompanying text.

[255] *See infra* notes 257–267 and accompanying text.

[256] *See infra* notes 268–275 and accompanying text.

[257] These two programs are known respectively as the Warrant Service Officer (WSO) and the Jail Enforcement Model (JEM) respectively. According to the ICE website, as of May 2024 there were 60 JEM agreements in 16 states, and 75 WSO agreements in 11 states. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/identify-and-arrest/287g [https://perma.cc/7H36-SYAW]. Between 2002 and 2012, when the Obama administration discontinued the program, ICE also offered the Task Force Model, which gave deputized officers greater latitude to arrest suspects in the field. Press Release, U.S. Immigr. & Customs Enf't, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (Dec. 20, 2012), https://www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and [https://perma.cc/3D3W-KTQN].

(IGSA) to house immigration detainees in their jail facilities, with limited federal funding available to reimburse the costs of this detention.[258] On a more granular level, ICE routinely issues "detainers," requests for state or local authorities to retain custody of an individual it plans to place into removal proceedings.[259] Finally, the federal government has cycled through a variety of programs and initiatives to encourage—or in some cases, require—state and local law enforcement to share information about the criminal suspects they encounter, which can be cross-referenced with other federal law enforcement databases.[260]

Cooperative schemes enable states not only to participate in the enforcement of federal immigration law, but also to withhold participation. These various non-cooperation policies are commonly referred to as "sanctuary" policies.[261] Sub-federal governments can decline to enter into § 287(g) agreements, IGSAs, and other formal partnerships with ICE.[262] They can also refuse—either as a general policy or on a case-by-case basis—to honor immigration detainers or assist in immigration investigations.[263] Although federal law prohibits categorical policies against sharing information with immigration enforcement agencies, states and localities can simply opt not to col-

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[258] *See* Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2345 (2020) (describing federal incentives to contract with state and local governments rather than operate detention facilities directly); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 20301, 108 Stat. 1796, 1823–24 (creating the State Criminal Alien Assistance Program (SCAAP) to reimburse detention costs).

[259] *See* Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL'Y REV. 87, 105 (2016) ("The detainer had become the primary mode of interior [immigration] enforcement.").

[260] On the emergence of various technological and logistical programs to collect state and local immigration information, see Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1120–34 (2013) (discussing two such initiatives: the FBI's NCIC Immigration Violators File, and the Secure Communities program); Bridget A. Fahey, *Data Federalism*, 135 HARV. L. REV. 1007, 1024 (2022) (describing "fusion centers," that "facilitate information exchange by co-locating government *personnel*," including from state and local governments, the DHS, and the FBI, who "are then cross-authorized to access the information in each other's possession and directed to work jointly to analyze and investigate relevant leads").

[261] *See* Rick Su, *Designing Sanctuary*, 122 MICH. L. REV. 809, 814–19 (2024) (noting that although the term "[s]anctuary is now commonly used to describe cities that do not fully participate in federal immigration enforcement," in practice the term is not so easily defined).

[262] *See, e.g.*, CHI., ILL., MUN. CODE § 2-173-020(a) (amended 2021) (prohibiting all Chicago agencies from entering into agreements with the federal government to enforce civil immigration law).

[263] *See, e.g.*, *id.* § 2-173-020(a)(1)-(3) (prohibiting arrests and detention based on immigration status, prohibiting against permitting ICE agents access to detainees and facilities, and prohibiting the use of city resources to assist ICE investigations); *id.* § 2-173-020(a)(5) (prohibiting transfers of detainees into ICE custody for civil immigration enforcement purposes).

lect immigration or citizenship information.[264] Particularly in the recent era of immigration polarization, sanctuary policies have often functioned as an effective form of state and local dissent from federal immigration policies.[265]

Enforcement—i.e., arrest, detention, and removal—is by no means the only example of cooperative federalism in immigration. The federal refugee resettlement program, for example, allows states to consult with the federal government and draft plans to distribute federal funds to refugee service providers.[266] Additional examples include the U Visa or Special Immigrant Juvenile Status programs, in which state and local courts and law enforcement agencies can certify to federal agencies that victims of crime or abandoned children are eligible for immigration status.[267] There is no shortage of formal mechanisms for state governments to participate in achieving the aims of federal immigration law.

These cooperative federalism schemes give rise to state governance interests. First, states should have standing to advance interests in preserving their authority to determine whether to participate in these schemes in the first place. One straightforward application of such standing is in situations where federal policies improperly coerce state cooperation or commandeer state law enforcement resources. For example, in 2017, the Trump administration declared that "sanctuary jurisdictions" were no longer eligible for federal law enforcement grants—jeopardizing a number of cooperative programs in immigration and criminal law enforcement—leading to lawsuits from several affected governments.[268] There were several valid grounds for standing in

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[264] *See* 8 U.S.C. § 1373(a) ("[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to . . . the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."). *But see* Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 847 (2019) ("[T]here are signs that § 1373, the sole federal anti-sanctuary provision, might be violating the anticommandeering doctrine.").

[265] *See* Su, *supra* note 261, at 834–42 (outlining the structure and the rise of sanctuary policies, including the increased politicization of the issue).

[266] *See* INA § 412, 8 U.S.C. § 1522 (establishing refugee assistance programs); Hamburger, *supra* note 198, at 13–14 (describing the refugee programs as a "fully cooperative scheme" between federal and state governments).

[267] *See* 8 C.F.R. § 214.14(c)(2)(i) (2024) (immigrant victims of crimes eligible for U Visa must submit form "signed by a certifying official," including state and local judges, prosecutors, and law enforcement officers); Shani M. King & Nicole Silvestri Hall, *Cooperative Federalism and SIJS*, 61 B.C. L. REV. 2869, 2877–81 (2020) (discussing the role of state family court judges in facilitating applications for Special Immigrant Juvenile Status).

[268] Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); *see* City & County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018) (challenge of Executive Order No. 13768); City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018) (same); City of Philadelphia v. Att'y Gen. of the U.S., 916 F.3d 276 (3d Cir. 2019) (challenging conditions imposed on DOJ grant in 2017, including requirements for DHS cooperation). Though these lawsuits were primarily

these cases, but among them was the fact that a federal action that "violates the Tenth Amendment's prohibitions against commandeering" harms the state's interest to choosing whether or not to participate in federal immigration enforcement partnerships.[269]

To give another example where this theory of standing applies, many state and local governments fiercely opposed the Obama administration's attempt to require sub-federal law enforcement to share immigration information with ICE through a program known as Secure Communities.[270] Although these governments chose to express their grievances against the program through other means, had they pursued litigation, they would have had standing to challenge it on anti-commandeering grounds.

Second, as the sanctuary city cases also demonstrate, states have an interest in negotiating the terms of the cooperative schemes in which they participate. They should therefore have standing to challenge federal action that unlawfully alters the conditions of state participation. This was the case when various local governments alleged that by purporting to withdraw funding from sanctuary jurisdictions, President Trump's 2017 executive order unconstitutionally usurped Congress's spending power.[271] Standing here is not limited to Tenth Amendment anti-commandeering or separation-of-powers claims. To take an example outside of the civil enforcement context, in 2016, Texas sued the Obama administration over its policies for admitting Syrian refugees, on the basis that it violated both its duty to consult with states under the Refugee Act and the APA.[272] Although the district court in that case observed that it "present[ed] a litany of political questions" and ultimately denied the state's application for injunctive relief, it correctly concluded that the state's claims were justiciable.[273] Although the Refugee Act may not provide the states with a cause of action for the alleged failure to consult, the cooperative structure of refugee resettlement clearly does create an implementation role for states, which consequently they have an interest in defining.

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brought by municipal and county government plaintiffs, the same principles apply to state governments, which like these local governments may participate in the relevant cooperative schemes.

[269] County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 534 (N.D. Cal. 2017), *aff'd sub nom.*, *City & County of San Francisco*, 897 F.3d at 1236.

[270] *See* Fahey, *supra* note 260, at 1027, 1056 (describing the shift in characterization by the DHS of the Secure Communities program, initially described as one in which states could voluntarily participate, to one in which states were obligated to participate).

[271] *See City & County of San Francisco*, 897 F.3d at 1234 (in issuing the executive order, "the Administration claimed for itself Congress's exclusive spending power"); *City of Chicago*, 888 F.3d at 280 (plaintiff city challenged conditions as "unconstitutional as a violation of separation of powers principles"); *cf. City of Philadelphia*, 916 F.3d at 291 (the executive order was unlawful because it was not authorized by an act of Congress).

[272] *See* Tex. Health & Hum. Servs. Comm'n v. United States, 166 F. Supp. 3d 706, 712 (N.D. Tex. 2016) (summarizing plaintiff state's claims under the APA and the Refugee Act).

[273] *Id.* at 710.

State governments need not already be involved in cooperative programs to seek standing to challenge such actions. They may assert interests in the legality of programs that seek their participation because they may decide to participate at a later date.[274] But in these cases, ordinary standing rules apply, including the requirement that states demonstrate that the alleged injury to their interests is imminent and traceable to the government's action.[275] A state may therefore need to show that there is some actual likelihood that it will decide to enroll in a cooperative program, or that an agency action meaningfully affected its decision over whether to do so.

State standing to challenge federal actions that affect cooperative schemes is relatively straightforward. These schemes explicitly seek state participation in carrying out federal objectives, and fundamentally rest on states' voluntary participation. A federal action that improperly coerces state involvement or otherwise imposes unlawful terms on these partnerships is therefore a direct injury to the state as a participating government. States should have standing to challenge such actions.

B. Maintaining Legislation Over Immigrant Membership Rights

Participation in these cooperative schemes, however, is not the only role for states in the national system of immigration enforcement and regulation. State laws encompass a wide range of policy areas that have important impacts on noncitizens' lives, even more so in the case of undocumented immigrants. Only a brief and incomplete summary is possible here, which Section B provides. States may, for example, decide whether to allow noncitizens to vote or stand as candidates for office.[276] They can choose to grant undocumented immigrants driver's licenses or identification cards.[277] States also

[274] *See* Roesler, *supra* note 23, at 681–82 ("The critical inquiry is whether the federal law encourages states to aid in its implementation. If it does, states should have standing to litigate whether Congress exceeded its constitutional authority.").

[275] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992) ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

[276] Although most states and localities today do not allow noncitizens to vote or run for office, this was not always the norm. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993) (arguing "that the current blanket exclusion of noncitizens from the ballot is neither constitutionally required nor historically normal," and that "the disenfranchisement of aliens at the local level is vulnerable to deep theoretical objections since resident aliens—who are governed, taxed, and often drafted just like citizens—have a strong democratic claim to being considered members, indeed citizens, of their local communities"); RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 16–30 (2006) (describing the history of immigrant voting in the United States, and the emerging arguments in favor of restoring the right of noncitizens to vote).

[277] *See States Offering Driver's License to Immigrants*, NAT'L CONF. STATE LEGISLATURE, https://www.ncsl.org/immigration/states-offering-drivers-licenses-to-immigrants [https://perma.cc/

have significant policy discretion over immigrants' economic prospects, including policies that restrict or grant access to higher education, the availability of in-state tuition, eligibility for professional licenses, and public benefits.[278] Finally, some state and local governments have sought to reduce the immigration impact of their criminal justice systems and provide publicly funded legal representation for immigrants in federal removal proceedings.[279]

Together, these policy choices create a spectrum of membership rights across state and local jurisdictions—with more inclusive governments offering a larger bundle of rights to noncitizen residents than more restrictive governments.[280] Sub-federal officials may opt for either of these approaches for a variety of reasons. Some may be motivated by strong political convictions in favor of either welcoming or excluding immigrant residents; others may have more pragmatic concerns, such as encouraging noncitizens to cooperate with law enforcement or participate in public institutions or social life more broadly.[281]

Federal law integrates these kinds of state and local policy preferences into a larger structure of immigration law and policymaking. As Professor Cristina Rodríguez has explained, "the federal government, the states, and localities form part of an integrated regulatory structure that helps the country as a whole to absorb immigration flows and manage the social and cultural change that immigration inevitably engenders."[282] In other words, federal immigration law on its own does not fully account for the process by which noncitizens become members of the communities in which they live. This integration process is

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UTR4-6W4K] (Mar. 13, 2023) (listing state bills granting access to identification to undocumented residents). The choice to grant identification cards can also occur at the municipal level. *See generally* Els de Graauw, *Municipal ID Cards for Undocumented Immigrants: Local Bureaucratic Management in a Federal System*, 42 POL. & SOC'Y 309 (2014) (examining policies in San Francisco and New Haven under which undocumented immigrants are able to obtain municipal identification cards).

[278] *See* Hamburger, *supra* note 198, at 14–15 (collecting sources about each of these policies).

[279] *See* Talia Peleg, *The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 GEO. IMMIGR. L.J. 141, 142 (2021) (discussing local prosecutorial initiatives to reduce the immigration consequences of charging decisions); *Public Funding for Immigration Legal Services*, NAT'L IMMIGR. F. (Apr. 12, 2021), https://immigrationforum.org/article/public-funding-for-immigration-legal-services/ [https://perma.cc/26RC-2NDX] (summarizing development since 2013 of city- and state-funded immigration legal services programs as well as public-private partnerships in New York and California at the state level; and in San Francisco, Seattle, Chicago, Washington, D.C., Baltimore, Denver, and Los Angeles at the city level).

[280] For an overview of this spectrum of inclusive and restrictive rights regimes, see ALLAN COLBERN & S. KARTHICK RAMAKRISHNAN, CITIZENSHIP REIMAGINED: A NEW FRAMEWORK FOR STATE RIGHTS IN THE UNITED STATES 19–70 (2020).

[281] Hamburger, *supra* note 198, at 15.

[282] Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008); *cf.* Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 370 (2010) (proposing that immigration controls and local government regulations of residency "can be understood as interdependent counterparts in the same regulatory scheme").

nonetheless a core concern of immigration law and policy, and state and local laws play an important role in filling the gaps of the federal immigration statute.[283] Traditionally, these kinds of state regulations of immigration were considered to be "alienage laws," distinguished from immigration law proper.[284] But this dualistic framing obscures the ways in which all levels of government—exercising concurrent authority over both immigration and the various policy areas that are intimately intertwined with it—work together to shape the lives of noncitizens throughout the United States.

Federal law nonetheless imposes important constraints on state and local action. Individual constitutional rights doctrines, most importantly under the Equal Protection Clause, invalidate most forms of sub-federal discrimination against noncitizens with lawful immigration status.[285] But because the Supreme Court has refused to apply strict scrutiny to many restrictions on the rights of undocumented immigrants, structural doctrines also play a crucial role in determining which state and local actions can exist within this overall regulatory framework.[286] Most importantly, there is the doctrine of preemption, which invalidates state laws that deviate from the federal immigration statute's allocation of discretionary authority.[287] In some areas, Congress has chosen explicitly to displace state and local regulation of immigrants' rights, notably in the case of immigrant employment.[288] In others, federal law imposes somewhat less extensive constraints on state immigration action.[289] In

[283] *See* Hamburger, *supra* note 198, at 16 (noting the key role of state and local governments in integrating noncitizens into communities).

[284] On the distinction between alienage laws and immigration law, see *supra* notes 229–232 and accompanying text.

[285] *See* Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (noting the Court's precedent "establishe[s] that classifications based on alienage"—i.e., discrimination against lawful permanent residents—are "subject to close judicial scrutiny"). *But see* Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) (discriminatory restrictions that "serve[] a political function," such as reserving certain public functions for citizens, are subject to lower scrutiny).

[286] *See* Plyler v. Doe, 457 U.S. 202, 223 (1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'").

[287] *See supra* Part III.C, notes 219–250 and accompanying text; *see also* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1742 (2010) ("[P]reemption may substitute partially for equal protection by striking down state and local laws when equal protection challenges might not succeed in doing so.").

[288] *See* 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."); Hamburger, *supra* note 232, at 791–95 (discussing the evolution of employment preemption as analyzed by the Court).

[289] For example, federal law prohibits states from providing educational benefits to undocumented students that would be unavailable to an out-of-state U.S. citizen. 8 U.S.C. § 1623. However, states have interpreted this statute so as to allow undocumented students who have attended high school in the state to receive in-state tuition, because U.S. citizen residents of other states could also take advantage of this option. *See* Martinez v. Regents of the Univ. of Cal., 241 P.3d

others still, it affirmatively grants states regulatory authority within certain parameters.[290] Finally, in the immigration context, *Arizona v. United States* also established that some agency actions or policy documents—not just acts of Congress—can also have preclusive effect.[291] Other relevant structural doctrines include the federal constitutional right to interstate travel, derived from the federal Commerce power among other constitutional provisions, which prohibits state laws barring immigrant entries outright.[292]

Within this system, states should have standing to challenge federal immigration actions that interfere with valid uses of their authority to define the scope of immigrant membership through law. There is no need to categorize state interests in this context as indirect "quasi-sovereign" interests in promoting the public welfare. Rather, states' interests cut to the core of their role as government entities: "the power to create and enforce a legal code."[293] This case for standing is most obvious in scenarios in which states seek to defend their laws against federal preemption.[294] If a state believes that federal statutes, regulations, or agency action preempts its own laws relating to immigrant integration, it should have standing to claim that the federal law in question is unconstitutional or otherwise unlawful.

855, 859–60 (Cal. 2010). Federal law governing eligibility to vote and receive identification also sets a floor that state and local governments may choose to surpass. *See* 18 U.S.C. § 611(a)(2) (making it unlawful for a noncitizen "to vote in any election held solely or in part for the purpose of electing [federal officials] . . . unless . . . aliens are authorized to vote for such other purposes under a State constitution or statute or a local ordinance"); 49 U.S.C. § 30301 note (Sec. 202. Minimum Document Requirements and Issuance Standards for Federal Recognition) (setting minimum standards for identification documents that may be used for federal recognition, which do not prevent states from issuing noncompliant documents); *supra* notes 279–280 and accompanying text.

[290] Professor Ava Ayers makes the important observation that laws like the Welfare Reform Act of 1996—which preempted state laws providing public benefits to noncitizens, but enabled them to reauthorize these benefits through subsequent legislation—are themselves a form of cooperative federalism. Ayers, *supra* note 197, at 13–14.

[291] *See* 567 U.S. 387 (2012) (finding federal preemption where state law conflicted with immigration agency policies); Pratheepan Gulasekaram, *Immigration Enforcement Preemption*, 84 OHIO ST. L.J. 535, 540 (2023) (defending "the inclusion of presidential enforcement practice in immigration preemption analysis," because the executive agencies' "enforcement priorities and practices . . . capture and express the conflicting purposes and meanings of the immigration code, and more accurately track immigration enforcement as experienced by noncitizens and understood by the polity"); Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 694 (2014) (discussing the *Arizona* Court's expansion of preemption to include certain executive immigration actions).

[292] *See* R. Linus Chan, *The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self-Deportation Laws*, 34 PACE L. REV. 814, 848–66 (2014) (discussing the evolution of the Court's jurisprudence on the right to interstate travel as it applies to undocumented immigrants, including the longstanding recognition of a link between "the migration of people with the flow of commerce, including the migration of non-citizens").

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

[294] *See* Grove, *supra* note 216, at 863 ("States may challenge only federal statutes or regulations that preempt, or otherwise undermine the continued enforceability of, state law.").

States may also have standing to challenge a federal action that substantially undermines state law even without preempting it outright. If a state has enacted a valid law pursuant to its authority to regulate immigrants' membership rights, it has a stake in the validity of federal actions that make it significantly more difficult to enforce that law. In this respect, Texas was correct to assert in the *Texas DAPA* litigation that it had an interest in maintaining its legislative decision to deny driver's licenses to undocumented immigrants. Many legal scholars have rightly criticized the federal judiciary's unwillingness to apply strict scrutiny to these kinds of laws targeting undocumented immigrants.[295] Under this status quo, however, states retain the authority to deny licenses to at least some subset of immigrants who lack lawful immigration status.[296] Assuming, then, that Texas's law requiring "lawful presence" for license eligibility was valid, the state's allegation that granting lawful presence to DAPA-eligible Texans—and thereby qualifying them for subsidized driver's licenses under state law—"impos[ed] substantial pressure on them to change their laws" articulated a coherent theory of how federal action harmed Texas's governing interest.[297]

At the same time, a state's ability to successfully point to an immigrant-discriminatory law that might be affected by federal action does not automatically entitle it to standing. On the "weak" theory of special solicitude, the fact that a state has a unique interest in upholding such laws does not eliminate the requirements of traceability and redressability. In cases relying on similar theories to *Texas DAPA*, then, Courts should keep in mind Justice Kavanaugh's admonishment in *Texas Enforcement* that "indirect effects on state revenues or state spending"—even when these effects concern legitimate

[295] *See* Ayers, *supra* note 197, at 39–64 ("If the goal of strict scrutiny is to prevent states from taking account of morally irrelevant factors, and to prevent the subordination of noncitizens, then strict scrutiny should apply to the actions states take as part of discriminatory cooperative-federalism schemes. Strict scrutiny should apply whenever states have a choice."); Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77, 150–64 (2016) (establishing three "interpretative uses of federalism" in which "federalism considerations can work within equal protection analysis without substituting a concern about migrants' rights with an emphasis on constitutional structure"); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 497 (2001) ("[I]f a state's enactment of anti-immigrant welfare rules is *not* an act of immigration lawmaking, then these measures are entitled to no special immunity from ordinary equality principles.").

[296] Courts have been more willing to entertain equal protection challenges to laws that deny licenses or other public services to classes of noncitizens holding less-protective forms of status, such as temporary visas or DACA. *See, e.g.*, Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1065 (9th Cir. 2014) (holding that the Arizona law denying driver's licenses to DACA holders was "likely to fail even rational basis review"); Condon, *supra* note 295, at 144 (discussing divergent outcomes in challenges to laws denying licenses to nonimmigrant visa holders).

[297] *Texas DAPA*, 809 F.3d 134, 153 (5th Cir. 2015), *aff'd by an equally divided court*, United States v. Texas, 579 U.S. 547 (2016) (per curiam).

state interests—make state standing claims "more attenuated."[298] Furthermore, to the extent that future developments in equal protection doctrine might place these kinds of discriminatory laws under greater scrutiny, this might also weaken states' claims that a valid governing interest is affected.[299]

State interests in regulating immigrant integration also provide justification for standing in cases where states sued regarding various restrictive federal immigration policies. In the "Muslim Ban" cases, for example, Hawaii and Washington each asserted that denying the entry of foreign students and faculty harmed the mission of state universities.[300] States made similar arguments in response to President Trump's rescission of the DACA program.[301] We can, as these cases do explicitly, understand the states' interests in these cases to be the defense of their "property," institutions of higher education owned and operated by the state. But at the same time, the states also sought to defend concrete policy decisions to include noncitizens—whether holders of nonimmigrant visas or undocumented immigrants with DACA—as members of these public institutions. The structure of immigration federalism enables them to enact these policy choices.[302]

C. Rejecting General State Interests in Immigration Policy

In light of the preceding analysis, this Section rejects the notion that states retain general interests in immigration policy, a central premise of the strong theory of special solicitude for state standing. Although state interests in immigration are substantial in the U.S. federal system, states cannot claim a blanket interest in anything and everything having to do with immigrants. Notably, the broad powers reserved for the federal government under federal immigration law weigh strongly against the notion of a state interest in determining which noncitizens have a right to enter the United States. The INA establishes eligibility criteria for visas and naturalization, as well as the conditions for inadmissibility and deportability. Where there is discretion over who

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[298] *Texas Enforcement*, 143 S. Ct. 1964, 1972 n.3 (2023).

[299] *See* Das, *supra* note 24, at 148 (arguing that standing should not serve as "a form of 'backdoor discrimination' against immigrants in violation of Equal Protection principles").

[300] Hawaii v. Trump, 859 F.3d 741, 765 (9th Cir.) (discussing plaintiff state's standing on these grounds), *vacated*, 138 S. Ct. 377 (2017); Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017) (same).

[301] *See* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1034 (N.D. Cal.) (discussing plaintiff states' theories for standing based on "harm to their educational missions and the loss of students and teachers"), *aff'd in part*, 908 F.3d 476 (9th Cir. 2018), *vacated in part on other grounds sub nom.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

[302] One might also argue that because public universities can admit foreign students and sponsor foreign scholars for nonimmigrant employment and exchange visas, this reflects another cooperative component of the federal immigration system.

may enter the United States, be granted lawful immigration status, or be placed in removal proceedings, this discretion is delegated to federal Executive Branch agencies. In other words, federal law, regulations, and enforcement practice determine who may enter, remain in, and be deported from the United States. States may play some limited roles in the operation of this system—for example, through supervised enforcement partnerships like the § 287(g) program. But this system as it currently exists does not delegate subfederal governments a role in setting the country's immigration policy.[303]

Neither do states have a justiciable interest in determining which noncitizens already present in the United States can enter their own borders. All individuals present in the United States enjoy a constitutional right to interstate travel.[304] This right encompasses multiple forms of travel, grounded in multiple provisions of the Constitution.[305] Although the scope of some applications of the interstate travel right remains murky, one of its clearer dimensions is the Dormant Commerce Clause's prohibition on state laws that directly prohibit movement between states.[306] This prohibition makes no exception for laws targeting noncitizens—undocumented or otherwise.[307] As we have seen, states may adopt some laws that restrict undocumented immigrants' rights, which may discourage them from moving to these states. This may in fact be the express intent of restrictive state legislators.[308] But the Supreme Court has made it crystal clear: "[t]he States . . . do not have any right to select their citizens."[309] States therefore have no valid interest in excluding immigrants entirely from their borders.

As a result, states should not be entitled to standing based solely on noncitizens' presence, or the diffuse costs this presence supposedly imposes. In the cases where courts have adopted the strong view of special solicitude, states argued that federal policies put more undocumented people within their borders, increasing the costs of criminal punishment, medical services, public

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[303] Elsewhere, I have written favorably of proposals to grant states greater decision-making powers in the employment visa context. *See* Hamburger, *supra* note 198, at 43–44. Were Congress to enact such proposals, it might in the process create greater state interests in policies affecting the ability of noncitizens to enter the country from abroad.

[304] *See* Noah Smith-Drelich, *The Forgotten Fundamental Right to Free Movement*, 119 NW. U. L. REV. (forthcoming 2025) (manuscript at 5–7) (on file with author).

[305] *Id.*

[306] *See* Edwards v. California, 314 U.S. 160, 176–77 (1941) (holding a California statute that restricted entry into the state was unconstitutional as an interference with the Commerce Clause).

[307] *See* Chan, *supra* note 292, at 855–57 ("[T]he Court has a long history of equating the migration of people with the flow of commerce, including the migration of non-citizens.").

[308] *See* Hamburger, *supra* note 198, at 15 ("Restrictionist state and local lawmakers tend to declare their intent to exclude undocumented residents more directly.").

[309] Saenz v. Roe, 526 U.S. 489, 511 (1999).

education, and the like.[310] According to this theory, such costs affect the states' "quasi-sovereign interests," because these interests include "immigration policy"[311] writ large, or a "sovereign interest in who is present in its borders."[312] Unlike in *Texas DAPA*, where the state at least could point to a (plausibly) valid state law affected by federal policy, these state standing claims rely entirely on the position that courts must respect state interests in controlling immigration and excluding unwanted noncitizens—a position with no basis in immigration federalism. State standing based on this sweeping characterization of state immigration interests, which ignores the actual roles states play in the federal immigration system, must be rejected.

D. Rethinking Proprietary Interests

Finally, this Section clarifies that although nothing in this standing framework displaces the conventional doctrinal view that states can sue the federal government to advance proprietary interests, it does suggest that the distinction between proprietary and sovereign or public interests is not as clear as one might think. The above discussion of state immigration interests demonstrates considerable overlap with cases where standing was otherwise justified on proprietary grounds. States' interests as proprietors of state universities coincided with their interests in maintaining immigrant-inclusive institutions.[313] "Sanctuary" jurisdictions' interests in preserving their eligibility for federal law enforcement funds was inextricable from their interest in choosing not to participate in cooperative immigrant enforcement schemes.[314] These cases illustrate Professor Seth Davis's observation that although states have the same private-law interests as any non-governmental plaintiff, "states can suffer financial injuries in uniquely public capacities."[315] In politically salient litigation, state proprietary interests are unlikely to be meaningfully separate from the state's role as a sovereign government.

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[310] *See, e.g.*, *Texas Enforcement*, 40 F.4th 205, 216–17 (5th Cir. 2022) (finding standing based on alleged costs associated with undocumented immigrants within the state), *invalidated by Texas Enforcement*, 143 S. Ct. 1964 (2023); *Texas DACA*, 50 F.4th 498, 517 (5th Cir. 2022) (same).

[311] *Texas DACA*, 50 F.4th at 516.

[312] Appellee's Answer Brief at 17, Florida v. United States, No. 23-11528, 2023 WL 3813774 (11th Cir. June 26, 2023).

[313] *See, e.g.*, Hawaii v. Trump, 859 F.3d 741, 765 (9th Cir.) (finding standing "grounded in its proprietary interests as an operator of the University"), *vacated*, 138 S. Ct. 377 (2017); Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017) (finding standing based on proprietary interests harmed by the challenged policy because it would prevent some students and faculty from attending the public university).

[314] *See, e.g.*, City & County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018) (challenging federal policy to withhold funds from sanctuary cities); City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018) (same); City of Philadelphia v. Att'y Gen. of the U.S., 916 F.3d 276 (3d Cir. 2019) (same).

[315] Davis, *supra* note 24, at 1243.

A full theory of what state proprietary interests mean in the contemporary context is beyond the scope of this Article, but there may be reason to believe that this doctrine is evolving. Although *Massachusetts v. EPA* seemingly authorized states to litigate a broad range of public interests, states have often chosen strategically to characterize their claims against the federal government as related to private law interests.[316] And although the Court obliquely distanced itself from special solicitude in *Texas Enforcement*, only one week later, it found that Missouri had standing to challenge President Biden's debt cancellation plan based on a tenuous theory of how this plan affected an independent state-chartered entity.[317] In short, proprietary standing arguments may be becoming newly controversial, and so it may be worth considering how federalism principles may support or weaken them in future cases.

V. IMMIGRATION FEDERALISM, STANDING, AND STATE ACCOUNTABILITY

Even while doing away with the strong theory of special solicitude that has emerged in recent immigration cases, the framework proposed in this Article amounts to a relatively modest limit on state standing. Of the standing arguments that states have advanced over the past decade, this approach rejects primarily only a quite recent trend toward the broadest view of state immigration interests. Even some iterations of the "immigrants-as-injury" theory of standing, such as the one articulated in *Texas DAPA*, can potentially be justified from this perspective.[318] But by narrowing state interests to state roles in the federal immigration system, this modest limitation on standing yields at least one important benefit: fostering state accountability. Part V details the accountability-promoting features of immigration federalism standing, addressing several potential objections. Section A discusses how limiting standing can prevent states from using litigation against federal immigration policy as an end-run around state responsibility.[319] Sections B and C apply this insight to address two possible objections to this Article's theory of standing, involving federalism[320] and equality[321] concerns, respectively.

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[316] *See* Brescia, *supra* note 24, at 428 (noting that "states are most successful in establishing standing to sue to challenge federal actions and authority where they allege the direct harms they suffer, including harms to their proprietary interests").

[317] As Justice Kagan observed in her *Biden v. Nebraska* dissent, the entity in question played no part in the student debt case, and apparently refused to cooperate with the state's litigation efforts by requiring the state to file "sunshine law" demands to receive relevant documents. 143 S. Ct. 2355, 2387 (2023) (Kagan, J., dissenting).

[318] On the immigrants-as-injury theory, see Koh, *supra* note 24; on *Texas DAPA*, see *supra* notes 298–302 and accompanying text.

[319] *See infra* notes 322–327 and accompanying text.

[320] *See infra* notes 328–333 and accompanying text.

[321] *See infra* notes 334–347 and accompanying text.

A. Blocking End-Runs Around State Responsibilities

If states lack standing to sue based on interests that exceed their immigration authority, then to accomplish the same goals, they will have to attempt to use that authority instead. State immigration policymaking frequently functions as a form of dissent against the federal government.[322] This is also true of state lawsuits challenging federal agency actions.[323] But if states can ask federal courts to intervene in federal policymaking where they themselves lack the power to pursue the same immigration agenda, this presents a problem. Not only does this provide states an end-run around the structural allocation of immigration authority. It also allows them to avoid the kinds of immigration lawmaking and policymaking decisions for which their voters can hold them accountable.

States' governing roles in immigration federalism provide opportunities to create alternatives to the immigration policy made in Washington. For this reason, Democratic-controlled states saw an explosion of pro-immigrant integration lawmaking—such as expansions of eligibility for driver's licenses or in-state tuition—as well as sanctuary policies during President Donald Trump's term in office.[324] Similarly, Republican state leaders have passed a number of ambitious laws restricting immigrants' rights since President Joe Biden took office.[325] Importantly, immigration federalism facilitates "dissenting by deciding," which as Professors Jessica Bulman-Pozen and Heather Gerken explain, "allows dissenters to offer up a real-life instantiation of their view."[326]

This sort of "real-life" immigration agenda is not merely an abstract position on the benefits or drawbacks of immigration, but an actual set of poli-

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[322] *See, e.g.*, COLBERN & RAMAKRISHNAN, *supra* note 280, at 1970 (detailing how both restrictionist and integrationist state policies respond to perceived flaws in federal immigration enforcement); Su, *supra* note 261, at 835 (explaining how sanctuary policies express dissatisfaction with federal enforcement efforts).

[323] *See* NOLETTE, *supra* note 13, at 168–97 (discussing state-led litigation as dissent against federal policies in areas including environmental, healthcare, and immigration law); Bulman-Pozen, *supra* note 13, at 1081 (characterizing modern trends in state litigation against federal agency actions as inherently partisan, wherein "[s]tates make demands for autonomy, they enact shadow policies rejected by the federal government, they fight federal programs from within—and they do all of this because of partisan commitments").

[324] *See* Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 153–57 (2019) (describing a significant uptick in pro-immigrant sub-federal lawmaking following Trump's election).

[325] *See, e.g.*, 2023 Fla. Laws 2023-40 (enacting numerous immigration measures including forbidding the issuance of driver's licenses to undocumented immigrants, requiring hospitals to collect immigration status data, and imposing penalties for "smuggling" undocumented immigrants into the state); 2023 Tex. Sess. Law Serv. 4th Called Sess. Ch. 2 (West) (creating a state crime of "Illegal Entry from Foreign Nation" and authorizing state judges to order offenders to leave the country); 2024 Iowa Acts 68 (criminalizing entry into Iowa by certain noncitizens).

[326] Bulman-Pozen & Gerken, *supra* note 19, at 1293–94.

cies with tangible implications for state residents. State elected officials must explain to their voters why they believe, for example, denying driver's licenses to thousands of immigrants—or, limiting police contact with federal immigration agents—justifies the potential risks to public safety, and they must stand by the consequences of these decisions. For state politicians, it may be far less risky to avoid this political process through litigation. By going straight to a federal judge to seek the invalidation of a national policy, state officials can signal a position on national immigration questions—and, if successful, achieving nationwide consequences—without committing their own governments to any particular course of action. This is not to say that all actions states might take while claiming authority to regulate immigration are desirable. But when they are not, state voters have a recourse at the ballot box, as do potential litigants affected by these actions—including in many cases the federal government.[327]

B. Accountability and Federalism

This accountability justification for limiting state standing provides a response to one potential objection to this article's approach, namely that it does not adequately account for state autonomy in the federal system. Notably, Professors Margaret Lemos and Ernest Young have embraced state public law litigation on federalism grounds.[328] In their view, restricting states' ability to sue over major public policies risks reducing the role of autonomous state governments as a "'safety valve' for polarized conflict at the national level."[329] If one supports federalism as a system of decentralized decision-making, as Lemos and Young do, they see no reason to distinguish between states' roles as litigators and as lawmakers. Both are essential for promoting a healthy political system, which requires state governments in various ways to cut against the grain of what the federal government is doing. As a result, standing should not be an obstacle to states' ability to play this role.

Immigration federalism reveals much that is right with Lemos and Young's motivation. If there is value in a federal system that integrates auton-

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[327] Preemption doctrine, at least in theory, imposes some guardrails to this process, establishing where state "dissent" interferes with the overall federal statutory design. Recent efforts by states to enact their own schemes for punishing "illegal" entries have been invalidated by federal courts on preemption grounds, in cases brought by both nonprofit advocacy organizations and the Department of Justice. *See* United States v. Texas, 719 F. Supp. 3d 640, 651–52 (W.D. Tex.) (issuing preliminary injunction against Texas's S.B. 4 law), *stay pending, appeal denied*, 97 F.4th 268, 298 (5th Cir. 2024); United States v. Iowa, No. 4:24-cv-00162-SHL-SBJ, 2024 WL 3035430, at *1 (S.D. Iowa June 17, 2024) (issuing injunction against Iowa S.F. 2340), *appeal docketed*, No. 24-2265 (11th Cir. argued Sept. 26, 2024).

[328] *See generally* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43 (2018).

[329] *Id.* at 49.

omous state governments into a national immigration scheme, it is the potential to increase immigration's salience as a local rather than national issue.[330] Many immigration advocates are familiar with stories of people who once embraced anti-immigrant rhetoric from national-level politicians, only to change course when they see the effects of the corresponding policies on actual neighbors and institutions in their own communities.[331] Federalism may have the potential to serve as a "steam valve" against the intensely partisan immigration conflicts at the national level.[332]

The problem is that federal litigation is not nearly as well suited to this task as the immigration policymaking options state officials have via their own laws and institutions. It is true, as Lemos and Young observe, that most state attorneys general are democratically elected officials, and this may perhaps give them more legitimacy to litigate public law issues than private actors.[333] But so are the governors, state legislators, and local leaders capable of implementing an immigration agenda that can shape residents' daily lives and respond to their needs. In contrast, federal litigation challenging agency immigration actions involves state officials directly in national-level controversies. Insisting that state governments make some commitment to enacting this kind of agenda through their own legal system to establish standing promotes the kind of policy autonomy that Lemos and Young find so valuable in the U.S. federal system.

C. Accountability and Equality

This Section addresses a second objection, that this immigration federalism approach finds state standing in too many cases, rather than too few. Specifically, Professor Jennifer Lee Koh advocates for a rule of "anti-solicitude" against state standing arguments that cast human beings' mere existence as a

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[330] *See* JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 97–148 (2022) (explaining that the prevalence of national over state and local political agendas has undermined democratic politics in the U.S. federal system).

[331] *See, e.g.*, Binyamin Appelbaum, *In City Built by Immigrants, Immigration Is the Defining Political Issue*, N.Y. TIMES (Oct. 12, 2016), https://www.nytimes.com/2016/10/13/business/economy/hazleton-pennsylvania-donald-trump-immigrants.html [https://perma.cc/9L3Y-T7U9] (interviewing lifelong Republicans in Hazleton, Pennsylvania who were persuaded to vote against Donald Trump by positive experiences with immigrants in their community); Pham & Hoang Van, *supra* note 324, at 163 (observing that in a substantial number of sub-federal jurisdictions that enacted sanctuary policies in 2017, a majority of the voting population had supported Donald Trump in the 2016 national elections).

[332] *See* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997) ("[S]tate-level authority will allow those states harboring intense anti-alien sentiment to act on those sentiments at the state level, thus diminishing any interest in their part to seek national legislation to similarly restrictionist ends.").

[333] Lemos & Young, *supra* note 328, at 117.

public injury.[334] Following Koh as well as Professor Alina Das, we should be skeptical of any principle of standing that produces this result—effectively extending the federal judiciary's approval to legal arguments that dehumanize or discriminate against immigrants, often with thinly veiled racist motivations.[335]

My focus on structural authority and Professors Koh and Das's focus on Equal Protection share a similar orientation. Both authors are correct to be concerned that an "immigrants-as-injury" theory of standing "permits an end-run around Equal Protection," allowing states to claim a sovereign interest in discriminatory acts that they are otherwise constitutionally forbidden from taking.[336] On this theory, for example, courts should not recognize a state's interest in denying driver's licenses to immigrants in ways that violate the Equal Protection Clause—as Texas suggested they should in *Texas DAPA*.[337] This argument largely mirrors the approach taken in this Article: namely, that courts should also reject theories of state interests in areas where states lack the constitutional or statutory authority to act.

A case like *Texas DAPA* illustrates both the differences between our approaches, but also the potential for the two to reinforce one another. I have explained above that Texas most likely did have an interest in maintaining its driver's license law that may have been sufficient to give rise to standing.[338] This was true because DAPA substantially affected a policy on immigrant driver's license validly enacted into state law. My analysis here, though, was contingent on the fact that courts, to date, have been unwilling to read the Equal Protection Clause as prohibiting laws denying driver's licenses to undocumented immigrants, as they have for certain other classes of noncitizens.[339] Were courts to adopt such a broader understanding of Equal Protection, this would eliminate any justiciable interest in upholding the invalidated law. Standing should not provide an end-run around either Equal Protection principles or structural allocations of governing authority.

Given the deficiencies of current law in both Equal Protection and immigration federalism in protecting immigrants' rights, these approaches are both necessary, and can be complementary. Under the prevailing status quo, sub-federal governments are empowered to make a wide variety of actions that harm noncitizens, particularly those without lawful status. Through co-

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[334] Koh, *supra* note 24, at 898; *see* Das, *supra* note 24, at 155 (characterizing Koh's anti-solicitude argument as "an appropriate response when a theory of standing treats the requirements of Equal Protection as an injury to the state").

[335] Koh, *supra* note 24, at 946–48.

[336] Das, *supra* note 24, at 149 (summarizing and expanding on Koh's arguments).

[337] *Texas DAPA*, 809 F.3d 134, 153 (5th Cir. 2015), *aff'd by an equally divided court*, United States v. Texas, 579 U.S. 547 (2016) (per curiam).

[338] *See supra* notes 292–296 and accompanying text.

[339] *See supra* notes 285–292 and accompanying text.

operative enforcement schemes, state and local police and sheriff's departments can work directly with ICE to target immigrants for deportation—enabling both agencies to engage in discrimination and civil rights violations.[340] States' roles in defining immigrant membership rights allow more restrictive jurisdictions to deny residents access to identification, education, public benefits, and the like simply because they are undocumented.[341] Koh's proposed rule of "anti-solicitude" may help ensure that some of the most flagrantly unconstitutional forms of discrimination against immigrants do not grant states a free pass to challenge federal actions in court.

The reality is, though, as Das writes, that "Equal Protection jurisprudence is not nearly as protective of immigrant rights as it could and, many scholars argue, should be."[342] Because Texas's driver's license law did not in fact violate Equal Protection, cases like this do not actually prevent an end-run around the Constitution's rights protections. Given this status quo, limiting standing to areas where states actually have the authority to act cuts off the most aggressive versions of the "immigrants-as-injury theory." As explained above, it promotes state accountability by encouraging them to exercise their authority—risking political resistance from immigrants' rights advocates and their allies, such as the organized protest against Texas's driver's license law itself.[343] In cases where states are not willing to assume these risks by committing to a specific immigration law or policy, the less costly route to the federal courts should not be available. This Article's approach also provides a principled basis for justifying standing in many of the challenges to restrictive federal immigration restrictions in recent years. Though litigation against President Trump's Muslim ban, sanctuary city order, and DACA rescission all relied mainly on "proprietary" standing theories, these theories overlapped with state and local governments' interest in carrying out their immigration governing roles.[344]

At the same time, the cause of immigrant equality might be better served by a simple bright-line rule against state standing in *any* case involving immigration. In legal challenges to restrictive federal policies—such as those enacted under the Trump administration—there are typically plenty of private

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340 *See* ACLU, LICENSE TO ABUSE: HOW ICE'S 287(G) PROGRAM EMPOWERS RACIST SHERIFFS AND CIVIL RIGHTS VIOLATIONS 6 (2022), https://www.aclu.org/report/license-abuse-how-ices-287g-program-empowers-racist-sheriffs [https://perma.cc/X4PS-RLEK] ("Our findings indicate that in many cases, the administration is empowering law enforcement officials [under the 287(g) program] who are unabashedly anti-immigrant or racist.").

341 *See* Part IV.B, *supra* notes 276–302 and accompanying text.

342 Das, *supra* note 24, at 150.

343 *See* Diane Smith, *Immigrants, Advocates to Rally in Austin for Driver's Licenses*, FORT WORTH STAR-TELEGRAM, https://www.star-telegram.com/news/state/texas/article9685613.html [https://perma.cc/989L-3PF3] (Feb. 10, 2015).

344 *See* Part IV.D, *supra* notes 313–317.

plaintiffs with standing to sue.[345] State litigants, and therefore state standing, may not be as essential to challenge anti-immigrant policies as pro-immigrant ones. But because private plaintiffs with standing are likely to exist in such cases, states could nonetheless become powerful allies in litigation coalitions, thanks to the "one-plaintiff rule" that only requires a single plaintiff with standing.[346] Although this sort of blanket ban on state standing in the immigration context might be attractive from an immigrants' rights point of view, it is nonetheless difficult to justify without recourse to arguments grounded in federal plenary power—in other words, an immigration exception to the general principle that states have interests in their activities as government entities. As Professors David Rubenstein and Pratheepan Gulasekaram have observed, these sorts of appeals to "immigration exceptionalism" can have adverse consequences for immigrants' rights in some areas even when they bolster them in others.[347]

CONCLUSION

For nearly a decade before *Texas Enforcement*, courts struggled with how to treat states' assertions that their interests in immigration regulation and enforcement entitled them to challenge federal policy. The Supreme Court's decision hinted that it may be unwilling to accept the most sweeping interpretation of states' immigration interests, but said little about why, or how courts should be thinking about state standing instead. This Article has provided a justification for this move away from the strong theory of special solicitude, and outlined a federalism-informed framework for identifying state sovereign interests related to immigration. Highly politicized state litigation against federal immigration policies will continue to move through the federal courts. This Article's approach to standing offers reasons to recognize legal claims arising from states' roles in the federal immigration system, and to reject those that seek to circumvent those roles.

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[345] *See* Riley T. Keenan, *Minimal Justiciability*, 109 MINN. L. REV. (forthcoming 2025) (manuscript at 27–29) (discussing coalitions of private and public plaintiffs in the "Muslim Ban" cases); *see also supra* notes 50–51 and accompanying text.

[346] *See* Keenan, *supra* note 345 (manuscript at 28–29) (discussing the benefits of the "one-plaintiff rule").

[347] *See* Rubenstein & Gulasekaram, *supra* note 220, at 591 (describing immigration exceptionalism as "a fraught means to certain ends").